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Picture two men facing the possibility of unwanted fatherhood. One man agreed to go through in vitro fertilization (IVF) with his partner, but years later has changed his mind. Despite the fact that the embryos created through IVF are his partner's last chance to be a genetic parent, a court allows him to block her use of the embryos.

By contrast, another couple's sexual relationship broke the law. The woman was a legal adult, and her partner was a child under the age of eighteen. Their encounter was thus statutory rape. Her crime led to pregnancy, and after she gave birth, she sued the teenager for child support. Despite his protest that he did not consent to the sexual activity that led to the child's birth, the court affirms the child support order.

As a practical matter, this inconsistency in treatment of unwanted fatherhood may instinctively make sense, applying two different rules for two very different contexts. A deeper examination of the cases, however, reveals much more going on. This Article uses the frame of masculinities theories to dive further into the inconsistency and uncovers two groundbreaking implications that stretch far beyond the specific circumstances. First, the varying treatment of embryo disposition disputes and the characterization of male victims of statutory rape have one constant: a dismissal and rejection of men's emotions. Second, exploring the inconsistent treatment of men's consent to become fathers in sexual reproduction versus stored embryos reveals a clear rejection by courts of the personhood concept that embryos are human life. These revelations inform not only how embryo disposition disputes should be resolved, but also fetal personhood and family law's treatment of fathers.

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INTRODUCTION

Picture two men facing the possibility of unwanted fatherhood. One man's girlfriend was diagnosed with cancer in her early thirties and told that the cancer treatment would likely render her infertile. On the advice of her physicians, she began preparing to have eggs removed in order to be turned into embryos through in vitro fertilization (IVF) and stored so that after her cancer treatment was complete, she would have a chance at becoming a genetic mother. She asked her boyfriend to donate sperm to create the embryos, but he said no. After she turned to a previous boyfriend, however, her boyfriend changed his mind, and a number of embryos were successfully created and stored. Her cancer treatment was successful and the couple married, but before they attempted implantation of any of the embryos, they divorced. He argued that his ex-wife should not be allowed to use the embryos without his consent and was successful, blocking her access to her last opportunity to be a genetic parent.[1]

By contrast, another couple's sexual relationship broke the law. A woman in her midthirties had sexual intercourse with a fifteen-year-old boy. Their sexual encounter led to a pregnancy, and she asked a court to declare that the minor was the legal father and impose a child support obligation upon him, even though he was not yet a legal adult. A court agreed to do so, saying that the boy was "not an innocent victim" and must take responsibility for his actions.[2]

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1. *See infra* note 94 and accompanying text.
2. *See infra* note 146 and accompanying text.

Most people would react to these two scenarios very differently than the courts. Why allow a man who consented to donating sperm, whose ex-wife relied on his agreement to make the embryos in the first place, to back out years later when it was too late for her to make more embryos? Why impose a significant financial burden lasting nearly two decades on a teenager who was the victim of a crime? Why treat the two questions of fatherhood so differently and in such counterintuitive ways?

As a practical matter, this inconsistency in treatment of unwanted fatherhood may instinctively make sense, applying two different rules for two very different contexts. In cases involving disputes over stored embryos, courts have been given very little statutory direction and have developed three very different approaches for analyzing an unusual problem. In cases involving sexual reproduction, however, courts have applied an inflexible rule based in theory on the greater needs of the newborn child, prioritizing the child's needs even above those of the victim of statutory rape. At the surface level, courts have simply crafted different rules responding to very different public policy dilemmas where legislatures have left a void in regulation.

A deeper examination of the cases, however, reveals much more going on. This Article uses the frame of masculinities theories to dive further into the inconsistency and uncovers two novel implications that stretch far beyond the specific circumstances. First, the varying treatment of embryo disposition disputes and the characterization of male victims of statutory rape have one constant: a dismissal and rejection of men's emotions. Second, exploring the inconsistent treatment of men's consent to become fathers in sexual reproduction versus stored embryos reveals a clear rejection by courts of the personhood concept that embryos are human life.

The Article begins with an explanation of how embryos are created and stored in the context of IVF, and the three varying approaches that courts currently use to resolve disputes arising when the intended parents of the stored embryos later disagree about what to do with them. Part II turns to the question of consent in the context of sexual reproduction, demonstrating the inflexible rule of genetic parenthood as applied to fathers, even where the genetic father could not have legally consented to the sexual act that led to pregnancy. Part III sets the two contexts against each other and discusses how the seeming inconsistencies reveal two far-reaching conclusions: how differently courts in both circumstances treat statements about the emotions of men and women, and why the inconsistent recognition of men's consent to become fathers demonstrates that courts have rejected personhood and instead use the autonomy of pregnant people as a dispositive question in parentage disputes. The conclusion turns to the practical implications, recommending significant reforms to the law of embryo disputes to remove the gendered reliance on women's emotions, and why IVF and embryos should be a central part of modern abortion jurisprudence and rhetoric.

I. THE TECHNOLOGY AND CASELAW OF FROZEN EMBRYOS

Assisted reproductive technologies (ART) are how a significant number of Americans become parents—by one recent estimation, about 1.5% of babies born per year are created with the assistance of ART.[3] One common technique is in vitro

3. Catherine Wheatley, Note, *Arizona's Torres v. Terrell and Section 318.03: The Wild*

fertilization (IVF), combining egg and sperm that have been taken from the genetic parents' bodies to implant in a uterus at a later date. In order to do this, the person whose eggs will be used takes hormones to stimulate the ovaries into producing multiple eggs, which are removed by doctors who then fertilize the eggs in vitro.[4] This carries some risks, including Ovarian Hyperstimulation Syndrome, uncomfortable side effects from the hormones, infection, and other complications that accompany any minor surgical procedure.[5] After developing through a few cell divisions, the embryo can be implanted into a uterus or frozen and stored for long periods of time.[6]

The IVF process typically results in at least a few (and often as many as a dozen) embryos being frozen in storage. The process of stimulating ovaries and then removing eggs is an unpleasant and costly one, so both doctors and patients hope to produce several usable eggs from any given cycle. Thus, even if a person is actively trying to get pregnant, there would likely be surplus eggs left over after the procedure. Those eggs could be frozen before they are fertilized, but the higher water content of eggs means that freezing them risks ice crystals that can render the egg unusable after it is thawed.[7] By comparison, freezing embryos is more likely to eventually lead to a successful pregnancy and thus more common.[8]

As a result, there are likely over half a million frozen embryos currently stored throughout the country.[9] What happens to those embryos (who can authorize their use, how long they are stored, and so on) is theoretically determined through forms drafted by fertility clinics and given to the people using their services before procedures begin.[10] In concept, these agreements would lay out the considered judgments of the genetic parents—but as is so often the case in family law, the reality is quite different. Forms may not anticipate all future events, such as a married couple divorcing. Some couples may neglect to specify an answer for some contingencies, either because they accidentally overlooked a section or because they had not yet

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West of Pre-Embryo Disposition, 95 IND. L.J. 299, 299–300 (2020); Carinne Jaeger, *Yours, Mine, or Ours: Resolving Frozen Embryo Disputes Through Genetics*, 40 SEATTLE U. L. REV. 1141, 1142 (2017).

4. John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 440 (1990).

5. Browne C. Lewis, *Let She Who Has the Womb Speak: Regulating the Use of Human Oocyte Cryopreservation to the Detriment of Older Women*, 72 ARK. L. REV. 597, 604 (2019).

6. Robertson, *supra* note 4, at 440.

7. Melissa B. Herrera, *Arizona Gamete Donor Law: A Call for Recognizing Women's Asymmetrical Property Interest in Pre-Embryo Disposition Disputes*, 30 HASTINGS WOMEN'S L.J. 119, 125 (2019).

8. Seema Mohapatra, *Using Egg Freezing to Extend the Biological Clock: Fertility Insurance or False Hope?*, 8 HARV. L. & POL'Y REV. 381, 384–85 (2014).

9. Valerie A. Mock, *Getting the Cold Shoulder: Determining the Legal Status of Abandoned IVF Embryos and the Subsequent Unfair Obligations of IVF Clinics in North Carolina*, 52 WAKE FOREST L. REV. 241, 246 (2017); *see also* Katheryn D. Katz, *Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation*, 18 WIS. WOMEN'S L.J. 179, 187 (2003) ("In May of 2003, the first national count revealed the full scope of the phenomenon; there are 400,000 frozen human embryos in fertility clinics . . . .").

10. Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57, 59 (2011).

decided what to do and want to leave the decision for later. Or couples might specify one plan and change their mind as time goes by.

There are many reasons why such a decision is difficult to make in the moment and why the decision made at the time of the procedure may not remain the preference of the people involved. As Deborah Forman has argued, people seeking the services of a fertility clinic generally receive a whole batch of consent forms all at once, pertaining to the various medical procedures involved in IVF, financial information, permission for the clinic to share insurance and health information, as well as long-term decisions about what to do with any surplus embryos that might be created in the future.[11] People who have yet to successfully create a single embryo are asked whether they wish to grant perpetual consent for use, donate extra embryos to other people who would use them to become parents, donate extra embryos for use in medical research, thaw and discard the embryos, or keep the extra embryos in storage indefinitely.[12] Couples are asked to choose among those options for each one of a number of future events, such as if they divorce, one member of the couple dies, or both of them die. Jody Madeira's surveys of patients who have used the services of fertility clinics found that they were surprised by questions about what to do with embryos in the future and had not put advance thought into how they would answer.[13] Any one of these decisions, accompanied by dense medical and financial information about IVF, would be difficult to make in isolation, and couples are asked to make them all at once relatively quickly.

When confronted with such choices, studies have found a gendered pattern in what options couples actually designate. In a review of almost four hundred IVF cycles, couples assigned control of embryos differently in the case of one person's death according to the gender of the deceased person. If the man died, couples were more likely to allow the surviving woman to control the embryos and attempt to bring them to term, but if the woman died, they were more likely to discard or donate the embryos.[14] In the case of divorce, however, even couples who would allow use of embryos after the death of one partner opted to discard the embryos about half of the time.[15] As the researchers reviewing these decisions speculated,

> One wonders if couples are choosing based on logistics [of women being able to become pregnant rather than needing a surrogate or another partner to become pregnant], or rather on the assumption that it is more

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11. *Id.* at 67.

12. Brandon J. Bankowski, Anne D. Lyerly, Ruth R. Faden, & Edward E. Wallach, *The Social Implications of Embryo Cryopreservation*, 84 FERTILITY & STERILITY 823, 825 (2005).

13. Jody Lyneé Madeira, *The ART of Informed Consent: Assessing Patient Perceptions, Behaviors, and Lived Experience of IVF and Embryo Disposition Informed Consent Processes*, 49 FAM. L.Q. 7, 22–26 (2015).

14. Sigal Klipstein, Richard H. Reindollar, Meredith M. Regan & Michael M. Alper, *Gender Bias in the Disposition of Frozen Embryos*, 76 FERTILITY & STERILITY 1181, 1182 (2001).

15. *Id.* at 1183.

> appropriate for potential children to be reared by their mothers than by their fathers.[16]

The danger, obviously, is that people regret their decision later, either because their preferences have changed or they failed to indicate a clear preference in advance. Empirical studies show that a supermajority of patients who have gone through IVF change their minds about what they want done with extra embryos as time passes.[17] As Forman summarizes, preferences often change after patients know how many embryos they were able to create and after they have had some embryos implanted. Before any embryos are created, when couples are typically still hoping to achieve even one successful pregnancy, they "do not seriously consider options other than using all stored embryos."[18] They are perhaps more sympathetic to the desires of other couples struggling with infertility and are more willing to say they would donate any extra embryos to another couple.[19] If that same couple successfully brings one of their own embryos through pregnancy, however, they then see the stored embryos as potential siblings.[20] As Forman explains: "[W]hile we might have assumed that viewing embryos as akin to children would reduce the interest in discarding the embryos, in fact, patients viewed donating the embryos to others more as relinquishing a child, a choice they were not willing to make."[21]

The implantation stage of IVF also encourages women[22] to feel more attachment to embryos. Immediately before embryos are transferred, the clinic typically shows the person undergoing the transfer a photo of the embryos. Jody Madeira has described the impact:

> That image seems to capture so much—the emotional energy required to ride the IVF rollercoaster, which jolts around in extremes of hope and despair; the hours spent in the fertility clinic for doctor's appointments, tests, blood draws, and ultrasounds; the expense of required medications and treatment; the discomfort, even pain, of massive ovaries and drug injection sites; the retrieval surgery. All that—for these. For the intended mother, this picture confirms that she has accomplished all she can in order to ensure that the cycle results in a successful pregnancy, and also that she is "pregnant until proven otherwise"—a phrase that female infertility patients use to denote the expectant state in which one awaits the "beta" pregnancy test.[23]

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16. *Id.* at 1184.
17. Forman, *supra* note 10 at 71.
18. *Id.* at 72.
19. *Id.* at 73.
20. *Id.*
21. *Id.*
22. A person of any gender can produce eggs and/or have a uterus, and this Article will use more inclusive language wherever possible. Here, I mean to imply a gendered treatment of potential parents by fertility clinics and thus use the term "women" deliberately.
23. Jody Lyneé Madeira, *Conceivable Changes: Effectuating Infertile Couples' Emotional Ties to Frozen Embryos Through New Disposition Options*, 79 UMKC L. REV. 315, 319 (2010).

It is easy to imagine why someone who has gone through multiple unsuccessful IVF attempts might develop a stronger attachment to stored embryos over time, as the embryos represent their dwindling hopes to become a genetic parent. Or, someone who had a successful birth may feel overjoyed at parenthood and hope to give their child a sibling. Or an even more dramatic context might exist—some people go through IVF because they were diagnosed with cancer and told that treatment would damage or destroy their future fertility. In such circumstances, stored embryos might be the only chance they have at becoming a genetic parent. Even if an initial agreement contemplated giving up access to stored embryos in the future, the decision involves incredibly high and deeply personal stakes, and often an agreement is enforced years after it was first made and after circumstances have greatly changed.

Given the long time horizon, disputes over stored, frozen embryos typically arise after an opposite-sex couple who each contributed genetic materials to the embryos break up and disagree about what to do with the embryos. Most of the time, one of the partners wants to use the embryos, and the other wishes to discard or donate the embryos. Resolution of such disputes will either deprive one person of a chance (perhaps their last chance) at genetic parenthood or foist unwilling parenthood upon the other.[24]

In most existing cases, the partner wishing to use the embryos is a woman whose eggs were used to create them. In such circumstances, she has gone through difficult and painful medical procedures to extract her eggs. By the passage of time alone, her fertility is likely worse than when the embryos were created, so starting anew has even lower chances of success. If the fertilization had taken place in her body, she would hold decision-making power over the pregnancy, and her ex-partner could not force her to have an abortion.[25] Some commentators have described her as holding a reliance interest in the stored embryos.[26]

In other circumstances, loss of stored embryos is recognized as a significant loss, albeit one that the law often imperfectly compensates. Dov Fox has written extensively about what he calls reproductive negligence, which encompasses both people deprived of procreation and procreation imposed upon people.[27] Fox has focused on mistakes made by fertility clinics, such as improperly storing frozen embryos and causing their unintentional destruction. Courts have, in his words, "struggle[d] mightily to translate defeated life plans" into legal claims,[28] but his work chronicles the significant harm caused by such mistakes, and at least three courts

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24. Occasionally, the litigation takes so long that the embryos are destroyed or otherwise rendered unusable before a final resolution is reached. *See, e.g.*, Litowitz v. Litowitz, 48 P.3d 261, 271, amended *sub nom*. *In re* Marriage of Litowitz, 53 P.3d 516 (Wash. 2002) (noting that by the terms of the original agreement with the fertility clinic, the two embryos that were the subject of litigation would have been thawed and discarded the previous year).

25. Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 849 (2000).

26. Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1029 (2004).

27. Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 153 (2017).

28. Dov Fox, *Redressing Future Intangible Losses*, 69 DEPAUL L. REV. 419, 447–48 (2020).

have allowed some kind of recovery against clinics for the harm of "negligently deprived procreation."[29]

On the other hand, Glenn Cohen has untangled the concept of freedom from parenthood, which would be violated if one partner were allowed to use embryos over the wishes of the other partner to discard them. Cohen traces three dimensions of the right not to be a parent: "a right not to be a gestational parent, a right not to be a genetic parent, and a right not to be a legal parent."[30] The latter two would be violated by the use of previously created embryos against the will of one of the ex-partners.

In such conflicts, two people who once hoped and planned to conceive and raise a child together are potentially bound by earlier decisions. Their previous choices, either to specify who would control the embryos in the case of divorce or their failure to decide in advance, were made before they knew whether initial IVF attempts would be successful, before they could assess whether those embryos would be one path to parenthood or the only remaining chance, and before the demise of their relationship. Susan Frelich Appleton has described such changed choices as regret, specifically regret as reconsideration.[31] Kaiponanea Matsumura has described what he calls the "different selves rationale," arguing that "the person who made the promise is different in a legally significant way from the person against whom it is asserted such that enforcement would now be improper."[32] It is no wonder that so many of the "different selves" end up in court trying to enforce current preferences rather than older, less-informed choices. The next section turns to what guidance courts facing such disputes have been given through statute or regulation.

A. Existing Regulations

State legislatures have largely failed to provide any guidance for disputes over stored embryos. Some states have attempted to prevent such lawsuits by requiring that patients undergoing IVF be given information to, in the words of California's statute, "allow the individual to make an informed and voluntary choice regarding the disposition of any human embryos remaining following the fertility treatment."[33] California and a handful of other states require that clinics provide their patients with agreements that specify what will happen to the embryos in the event of future events such as the death of one of the partners or if a couple divorces.[34]

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29. Fox, *supra* note 27, at 196.

30. I. Glenn Cohen, *The Right Not to Be A Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1121–22 (2008).

31. Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255, 301 (2011).

32. Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71, 76 (2014).

33. CAL. HEALTH & SAFETY CODE § 125315 (West 2018); *see also* Mary Joy Dingler, *Family Law's Coldest War: The Battle for Frozen Embryos and the Need for a Statutory White Flag*, 43 SEATTLE U. L. REV. 293, 305 (2019).

34. CAL. HEALTH & SAFETY CODE § 125315 (West 2018); MASS. GEN. LAWS ANN. ch. 111L, § 4 (West 2018); N.J. STAT. ANN. § 26:2Z-2 (West 2018); *see also* Carissa Pryor, *What to Expect When Contracting for Embryos*, 62 ARIZ. L. REV. 1095, 1111–12 (2020).

The statutes that most directly substantively regulate disputes over embryos are generally motivated by antiabortion goals and view the embryos as persons. Such laws, known as personhood statutes, are often passed as a symbolic statement against or challenge to abortion rights, and have been proposed in state legislatures very frequently in recent years.[35] General personhood statutes are typically more concerned with embryos and fetuses in utero, and only implicitly potentially apply to stored embryos. Two notable exceptions, however, are Louisiana and Arizona. Louisiana state law defines an embryo as "an in vitro fertilized human ovum" and identifies it as a natural and juridical person.[36] A later section specifies that "[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."[37]

Arizona goes even further to intervene in disputes over embryos, and specifically directs that in the case of divorced spouses disagreeing about the disposition of stored embryos, courts should award the embryos to the spouse who wishes to use them.[38] If both spouses wish to use the embryos, the statute specifies that genetic relationship to the embryo can be used as a tiebreaker (if the embryo was created with only one spouse's gametes along with an anonymous donor),[39] or as a last tiebreaker to resolve the dispute "in a manner that provides the best chance for the in vitro human embryos to develop to birth."[40] The statute does allow a former spouse who does not want the embryos to be used to opt out of being considered a legal parent to any resulting children,[41] as does Texas.[42]

New Mexico also indicates a preference for use of all embryos, although its statute is not as direct as Arizona or Louisiana. In regulations on research involving pregnant people or fetuses, New Mexico law defines clinical research to not include IVF, "provided that this procedure shall include provisions to ensure that each living fertilized ovum, zygote or embryo is implanted in a human female recipient."[43]

For the most part, however, courts have been left to resolve disputes over embryos without guidance from the legislature. The next section discusses the three regimes courts have coalesced around as they craft their own resolutions.

B. Court Resolutions

Courts have developed three rules of thumb for resolving disputes over stored embryos: contemporaneous mutual consent, the contractual approach, and a balancing test. The three approaches rest upon quite different theories of equity,

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35. Wheatley, *supra* note 3, at 304.
36. LA. STAT. ANN. § 9:121 (2020).
37. *Id.* § 9:129 (2020).
38. ARIZ. REV. STAT. ANN. § 25-318.03(A)(1) (2018); *see also* Herrera, *supra* note 7, at 131.
39. ARIZ. REV. STAT. ANN. § 25-318.03(A)(3) (2018).
40. *Id.* § 25-318.03(A)(2).
41. *Id.* § 25-318.03(B)–(E).
42. TEX. FAM. CODE ANN. § 160.706 (West 2007).
43. N.M. STAT. ANN. § 24-9A-1 (West 2007).

weighing of the rights involved, and result in a range of possible outcomes for any given embryo dispute, depending on the state in which the case arises.

1. Contemporaneous Mutual Consent

The contemporaneous mutual consent approach to embryo disputes is the clearest, but also the least flexible: embryos can only be used if both intended parents agree to the usage at the time of implantation. One of the earliest articulations of the rule appeared in the Massachusetts case *A.Z. v. B.Z.* Two former spouses had attempted to have children for a decade, struggling with two ectopic pregnancies that destroyed both fallopian tubes of the wife.[44] They turned to IVF, which eventually led to a successful pregnancy with twins.[45] During their treatment with the fertility clinic, the husband and wife signed various consents relating to egg retrieval and IVF, which said that if the spouses separated, the wife would control disposition of the embryos for her use.[46] Perhaps relying on such documents, even before the separation of the spouses, the wife had one embryo implanted without the consent or knowledge of her husband.[47]

After the spouses split up, the wife wished to use four embryos that remained in storage.[48] The husband disagreed and argued that he had not actually agreed to the disposition specified in the consent forms. He had apparently signed all of the forms while they were blank, and the wife filled in the disposition choice later.[49] Under these circumstances, the court described itself as "dubious at best" that the consents actually represented the choice of the parties.[50] Even without questions about the validity of the consent forms, however, the court explained that it would not enforce such a consent where one partner had later changed their mind.[51] The court identified a public policy "that individuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a mechanism for forcing such relationships when they are not desired."[52] Accordingly, regardless of what any agreement specified previously, former spouses could withdraw their consent at any time and prevent the other from using stored embryos.

Another well-known example arose in Iowa, in the case *In re Marriage of Witten*. The couple in question had gone through IVF in unsuccessful attempts to become pregnant before deciding to divorce. At the time that they split up, seventeen embryos remained in storage.[53] The wife wanted to implant the embryos either in herself or in a surrogate, although she said that she would give her ex-husband the choice of whether to be a legal parent to any resulting children.[54] The husband, however,

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44. 725 N.E.2d 1051, 1053 (Mass. 2000).
45. *Id.*
46. *Id.* at 1054.
47. *Id.* at 1053.
48. *Id.*
49. *Id.* at 1053–54.
50. *Id.* at 1056.
51. *Id.* at 1057.
52. *Id.* at 1059.
53. 672 N.W.2d 768, 772 (Iowa 2003).
54. *Id.* at 772–73.

wanted to either keep the embryos in storage or donate them for potential use by another couple.[55] As in *A.Z.*, the court found that it "would be against the public policy of this state to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos."[56]

In some cases, it seems that courts are more comfortable with the result of contemporaneous mutual consent because the individual parties present unusual and problematic facts. One such case was decided recently in Missouri. Instead of facing infertility or a medical diagnosis prompting use of IVF, the couple involved was soon to be physically separated by the husband's military deployment. Prior to deployment he had some of his semen frozen,[57] which was then used to create embryos in his absence.[58] While the husband was stationed at Fort Bragg in North Carolina and his wife remained at their home in Missouri, she successfully carried twin boys to term using the embryos and was left with two in storage.[59]

The spouses had signed a consent form that said that in the event of their later divorce, the wife would have control over any additional embryos.[60] At trial, however, a number of facts muddied the reliability of the consent form. The husband testified that he could not remember whether the handwritten choice to grant control of the embryos to the wife was written on the form when he initialed it.[61] Moreover, the wife's initials at the same part of the page and the handwritten option giving her control of the embryos were written in two different colors of ink, and that clause was dated six days after the final signatures were placed on the form and notarized.[62] The courts refused, therefore, to credit the consent agreement, and specified that no use of the embryos could take place without written consent from both ex-spouses.[63]

Another case, *J.B. v. M.B.*, involved former spouses who flipped the typical gender pattern. After using IVF to have a daughter, seven embryos remained in storage.[64] After their marriage ended, the wife wanted the embryos discarded, and the husband wanted to donate them to other couples struggling with infertility.[65] He argued that his religious beliefs led him to view the embryos as potential life that should not be discarded.[66] The court, however, framed the question as his right to procreate—which the court noted would not be affected by whether the embryos were donated to other couples or not—against the wife's right not to procreate.[67] Again, the court cited "public policy concerns" to justify allowing people who had

55. *Id.* at 773.
56. *Id.* at 781.
57. McQueen v. Gadberry, 507 S.W.3d 127, 133 (Mo. Ct. App. 2016).
58. *Id.*
59. *Id.* at 134.
60. *Id.* at 153.
61. *Id.*
62. *Id.* at 154.
63. *Id.* at 158.
64. 783 A.2d 707, 710 (N.J. 2001).
65. *Id.* at 714.
66. *Id.* at 710−11.
67. *Id.* at 717.

previously signed consent agreements to change their mind and prevent use of stored embryos by their ex-partner.[68]

The most obvious advantage of the contemporaneous mutual consent approach is that it is clear. Some proponents argue that it is also the most realistic view, in the sense that it recognizes that the preferences of the parties may have understandably changed in the years since the embryos were created.[69] But the clarity and deference given to changed preferences also mean that one intended parent can veto—or more problematically, threaten to veto—the other intended parent's chance at genetic motherhood or fatherhood. As one court explained as a reason to reject the approach, requiring contemporaneous mutual consent "give[s] each progenitor a powerful bargaining chip at a time when individuals might very well be tempted to punish their soon-to-be ex-spouses."[70] The alternative might be to allow intended parents to lock in their preferences in advance through a contractual framework, the approach outlined in the next subsection.

2. The Contractual Approach

As the name implies, the contractual approach to embryo disputes enforces the agreement made between the couple and memorialized in documents drafted by the fertility clinic that creates and stores the embryos.[71] One representative case is *In re Marriage of Dahl & Angle*, which arose in Oregon.[72] The spouses had one child through sexual reproduction, then underwent IVF in the hopes of having a second child.

As they prepared for IVF, the fertility clinic they used presented them with an agreement that had a provision specifying who had the right to control any stored embryos. As the court quoted the agreement, the provision read: "If the CLIENTS are unable or unwilling to execute a joint authorization, the CLIENTS hereby designate the following CLIENT or other representative to have the sole and exclusive right to authorize and direct UNIVERSITY to transfer or dispose of the Embryos, pursuant to the terms of this Agreement[.]"[73] The spouses wrote in the wife's name next to that paragraph, and both initialed the provision.[74]

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68. *Id.* at 719–20. The court did note that it "express[ed] no opinion in respect of a case in which a party who has become infertile seeks use of stored preembryos against the wishes of his or her partner," anticipating some of the questions raised in more recent cases.

69. Matsumura, *supra* note 32, at 108.

70. Szafranski v. Dunston, 993 N.E.2d 502, 512 (Ill. App. Ct. 2013) (citing Mark P. Strasser, *You Take the Embryos But I Get the House (and the Business): Recent Trends in Awards Involving Embryos Upon Divorce*, 57 BUFF. L. REV. 1159, 1225 (2009)); *see also* Sarah Holman Loy, *Responding to Reber: The Disposition of Pre-Embryos Following Divorce in Pennsylvania*, 122 PENN ST. L. REV. 545, 558 (2018).

71. In addition to the cases discussed in this section, see Finkelstein v. Finkelstein, 79 N.Y.S.3d 17, 21 (N.Y. App. Div. 2018); Findley v. Lee, No. FDI-13-780539, 2016 WL 270083, at *2 (Cal. Super. Jan. 11, 2016); Cahill v. Cahill, 757 So. 2d 465, 467 (Ala. Civ. App. 2000); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).

72. 194 P.3d 834 (Or. 2008).

73. *Id.* at 836.

74. *Id.*

After one IVF implantation was unsuccessful, six embryos remained in storage.[75] The couple split up and disagreed about what to do with the remaining embryos: the husband viewed the embryos as human life and hoped to donate them to couples for implantation and hopefully pregnancies.[76] The wife, by contrast, wished to discard the embryos.[77] The Oregon court found that the agreement unambiguously gave the wife the sole ability to decide what to do with any stored embryos, so awarded control to her.[78]

A less straightforward case was decided earlier this year in Arizona and was introduced at the beginning of the Article. In 2014, a thirty-three-year-old woman was diagnosed with breast cancer and told that undergoing chemotherapy to treat the cancer would likely send her into early menopause and render her infertile.[79] After consulting with a fertility specialist, she decided to preserve her ability to have genetic children by first going through IVF to create and store embryos before her chemotherapy began.[80] She asked her boyfriend if he was willing to use his sperm to create the embryos, but he said no.[81] She then asked a previous boyfriend, who agreed to donate sperm. After her boyfriend learned of her plans, he reversed his previous decision and agreed to donate sperm himself.[82]

Prior to the procedures, the clinic presented the couple with a number of documents, including an agreement specifying who could make decisions regarding the embryos. The agreement contained one section that gave three possible actions if the intended parents split up, died, or were incapacitated: discarding the embryos, donating the embryos to another couple, or "[u]se by one partner with the contemporaneous permission of the other for that use."[83] That section also contained a "Note" specifying that "Embryos cannot be used to produce pregnancy against the wishes of the partner. For example, in the event of a separation or divorce, embryos cannot be used to create a pregnancy without the express, written consent of both parties, even if donor gametes were used to create the embryos."[84] The agreement then provided a series of subsections asking the intended parents to specify what they wanted done with the embryos in the event of various future contingencies. Subsection (H) addressed divorce, reading: "H. Divorce or Dissolution of Relationship. In the event the patient and her spouse are divorced or the patient and her partner dissolve their relationship, we agree that the embryos should be disposed of in the following manner (check one box only)."[85] The form then presented two options: (1) "A court decree and/or settlement agreement will be presented to the

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75. *Id.* at 836.
76. *Id.* at 837.
77. *Id.*
78. *Id.* at 842.
79. Terrell v. Torres, 438 P.3d 681, 684 (Ariz. Ct. App. 2019), *as amended* (June 6, 2019), *review granted in part* (Aug. 27, 2019), *opinion vacated in part*, 456 P.3d 13 (2020), *as amended* (Feb. 21, 2020).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 684–85.
84. *Id.* at 685 (emphasis omitted).
85. *Id.*

Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose," or (2) the embryos would be destroyed. The couple checked and initialed the first option.[86]

Seven embryos were subsequently created and stored by the fertility clinic.[87] The woman then underwent chemotherapy, which was successful in eliminating her cancer but, as predicted, left her in a menopausal state that a physician later testified meant her chances of having a genetic child were less than one percent.[88] Following her treatment, the couple married, but divorced two years later without having attempted to implant any of the stored embryos.[89] The woman wanted to implant the embryos in the hopes of having a genetic child, whereas the husband opposed any use by his former spouse.[90]

After the fight over the embryos became a lawsuit, both the trial and appellate courts read the IVF agreement's reference to "a court decree" in subsection (H) as indicating that a court had the power to award control of the stored embryos. Both lower courts balanced the interests of the parties: the trial court found that the right not to become a parent against one's will trumps the right to become a genetic parent, so directed the fertility clinic to donate the embryos to another couple.[91] The appellate court instead adopted the contractual approach, but found that "if the agreement leaves the decision to the court, the balancing approach provides the proper framework."[92] That court then concluded that "[the woman's] interests in the embryos—especially given that she gave up the opportunity to use another donor and she is likely unable to become a parent (biological or otherwise) through other means—outweighs [the man's] interest in avoiding procreation."[93]

The state supreme court agreed with the appellate court that the agreement should control but read the agreement differently to provide a substantive response rather than a direction to a court to decide what to do with embryos. Where the appellate court read subsection (H) as giving a court the power to decide, the state supreme court found that it was not a "final dispositional choice," and instead specified the form of any future direction to the fertility clinic:

> The provision does not modify or negate the requirement for express, contemporaneous consent by the parties for a unilateral award of the embryos to produce pregnancy. Nor does it grant the family court discretion to make either a unilateral award or direct donation. Instead, assuming the parties could not produce a settlement agreement, as occurred here, it requires them to procure a court decree directing FTC in the disposition.[94]

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86. *Id.*
87. *Id.*
88. *Id.* at 686.
89. *Id.* at 685.
90. *Id.*
91. *Id.* at 685–86.
92. *Id.* at 689.
93. *Id.* at 694.
94. Terrell v. Torres, 456 P.3d 13, 16 (Ariz. 2020), *as amended* (Feb. 21, 2020).

The court thus concluded that the agreement required contemporaneous consent by both parties for the clinic to take any action transferring the embryos.

These two cases illustrate the advantages and disadvantages of the contractual approach. On the one hand, in theory, it gives the most power to the people creating embryos, letting them consider, decide, and memorialize their own preferences.[95] John Robertson, one of the first scholars to write about embryo disputes, stressed the importance of "knowingly and intelligently made" agreements and the reliance that future litigants likely placed in those agreements.[96] Moreover, historical resistance to enforcing agreements between family members or sexual partners has had the effect of reinforcing stereotypical gender and family roles, as Kaiponanea Matsumura has persuasively chronicled.[97] The contractual approach ignores societal expectations, judicial or other bias, and looks to the wishes of the parties as they expressed them previously.

On the other hand, the contractual approach often fails to provide an answer. Sometimes the agreement itself, generally drafted and provided by the fertility clinic, does not have a section addressing what to do in the case of divorce.[98] Sometimes, as in *Terrell v. Torres*, courts disagree about what the agreement says. Or sometimes one party argues that the agreement as presented to the court does not reflect their actual intentions, either because they did not read or understand the document,[99] because they were not given time to adequately consider the document,[100] or because their preferences simply changed in response to time and significantly different circumstances.[101] Faced with such situations, many courts have used what has become known as the balancing approach, the subject of the next subsection.

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95. *Terrell*, 438 P.3d at 687.

96. John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 995 (2001); *see also* John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 424 (1990).

97. Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 164 (2013).

98. *See, e.g.*, *In re* Marriage of Rooks, 429 P.3d 579, 583 (Colo. 2018).

99. *See, e.g.*, *In re* Marriage of Dahl, 194 P.3d 834, 837 (Or. Ct. App. 2008) ("Husband denied having initialed or read the OHSU agreement, and stated that he had signed the last page of the document without a notary present and without having seen the rest of the document.").

100. *See, e.g.*, Patel v. Patel, No. CL16000156-00, 2017 WL 11453591, at *2 (Va. Cir. Ct. Sept. 7, 2017) (describing the couple being presented with consent documents in the lobby of the fertility center with only fifteen to twenty minutes to review and complete paperwork with informed consent for medical procedures and future disposition of embryos).

101. *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992), *on reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992) ("[W]e recognize that life is not static, and that human emotions run particularly high when a married couple is attempting to overcome infertility problems. It follows that the parties' initial 'informed consent' to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds.").

3. The Balancing Approach

A number of courts resist the arguably clearer rules of contemporaneous mutual consent or the contractual approach in favor of what has come to be known as the balancing approach, weighing the interests of the litigants against each other.[102]

The approach was first applied in an early Tennessee case from 1992.[103] The couple fighting over stored embryos had both already remarried after their divorce, and neither wanted to use the embryos themselves. Instead, the former wife wanted to donate the embryos to another couple, whereas her former husband wanted to discard them.[104]

In part because the case arose so early, the fertility clinic used by the former spouses had not provided an agreement that gave direction of what to do with the stored embryos. Nor had Tennessee given any direction in statutes or regulations of how to resolve such a dispute.[105] The court noted that, ideally, the agreement between the couple would direct a court concerning the disposition of the embryos, and the court added that if such an agreement could later be modified by the couple, the modified agreement should be enforced.[106] In the absence of such an agreement, however, the court decided to "weigh the interests of each party to the dispute."[107]

On the one hand, the husband in the case described the potential harm of unwanted parenthood.[108] His childhood had been an unhappy one in which divorce and his mother's subsequent nervous breakdown meant that he and three of his five siblings were sent to live in a church-run institution.[109] Because of his experiences, he was "vehemently opposed to fathering a child that would not live with both parents," whether that was within the dissolved marriage that he had been in or with another couple who used the donated embryos and subsequently divorced.[110]

Assessing the wife's interests, the court noted that, as would often be the case in embryo disputes,[111] her experience of creating the embryos had been more physically burdensome than the experience of her husband, as she suffered multiple painful ectopic pregnancies and six attempts at IVF.[112] The court acknowledged that to not allow her to donate the embryos would "impose on her the burden of knowing that

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102. In addition to the cases discussed in this section, see Bilbao v. Goodwin, No. HHDFA166071615S, 2017 WL 5642280, at *4 (Conn. Super. Ct. Oct. 24, 2017), *aff'd in part*, *rev'd in part*, 217 A.3d 977 (Conn. 2019). See also *Mate v. Mate*, an unpublished case that professes to apply the balancing approach to give control of the embryos to the ex-wife, but ordered the ex-wife to give her ex-husband notice of any attempted implantations and not to contest any petitions to terminate parental rights filed by her ex-husband if those implantations were successful. No. FBTFA156048231, 2016 WL 6603254, at *9, *18 (Conn. Super. Ct. Sept. 23, 2016).

103. *Davis*, 842 S.W.2d at 597.

104. *Id.* at 590.

105. *Id.*

106. *Id.* at 597.

107. *Id.* at 591.

108. *Id.* at 603.

109. *Id.*

110. *Id.* at 604.

111. *Id.* at 601.

112. *Id.* at 591–92.

the lengthy IVF procedures she underwent were futile."[113] It concluded, however, that the wife's interest in donating the embryos was "not as significant" as the husband's interest in avoiding unwanted parenthood.[114] The decision laid the groundwork for later cases in its explanation of what might have swung the balance the other way:

> The case would be closer if [Wife] were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means. We recognize the trauma that [Wife] has already experienced and the additional discomfort to which she would be subjected if she opts to attempt IVF again. Still, she would have a reasonable opportunity, through IVF, to try once again to achieve parenthood in all its aspects—genetic, gestational, bearing, and rearing.[115]

Twenty years later, a Pennsylvania court addressed precisely the closer case contemplated in *Reber v. Reiss*.[116] The ex-spouses in the case went through IVF after the wife was diagnosed with breast cancer at the young age of thirty-six.[117] After her doctors told her that cancer treatment would likely affect her fertility, she delayed the start of her treatment to allow doctors to collect eggs, which they used to create thirteen embryos.[118] After her treatment was concluded, her husband filed for divorce.[119]

The wife in *Reber* was immensely sympathetic: she had been forced to make a quick decision to create the embryos. She had risked her own health and life by delaying cancer treatment to do so, so it was obviously important to her. By the time that the ex-spouses were fighting over disposition of the stored embryos, the wife's doctors had indicated that chemotherapy had affected her fertility such that the stored embryos were her last chance at being a genetic mother.[120] And perhaps adding emotional insult to injury, her husband had a child with another woman eighteen months after their separation.[121]

The lawsuit eventually reached the Pennsylvania Superior Court, which noted "a compelling circumstance not at issue in cases resolved by our sister states . . . Wife has no ability to procreate biologically without the use of the disputed pre-embryos."[122] Yet the agreement signed at the fertility center did not provide an answer, as neither spouse signed the portion that specified what to do with the stored

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113. *Id.* at 604.
114. *Id.*
115. *Id.*
116. 42 A.3d 1131 (Pa. Super. Ct. 2012). This author rewrote the decision as part of the *Feminist Judgments Project* book series. *See* Dara E. Purvis, *Rewritten Reber v. Reiss, in* REPRODUCTIVE JUSTICE REWRITTEN 255 (Kimberly Mutcherson ed., 2020).
117. *Reber*, 42 A.3d at 1132–33.
118. *Id.* at 1133.
119. *Id.*
120. *Id.* at 1138.
121. *Id.* at 1133.
122. *Id.* at 1137.

embryos if the couple divorced or if one of them died.[123] The contractual approach was thus unhelpful. The court also dismissed using a rule of contemporaneous mutual consent since "it was quite obvious" that the spouses would not agree.[124] The court concluded that using a balancing approach was the "most suitable" option.[125]

The court then discussed each ex-spouse's interests. As already described, the wife was in an extreme position, in that the embryos were almost certainly her only opportunity to become a mother. The court acknowledged the possibility that she might adopt a child, although it also noted that the wife argued at trial that as an unmarried forty-four-year-old cancer survivor, she was unlikely to be considered a desirable option for adoptive placements.[126] Moreover, the decision recognized that the wife wanted to be pregnant and give birth to a child genetically related to her, a desire that would not be satisfied through other paths to parenthood:

> There is no question that the ability to have a biological child and/or be pregnant is a distinct experience from adoption. Thus, simply because adoption or foster parenting may be available to Wife, it does not mean that such options should be given equal weight in a balancing test. Adoption is a laudable, wonderful, and fulfilling experience for those wishing to experience parenthood, but there is no question that it occupies a different place for a woman than the opportunity to be pregnant and/or have a biological child. As a matter of science, traditional adoption does not provide a woman with the opportunity to be pregnant.[127]

By contrast, the husband had several reasons to explain his interest in not becoming a parent with his ex-spouse. First, he explained his own upbringing as an adopted child who did not know his biological father.[128] He did not want to bring a child into the world through a marriage and relationship that had already failed, guaranteeing a distant relationship between himself and the child. He also argued that he did not want to assume the financial obligation of another child.[129]

After weighing the two interests against one another, the court concluded that the wife's interests won.[130] The court explained that the husband's interests were addressed by the fact that his ex-wife promised that she would allow him to be involved in the child's life,[131] and that she would "do her best" to not seek child support payments from her ex-husband.[132] As a result, the frozen embryos were awarded to the wife.[133]

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123. *Id.* at 1136.
124. *Id.*
125. *Id.*
126. *Id.* at 1139.
127. *Id.* at 1138–39.
128. *Id.* at 1140.
129. *Id.* at 1141.
130. *Id.* at 1140.
131. *Id.*
132. *Id.* at 1141.
133. *Id.* at 1142.

As the preceding discussions have illustrated, the consent of a man to become a father is given varied treatment in the context of disputes over stored embryos. If the dispute arises in a state in which courts have applied the contemporaneous mutual consent approach, then the father's current lack of consent is dispositive. If the court hearing the case applies the contractual approach, a previous memorialization of consent or non-consent will be enforced. But if the balancing approach is applied, the man's lack of consent will be set against the perceived need of his ex-partner, which in some circumstances will outweigh his preference entirely. The patchwork of approaches makes disagreements over the fate of stored embryos unpredictable, particularly if the balancing approach is used.

By contrast, treatment of men's and boys' consent in the case of sexual reproduction has been evaluated extremely differently, and quite consistently: it is irrelevant. The next Part turns to how men's consent is ignored in the context of sexual reproduction.

II. SEXUAL REPRODUCTION AND MEN'S CONSENT

In contrast to the difficult determinations of control over frozen embryos, determinations of legal parentage in the context of sexual reproduction are typically much simpler, using bright-line rules of marriage and biological links. Examination of some of the more challenging examples of genetic fatherhood, particularly in cases where the biological father was under the age of consent at the time of conception, demonstrates a strikingly inflexible commitment to genetic link as generating parental responsibilities. This link seems to be in stark contrast with the more flexible logic represented in the case of frozen embryo disputes, but ultimately embodies a consistent legal implementation of the norms of hegemonic masculinity.

For most children born each year, their parentage is determined simply through operation of the marital presumption. Under the marital presumption, a child born to a married woman is the legal child of the married woman and her husband.[134] This presumption operates without concern for any proof of a genetic link between the husband and the child, and in some notable examples has withstood proof that the husband is not the biological father.[135]

If the parents are unmarried, by contrast, identification of the legal father is more difficult. If the biological father wishes to claim status as a legal parent, he may be able to sign a Voluntary Acknowledgment of Paternity, at least if he is on amicable terms with the biological mother. If he is not, and she prevents him from seeing or knowing about the birth, he may not be able to claim status as a legal parent, and the Supreme Court has said he has no constitutional right in play before that determination.[136]

If the mother or the state wishes to pursue the biological father for child support, however, the answer is quite clear that the genetic link is enough to justify his

134. Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2038 (2016).

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

136. *See* Dara E. Purvis, *The Constitutionalization of Fatherhood*, 69 CASE W. RES. L. REV. 542 (2019); Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 666 (2014).

identification as a legal parent and imposition of a child support order. The rule tying child support to genetics is simple and unyielding. Michael Higdon, for example, has written extensively about contexts in which men have been found liable for child support despite never having consented to the sexual act that led to the pregnancy.[137] This "regime of genetic entitlement," as Jennifer Hendricks has called it, leads to all sorts of public policy concerns regarding consent of either party in a sexual encounter, such as giving rapists the status of legal parent and ability to request visitation or custody.[138]

For purposes of the contrast with embryo disputes, however, this Article focuses upon circumstances where legal fatherhood is imposed despite a lack of consent. The next section addresses the most extreme example, statutory rape.

A. Statutory Rape as Fatherhood Without Consent

Statutory rape is premised on the idea that children cannot legally consent to sexual activity.[139] Regardless of the child's purported verbal consent or consent expressed through physical action, sexual conduct with the child is criminalized. Despite this explicit treatment of children as unable to consent, boys who have been the victims of statutory rape are routinely and uniformly held liable for child support obligations.[140]

Some examples of such impositions of a child support obligation occur in the context of a difficult public policy problem: both biological parents are underage, leaving the baby in a position of particular economic need and blunting at least some of the criticism of imposing child support on the victim of a crime.[141] The best-known example of such a case is probably *State ex rel. Hermesmann v. Seyer*, in which the

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137. Michael J. Higdon, *Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men*, 66 ALA. L. REV. 507, 517 (2015); Michael J. Higdon, *Fatherhood by Conscription: Nonconsensual Insemination and the Duty of Child Support*, 46 GA. L. REV. 407, 411 (2012).

138. Jennifer S. Hendricks, *The Wages of Genetic Entitlement: The Good, the Bad, and the Ugly in the Rape Survivor Child Custody Act*, 112 NW. U. L. REV. 75, 76 (2017).

139. Dara E. Purvis & Melissa Blanco, *Police Sexual Violence: Police Brutality, #MeToo, and Masculinities*, 108 CAL. L. REV. 1487, 1505 (2020).

140. L.M.E. v. A.R.S., 680 N.W.2d 902, 912 (Mich. Ct. App. 2004) ("The courts that have considered this issue have uniformly concluded that the fact that a child results from the criminal sexual act of an adult female with a minor male does not absolve the minor from the responsibility to pay child support."); Garrison, *supra* note 25, at 860; Higdon, *Fatherhood by Conscription*, *supra* note 137, at 425 ("[E]very court to consider the issue of whether a male victim of statutory rape is liable for child support has reached the same conclusion, using the same reasoning . . . ."); Ruth Jones, *Inequality from Gender-Neutral Laws: Why Must Male Victims of Statutory Rape Pay Child Support for Children Resulting from Their Victimization?*, 36 GA. L. REV. 411, 416 (2002).

141. *See, e.g.*, Hamm v. Off. of Child Support Enf't, 985 S.W.2d 742, 745 (Ark. 1999) ("Those cases in no way establish a public policy that an underage consenting male victim who impregnates the sexual-abuse perpetrator, here a fifteen-year-old female, should be relieved from any responsibility for the child born of that sexual relationship. While Arkansas does not appear to have any case law directly on point, other jurisdictions have soundly ruled contrary to Scott's contention.").

mother was the sixteen-year-old babysitter of the twelve-year-old father.[142] That age difference still triggered statutory rape laws even though the girl was herself underage, so the court acknowledged the baby's conception involved "criminal activity on the part of the other parent."[143] Despite this, the court's opinion clearly viewed the boy as something other than a victim. At one point, the court noted that the boy did not "register any complaint to his parents about the sexual liaison."[144] The court also referred to the baby as "the only truly innocent party."[145]

This problematic view of the male victims of statutory rape as voluntarily assuming the risk of pregnancy holds true even where the woman involved in the encounter is an adult. One of the most egregious age differences between partners was at issue in *County of San Luis Obispo v. Nathanial J.*, introduced at the start of the Article, in which a thirty-four-year-old woman had sex with a fifteen-year-old boy.[146] Despite an almost two-decade difference in their ages, and the criminal law's proposition that a boy that age could not legally consent to the sexual encounter, the court described the woman as "seduc[ing]" the victim, rather than the more accurate description that she sexually assaulted him.[147] The court stated that the boy was "not an innocent victim of [the woman's] criminal acts," because he "willingly participated" in the sexual activity.[148] The court's attitude was clear from the first words of its decision: "Victims have rights. Here, the victim also has responsibilities."[149]

Some courts stress the needs of the child for financial support. One court found that "[t]o penalize this child for the mother's actions would run contrary to the fundamental purpose" of child support proceedings.[150] Another court contemplated changing obligations as the father reached adulthood, writing that "[t]he rights of the child cannot be permanently foreclosed because his father was a minor at the time of conception."[151] Another case reasons that "the mother's conduct should have no bearing on the father's duty of support," since the purpose is to protect the child.[152]

More often, however, courts simply reject the premise of statutory rape laws and say the boys were not victims. More than one court states it outright: it was "hard to characterize appellant as the classic innocent victim of a crime,"[153] or in another case saying that a fifteen-year-old "was not an innocent victim of [the adult's] criminal

142. 847 P.2d 1273, 1274 (Kan. 1993).
143. *Id.* at 1279.
144. *Id.* at 1277.
145. *Id.* at 1279.
146. 57 Cal. Rptr. 2d 843, 843 (Cal. Ct. App. 1996), *as modified* (Nov. 20, 1996).
147. *Id.* at 843.
148. *Id.* at 845.
149. *Id.* at 843.
150. Mercer Cty. Dep't of Soc. Servs. *ex rel.* Imogene T. v. Alf M., 589 N.Y.S.2d 288, 290 (Fam. Ct. 1992).
151. Dep't of Revenue *ex rel.* Bennett v. Miller, 688 So. 2d 1024, 1026 (Fla. Dist. Ct. App. 1997).
152. *In re* Weinberg v. Omar E., 482 N.Y.S.2d 540, 540 (N.Y. App. Div. 1984).
153. Jevning v. Cichos, 499 N.W.2d 515, 516 (Minn. Ct. App. 1993).

act."[154] One describes the victim of a sex crime as "reckless."[155] Many decisions describe the victim as having consented, even though (to restate the obvious) the victim is legally incapable of consent: "No factual assertions in the opposing affidavits submitted by or on behalf of [the underage boy] state or give rise to a reasonable inference that his sexual intercourse with [the mother] was forced upon him or occurred without his consent."[156] Another court "gives no credit to [the underage boy's] testimony that he was forced to have sex with the mother."[157] Yet another writes that the underage boy "did not claim that his participation in the events which allegedly led to the child's conception was involuntary or forcibly compelled."[158] Another refers to the boy as "*technically* a victim."[159]

Other courts try to split the boy's status as the victim of a crime from the fact of his biological parenthood. One early example from 1961 is particularly dismissive:

> In his brief, [the boy] cites [state law] which defines rape in the third degree by a female of a male person under the age of eighteen years. We are not entirely sure of the application he would have us make of that provision to the facts of this case. If, however, he supposes, as we surmise he does, that by reason of this section his testimony should be viewed more favorably than that of other witnesses, it having an ethereal, mystic operation whereby his testimony becomes more worthy of belief, we have failed to discover any such purpose or effect from the wording of such statute. Certain it is that his assent to the illicit act does not exclude commission of the statutory crime, but it has nothing to do with assent as relating to progeny. His youth is basic to the crime; it is not a factor in the question of whether he is the father . . . .[160]

Although the sneering language might be attributed to the time, more recent cases follow the same logic that "[i]f voluntary intercourse results in parenthood, then for purposes of child support, the parenthood is voluntary. This is true even if a fifteen-year-old boy's parenthood resulted from a sexual assault upon him within the meaning of the criminal law."[161] A 2004 opinion found that:

> the issue presented by this case is not [the adult's] criminal culpability for criminal sexual conduct, or whether respondent was—or could have been—a 'consensual' participant in that activity. Rather, we are

154. *In re* Paternity of K.B., 104 P.3d 1132, 1135 (Okla. Civ. App. 2004).

155. *In re* J.S., 550 N.E.2d 257, 258 (Ill. App. Ct. 1990).

156. *In re* Paternity of J.L.H., 441 N.W.2d 273, 275–76 (Wis. Ct. App. 1989).

157. Mercer Cnty. Dep't of Soc. Servs. *ex rel.* Imogine T. v. Alf M., 589 N.Y.S.2d 288, 289 (Fam. Ct. 1992).

158. Commonwealth *ex rel.* Rush v. Hatfield, 929 S.W.2d 200, 202 (Ky. Ct. App. 1996).

159. L.M.E. v. A.R.S., 680 N.W.2d 902, 905 (Mich. Ct. App. 2004) (emphasis added).

160. Schierenbeck v. Minor, 367 P.2d 333, 334–35 (Colo. 1961) (paragraph break omitted).

161. *In re* Paternity of J.L.H., 441 N.W.2d at 276–77.

> concerned with whether respondent may be liable for child support for the child that resulted from the sexual activity.[162]

B. Factual Questions of Consent

Statutory rape is an unusually clear context in which consent is not legally present, but other examples of at least questionable consent exist with similarly problematic results that rely solely on genetic links to impose child support. One example is what Michael Higdon calls "stolen sperm," in which a man consented to a sexual act, but not sexual intercourse.[163] As Higdon writes, "whether this 'theft' occurred during nonconsensual intercourse or whether the sperm was harvested from sexual activity other than intercourse and then surreptitiously used for insemination, the courts have universally reached the same result. Specifically, the lack of consent is no bar to an obligation to pay child support."[164]

Even allegations of forcible sexual assault have been viewed as insufficient to disturb the obligation of child support arising from genetic fatherhood. In an infamous Alabama case from 1996, a man alleged that he had been sexually assaulted at a party.[165] Identified in the case as S.F., he had been drinking at a nightclub before traveling to a woman's house, and had drunk enough before he arrived that he had vomited.[166] The man's brother testified that S.F. had vomited again after arriving, so the brother and the woman hosting the party had put an unconscious S.F. into bed.[167] When the brother was leaving the party at about six o'clock in the morning, he was not able to wake S.F., so he left him in bed.[168] The brother returned later that morning and testified that S.F. had yet to sober up from the night before.[169] S.F. testified that he didn't remember anything past when he was put into bed, but woke up the following morning wearing only an unbuttoned shirt.[170] Three people testified that the woman later told them that she had had sex with S.F. while he was unconscious, one saying that the woman had said it "saved her a trip to the sperm bank."[171]

The woman became pregnant and sued S.F. for child support. He argued that because he did not consent to any sexual activity with the woman, it violated his due process rights to be liable for child support.[172] The appellate court held, as a matter of law, his consent was irrelevant:

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162. *L.M.E.*, 680 N.W.2d at 911–12.

163. Higdon, *Fatherhood by Conscription*, *supra* note 137, at 426–31; *see also* Purvis, *Origin*, *supra* note 136, at 665–66.

164. Higdon, *Marginalized*, *supra* note 137, at 523 (citing Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579 (Ill. App. Ct. Feb. 22, 2005)); *see also* State v. Frisard, 694 So. 2d, 1032, 1035–36 (La. Ct. App. 1997).

165. S.F. v. State *ex rel.* T.M., 695 So. 2d 1186, 1187 (Ala. Civ. App. 1996).

166. *Id.*

167. *Id.*

168. *Id.* at 1188.

169. *Id.*

170. *Id.* at 1187.

171. *Id.* at 1188.

172. *Id.* at 1187.

> The child is an innocent party, and it is the child's interests and welfare that we look to . . . . The purpose of this act is to provide for the general welfare of the child; any wrongful conduct on the part of the mother should not alter the father's duty to provide support for the child.[173]

Although such cases are thankfully rare, an unreported 2002 case from Wisconsin reached similar conclusions. In that case, the man alleged that he had been sexually assaulted after having been given a date rape drug.[174] Although a jury did not find that he had definitely been given the drug, it did find that he had proven that he had not consented to sexual intercourse.[175] On appeal, however, that court found that the man was entitled to a jury trial only on the question of whether he was the child's father, and he had admitted that he was the biological father.[176] Under the court's logic, this rendered any allegations about the circumstances of that biological fatherhood irrelevant, at least for purposes of imposing a child support obligation.

Such reliance on genetics to satisfy any question of paternity would be problematic on its own, but in other cases courts have used the circumstances of conception to deny a biological father parental status. Judge Richard Posner wrote an opinion for the Seventh Circuit in one such case arising out of statutory rape with an adult male perpetrator.[177] The facts are bizarre and troubling in multiple ways. The case began when Ruben Peña, then nineteen years old, committed statutory rape by having sexual intercourse with a fifteen-year-old girl.[178] Although Peña continued his relationship with the girl,[179] she did not tell him when she went into labor and delivered their child.[180] Subsequently her father had Peña meet him at a restaurant, where Peña was arrested for a felony statutory rape charge.[181] The problem, however, was that the charge Peña was arrested for required that the perpetrator of the statutory rape be at least five years older than the victim, and the difference in ages between Peña and the girl was only four years. Both the father, who signed the charge, and the state prosecutor who drafted the complaint knew this, and thus knew that the charge was inaccurate.[182] After Peña's sister learned that he had been arrested, she called the home of the girl. The girl's aunt, who was a state judge, answered the phone and told Peña's sister not to call again and that Peña's bail would be increased the following day.[183] The aunt was not the judge in Peña's case, but she was right that Peña's bail was increased—as Posner writes for the court, this "suggests that she may have spoken to the judge who handled [Peña's] case."[184]

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173. *Id.* at 1189.
174. *In re* Paternity of Derek S.H., No. 01–0473, 2002 WL 265006, at *1 (Wis. Ct. App. 2002).
175. *Id.*
176. *Id.*
177. Peña v. Mattox, 84 F.3d 894 (7th Cir. 1996).
178. *Id.* at 895.
179. *Id.*
180. *Id.* at 895–96.
181. *Id.* at 896.
182. *Id.*
183. *Id.*
184. *Id.*

In the meantime, the girl's parents had taken her, while she was in labor, from Illinois to Indiana, where she gave birth.[185] The speculated reason for the travel was that Indiana had a statute that specified that if the mother of a child was under sixteen years old when the child was conceived, she and the state did not have to secure the consent of the biological father for the child to be placed for adoption.[186] The child was placed with adoptive parents without Peña's knowledge or consent.[187]

Peña later sued, arguing that the prosecutor and the girl's parents and aunt deprived him of his constitutional right inhering in his relationship with the child.[188] The court rejected his claim, relying on a line of Supreme Court cases holding that unmarried biological fathers hold a substantive due process right only once they have created a substantial relationship with their biological child, something that Peña was unable to do since the baby was adopted while he was in police custody.[189] Posner went further to explain the significance of the fact that Peña had committed statutory rape:

> The criminal does not acquire constitutional rights by his crime other than the procedural rights that the Constitution confers on criminal defendants. Pregnancy is an aggravating circumstance of a sexual offense, not a mitigating circumstance. The criminal should not be rewarded for having committed the aggravated form of the offense by receiving parental rights which he may be able to swap for the agreement of the victim's family not to press criminal charges.[190]

This logic is sound and is the basis of many criticisms of giving rapists parental status.[191] Yet even Posner acknowledged that the reasoning is not applied for purposes of child support where the genders of perpetrator and victim are reversed, writing that although this "could be thought to be 'rewarding' the malefactress . . . the motive is different; it is to help the child."[192] Helping the child, however, is understood solely as finding a private source of financial support. Peña sued because he wanted the adoption reversed and wanted the opportunity to claim custody rights. It may be that he would not have received custody—his commission of statutory rape would certainly weigh against him in an assessment of the child's best interests—but it is curious that a biological parent seeking to claim parental responsibilities would be dismissed as not attempting to help the child.

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185. *Id.*
186. *Id.*
187. *Id.* at 898.
188. *Id.* at 897.
189. *Id.* at 899.
190. *Id.* at 900.
191. *See, e.g.*, Kara N. Bitar, *The Parental Rights of Rapists*, 19 DUKE J. GENDER L. & POL'Y 275 (2012); Anastasia Doherty, *Choosing to Raise a Child Conceived Through Rape: The Double-Injustice of Uneven State Protection*, 39 WOMEN'S RTS. L. REP. 220 (2018); Hendricks, *supra* note 138; Shauna R. Prewitt, *Giving Birth to a "Rapist's Child": A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape*, 98 GEO. L.J. 827 (2010); Moriah Silver, *The Second Rape: Legal Options for Rape Survivors to Terminate Parental Rights*, 48 FAM. L.Q. 515 (2014).
192. *Peña*, 84 F.3d at 900–01.

The contrast between male consent in the context of sexual reproduction and the context of frozen-embryo disputes is similarly curious. In the context of sex, the biological link itself is used to impose parental responsibility—not consent to pregnancy, not even consent to the sexual act. Genetic link has been deemed enough as a matter of law. Yet in the context of frozen-embryo disputes, two of the three approaches look to expressed consent to decline parental responsibility. Obviously, much of this difference arises from the extreme circumstances of such cases. But the difference can also be explained through a masculinities frame, asking what society and the legal system expect of men. The next part turns to this question.

III. INSIGHT FROM MASCULINITIES THEORIES

Exploration of gender stereotypes often focuses, quite understandably, on the oppression that gender bias works upon women.[193] Masculinities theories look to stereotypes and expectations about men's behavior and ask what harm such stereotypes also cause to men.[194] This harm does not negate or deny the sexism that remains a powerful force in American society and law but acknowledges the different ways that men of different races, classes, sexualities, and other characteristics experience expectations of manhood.[195] The gendered constructions of masculine and feminine can both privilege manhood and limit what manhood should look like.[196] Anyone who deviates from "ideal" manhood, known as hegemonic masculinity, is seen as less of a man and faces sanction or punishment.[197]

Masculinities analysis exposes the harm of gender stereotypes in many contexts,[198] but family law is a particularly rich area of exploration. Masculinities

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193. *See* Michael Kimmel, *Integrating Men into the Curriculum*, 4 DUKE J. GENDER L. & POL'Y 181, 186 (1997) ("American men have come to think of themselves as genderless, in part because they can afford the luxury of ignoring the centrality of gender.").

194. Purvis & Blanco, *supra* note 139, at 1512; Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1040 (1996). Nancy Dowd has described the work of masculinities as "ask[ing] the man question." Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 204 (2008).

195. *See* Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 269–70 (2013); see also Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415, 420–21 (2010) [hereinafter Dowd, *Asking the Man Question*].

196. *See* Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK UNIV. L. REV. 1047, 1060 (2012) [hereinafter Dowd, *Fatherhood and Equality*]; Dowd, *Masculinities*, *supra* note 194, at 230.

197. *See* Purvis & Blanco, *supra* note 139, at 1511; *see also* Dara E. Purvis, *Trump, Gender Rebels, and Masculinities*, 54 WAKE FOREST L. REV. 423, 429–31 (2019) [hereinafter Purvis, *Trump*]; Dara E. Purvis, *The Sexual Orientation of Fatherhood*, 2013 MICH. ST. L. REV. 983, 991–97 (2013) [hereinafter Purvis, *Sexual Orientation*].

198. *See, e.g.*, Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies,* Terry *Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009) (discussing masculinities and the police); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000) (discussing violence and masculinities); Ann C. McGinley, *Masculinities at Work*,

play a key role in family law in that they help to explain often contradictory ways that men are treated by the law and ways that men act within families. For example, one of the most fundamental precepts of hegemonic masculinity is defining what men are *not*: men are not women.[199] Fathers are not mothers.[200] Fathers do not engage in nurturing caregiving; they are breadwinners who give their children financial but not emotional support.[201] Men live individual lives and lack the strong family relationships that women have.[202]

Both in reference to their families and in broader contexts, men do not express or even acknowledge emotions. Men are expected not to acknowledge emotional suffering or harm and certainly not to speak about it openly.[203] Expressing emotion, especially emotion about family relationships, is seen as feminine and thus unacceptable.[204]

Both of these directives of hegemonic masculinity—fatherhood is breadwinning, and real men do not talk about their emotions—operate strongly in the contexts of embryo disputes and consent to sexual activity. Delving further into the way masculinities operate in these contexts explores some of the starkest inconsistencies in male consent and illuminates the broader implications of frozen-embryo disputes. The next section discusses how courts hearing embryo disposition disputes underscore masculinities' insight about men and emotion.

A. The Power of Gender Stereotypes on Emotional Arguments

In both embryo disputes and questions of consent in the context of sexual reproduction, the perceived harm of unwanted parenthood articulated by courts is primarily financial: the harm of a child support obligation. This is fatherhood as defined by hegemonic masculinity, rejecting the emotional caregiving work of parenthood in favor of the more stereotypically masculine competition and breadwinning of the marketplace.[205]

This rejection of emotion helps to explain why the interests of boys victimized by statutory rape are so easily dismissed in favor of the perceived financial need of the child. It even helps to explain why courts are so reluctant to label such boys victims at all. Hegemonic masculinity sees sex as a competition, as one way to dominate both the women a man has sex with (hegemonic masculinity is rigidly homophobic)[206]

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83 OR. L. REV. 359 (2004) (discussing masculinities and employment); Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 68 (2002) (discussing masculinities and male-dominated institutions such as military-style academies).

199. *See* Dowd, *Asking the Man Question*, *supra* note 195, at 418.

200. Purvis, *Trump*, *supra* note 197, at 431–32.

201. Dowd, *Fatherhood and Equality*, *supra* note 196, at 1049–50.

202. Richard Collier, *Masculinities, Law, and Personal Life: Towards A New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431, 448–49 (2010).

203. Cunningham-Parmeter, *supra* note 195, at 282.

204. Levit, *supra* note 194, at 1062.

205. *See* Purvis, *Trump*, *supra* note 197, at 431–32; Purvis, *Sexual Orientation*, *supra* note 197, at 993.

206. *See* Purvis, *Trump*, *supra* note 197, at 439.

and the other men to whom the hegemonic man brags about those sexual encounters.[207] There is no room in hegemonic masculinity to acknowledge that some sexual encounters might be unwanted or might cause lasting emotional harm. Susan Frelich Appleton has referred to the financial burdens imposed on male victims of statutory rape as "the price of pleasure," the sexual pleasure assumed to have been enjoyed by the victim of a crime when hegemonic masculinity refuses to contemplate that a boy might have mixed or negative feelings about sex.[208]

Similarly, frozen-embryo disputes demonstrate the impact of hegemonic masculinity in courts' failure to equally recognize the emotions of men and women facing difficult questions about parenthood. In particular, the balancing approach is deeply rooted in gendered stereotypes around parenthood. When called upon to assess the desires of litigants to become or not become a parent, or the supposedly objective value of control over embryos to those desires, courts repeatedly credit the desires of women to become mothers while dismissing men's emotions.

Most specifically, courts stress over and over the importance of becoming a mother. The *Reber* court noted that a wife's "compelling interests" included "what is likely her only chance at genetic parenthood and her most reasonable chance for parenthood at all."[209] The *Szafranski* court described the wife's "last and only opportunity to have a biological child with her own eggs."[210] The court referenced the wife's family history as part of her desire for a biological child, noting that she wanted to become a mother to maintain some part of her father, who passed away when she was a young child.[211] The *Terrell* appellate court viewed the fact that the couple had attempted IVF as proof of the strength of the wife's desire, noting the strength of "Torres' desire to have a biologically-related child—which was the entire purpose of engaging in IVF in the first place."[212] The *Patel* court described in detail the emotion that the wife brought to her testimony:

> Without the use of the embryos, Sajel Patel will never be able to be the mother of biological siblings – with all the joy and pain it can bring. She will never be able to give her daughter a biological sibling. During the hearing on this issue, Sajel Patel often was tearful. Her testimony was a plea for an award to her. Her inability to have additional children clearly weighs heavily on her.[213]

The woman's desire to have a child is also often rooted specifically in their desire to have a biological child and to be pregnant themselves.[214] The *Reber* court wrote at length about the difference, stating:

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207. *See* Purvis & Blanco, *supra* note 139, at 1513.

208. *See* Appleton, *supra* note 31, at 301.

209. Reber v. Reiss, 42 A.3d 1131, 1140 (Pa. Super. Ct. 2012).

210. Szafranski v. Dunston, 34 N.E.3d 1132, 1137 (Ill. App. Ct. 2015).

211. *Id.* at 1162.

212. Terrell v. Torres, 438 P.3d 681, 692 (Ariz. Ct. App. 2019), *as amended* (June 6, 2019), *opinion vacated in part*, 456 P.3d 13 (2020), *as amended* (Feb. 21, 2020).

213. Patel v. Patel, No. CL16000156-00, 2017 WL 11453591, at *6 (Va. Cir. Ct. Sept. 7, 2017).

214. *But see* Ruth Colker, *Pregnant Men*, 3 COLUM. J. GENDER & L. 449, 459 (1993) ("Male sperm donors, I will suggest, are considered to be "pregnant persons" and, not

> There is no question that the ability to have a biological child and/or be pregnant is a distinct experience from adoption. Thus, simply because adoption or foster parenting may be available to Wife, it does not mean that such options should be given equal weight in a balancing test. Adoption is a laudable, wonderful, and fulfilling experience for those wishing to experience parenthood, but there is no question that it occupies a different place for a woman than the opportunity to be pregnant and/or have a biological child. As a matter of science, traditional adoption does not provide a woman with the opportunity to be pregnant.[215]

There are some limits to such claims. Courts often referenced the difference between a woman's desire to have *any* children and a woman's desire to have *more* children, treating the latter as a weaker interest. Sometimes the reference was oblique, such as the *Terrell* court describing the desire to "become a parent" rather than "have another child" or something more expansive.[216] But sometimes the discussion was explicit, as in the *Rooks* court explaining specifically that the wife in that case "has already borne three children," noting that she was not like the women in *Davis*, *Szafranski*, or *Reber*, "where the woman's only opportunity to bear children would be foreclosed if the court did not award the embryos to her."[217] Similarly, in rejecting the wife's claim in *McQueen*, the court explained that the wife's right to procreate did not extend to a right to procreate with her ex-husband through use of stored embryos, in part because "the parties did not begin the process of IVF because McQueen had any infertility issues and McQueen has been able to achieve parenthood."[218]

The difference is highlighted by contrasting with women who sought to donate embryos rather than use the embryos themselves. The *Davis* court was faced with such a scenario and stated outright that the decision "would be closer" if the ex-wife wanted to use the embryos herself and if that use was her only "reasonable means" of becoming a parent.[219] The court went on to state:

> [We] recognize the trauma that Mary Sue has already experienced and the additional discomfort to which she would be subjected if she opts to attempt IVF again. Still, she would have a reasonable opportunity, through IVF, to try once again to achieve parenthood in all its aspects—genetic, gestational, bearing, and rearing.[220]

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surprisingly, these pregnant male persons are treated much better than pregnant female persons.").

215. Reber v. Reiss, 42 A.3d 1131, 1138–39 (Pa. Super. Ct. 2012).

216. *Terrell*, 438 P.3d at 690.

217. *In re* Marriage of Rooks, 488 P.3d 116, 122 (Colo. App. 2016), *rev'd*, 429 P.3d 579 (Colo. 2018).

218. McQueen v. Gadberry, 507 S.W.3d 127, 145–46 (Mo. Ct. App. 2016).

219. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992), *on reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

220. *Id.*

This is not to say that these women's desire to be parents is not deeply held or that their emotional desire is not valid. But there is a striking contrast to how men's emotional arguments are not credited by courts. The husband in *Reber* explained his opposition to his ex-wife using their stored embryos by referencing his own history as an adopted child who never knew his biological father.[221] Although the court acknowledged his concern as "not unreasonable," it found that his ex-wife's statement that she would allow him "to be involved in the child's life, if he so desires" eliminated his worry.[222] The court did not acknowledge the realities of what this might look like: joint custody shared with a woman he had spent considerable time suing, with a lengthy and public record of his initial position that he did not want the child born at all. Instead, the wife's promise to allow him some amount of involvement was credited—just as the court also credited her statement that she would "do her best" to promise that she would not seek child support from her ex-husband, a promise that is unenforceable under the law.[223]

One of the most striking rejections of a man's emotions took place in *Szafranski*. The male partner in question, Jacob, sent an email to his ex-partner laying bare his fears about what genetic parenthood would mean for his life and other family relationships in the future:

> I just am afraid that this will be something that haunts me for the rest of my life and that once I do find someone who I'm ready to love and have a family with they will reject me on the basis that I could potentially have a child of my own in the world with another women [sic], that I know nothing about and neither of which have I ever loved. The thought of a child being a mutually desired choice in the shared life and relationship of two loving adults is something very fundamental and non-negotiable to some people. I just wonder if my future happiness in life will be tethered to the women [sic] I cared for years ago and the child I never knew.[224]

His worries were not merely hypothetical: he had dated a woman who was surprised and unhappy to learn that his ex-girlfriend might have access to embryos created with his sperm and told him that she would break up with him if the embryos were going to be developed.[225] Yet the court minimized his concern by "observ[ing] that many of Jacob's cited concerns were risks that both parties faced and knowingly accepted in agreeing to undergo IVF."[226] The court reinforced a lower court's finding that his concerns were "speculative."[227] Then, after noting that it did not want to "diminish[] Jacob's valid concern," the court declared that it would "not give weight to the judgments of those who have no direct interest in this controversy."[228] But Jacob was

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221. Reber v. Reiss, 42 A.3d 1131, 1140 (Pa. Super. Ct. 2012).
222. *Id.*
223. *Id.* at 1141.
224. Szafranski v. Dunston, 34 N.E.3d 1132, 1141 (Ill. App. Ct. 2015).
225. *Id.* at 1146.
226. *Id.* at 1162.
227. *Id.* at 1163.
228. *Id.* at 1163.

not asking the court to decide the fate of the embryos based upon his later girlfriend's judgment—he was arguing that *his* future life and happiness would be impacted.

The *Patel* court also rejected a man's worries around the potential use of embryos. In that case, the couple had one child when the wife was diagnosed with breast cancer.[229] Because her treatment would likely affect her fertility, they went through IVF, even though they already disagreed about whether or not to have more children.[230] The two had not discussed what to do with embryos if they divorced and only realized they would need to specify a disposition when they were given documents to sign immediately before the egg retrieval.[231] After an initial decision that the wife would control them, the husband said he was not comfortable with that plan and would not move forward with the procedures unless they specified that the embryos would be destroyed in the case of divorce.[232] After the wife's treatment, the two divorced, and the wife argued that the embryos represented her only chance to have another biological child.[233] In opposition, the husband pointed to several concerns, including the effect that another child would have on their daughter, the risks inherent in the procedure and pregnancy that might leave his daughter without a mother, and the prospect of engaging in a second custody battle.[234] As with *Szafranski*, the court reasoned that these were "risks present when he agreed to the IVF" and thus dismissed his worries about his daughter.[235]

Courts have also rejected at least two men who wanted embryos donated to other couples based on their beliefs that the embryos were human life. One such man described "many long and serious discussions regarding the . . . moral and ethical repercussions" of IVF treatment.[236] He testified that his religious faith meant that using IVF was a "dilemma" and that he and his then-wife "agreed that no matter what happened the eggs would be either utilized by us or by other infertile couples."[237] Similarly, in *Dahl* the husband testified that he believed that embryos were human life and wished to donate the embryos to other couples because "there's no pain greater than having participated in the demise of your own child."[238] In both cases, courts rejected the men's argument and directed that the embryos be discarded. The only example of a court giving control over embryos to a male partner over the objections of his female ex-partner who wanted the embryos to be destroyed was in a case in which only the male partner was genetically related to the embryos, which had been created using donated eggs.[239]

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229. Patel v. Patel, No. CL16000156-00, 2017 WL 11453591, at *1 (Va. Cir. Ct. Sept. 7, 2017).

230. *Id.*

231. *Id.* at *1.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. J.B. v. M.B., 783 A.2d 707, 710 (N.J. 2001).

237. *Id.*

238. *In re* Marriage of Dahl, 194 P.3d 834, 837 (Or. 2008).

239. *See In re* Marriage of Nash, No. 62553-5-I, 2009 WL 1514842, at *4–7 (Wash. Ct. App. June 1, 2009).

This rejection or dismissal of men's emotional concerns is not universal. A few courts reference the emotional[240] or psychological[241] consequences of unwanted fatherhood. But such acknowledgments typically come outside of the context of the modern balancing approach. *McQueen*, which acknowledges the ex-husband's concern that he and his ex-wife could not co-parent more children given the difficulties they had co-parenting their existing children[242] and the "possible life-long emotional, psychological, and financial responsibilities,"[243] used the rule of contemporaneous mutual consent, not a balancing test.[244] *Terrell*, which noted the man's concerns that the contentious breakup would mean that he could never have a significant relationship with his child,[245] used the contractual approach. Even the *Davis* court, which credited Junior Davis's description of how terrible an emotional impact his father's absence had in his life after his family dissolved and he was sent to a Lutheran home for boys,[246] did not weigh his interest in not procreating against his ex-wife's desire to use the embryos herself but rather her desire to donate them to another couple.

Nothing about embryo dispute cases lends itself to bright-line rules. There is a pattern, however, that courts describe, quote, and rely upon women's descriptions of their emotions, and particularly the emotional harm of being denied a chance to become a mother, while they minimize men's descriptions of the emotional harm of being forced to become a father, of knowing embryos were destroyed when he believes that to be murder, or the impact of pursuing IVF pregnancy upon his existing child. This difference is merely rhetorical if the court ultimately resolves the dispute by enforcing an agreement between the couple or by requiring contemporaneous mutual consent. The balancing approach is different: it expressly weighs the interests of the litigants against each other. A court that credits a woman's emotional appeal that conforms to gendered stereotypes about women's desires to be mothers, yet dismisses a man's emotional appeal, turns the balancing test from an assessment of interests into a tool reinforcing sexist prejudice.

Courts have consistently dismissed men's emotions in both embryo disposition disputes and treatment of men's consent to sexual activity that led to pregnancy. The legal treatment of consent in each circumstance, however, is different. The next section turns to this inconsistency.

B. The Inconsistent Recognition of Men's Intent

A second dilemma presented by embryo disputes has to do with how the law views men's intent to become fathers. As described above, in the context of sexual

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

241. Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992), *on reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

242. *McQueen*, 507 S.W.3d at 136.

243. *Id.* at 147.

244. *Id.* at 158.

245. Terrell v. Torres, 438 P.3d 681, 686 (Ariz. Ct. App. 2019), *as amended* (June 6, 2019), *review granted in part* (Aug. 27, 2019), *opinion vacated in part*, 248 Ariz. 47, 456 P.3d 13 (2020), *as amended* (Feb. 21, 2020).

246. *Davis*, 842 S.W.2d at 603–04.

reproduction, the law simply does not care what a man's intent was at the time of conception. There is certainly no requirement that he intend to be a father, and there are plenty of examples where there is not even a requirement that he intend to have sex. Yet the mere existence of a child is deemed sufficient to trigger parental status and responsibilities, regardless of his intentions at the time of conception.

If the same logic held, then a man who changed his mind regarding disposition of stored embryos should be ignored. After all, if a man who engages in sexual intercourse is bound to accept the risk of his decision, surely the changed mind of a man who participated in the creation of the embryos with the express goal of pregnancy should be similarly bound to his past decision?

Some women have made this argument in litigation, but the majority of courts to address it have refused to view consent to enter IVF treatment as perpetual consent to reproduce. The *Patel* court is a counterexample, noting that the couple "endured the expensive and invasive IVF procedure" with the intent of having another child.[247] The *Reber* trial court found that the husband "implicitly agreed to procreate with Wife when he agreed to undergo IVF, signed the consent form, provided sperm for the creation of the pre-embryos, and agreed to the fertilization causing the pre-embryos to be created. The use of the pre-embryos was never made contingent upon the parties remaining married."[248] The appellate court agreed, noting that "the only reason one undergoes IVF is to have a child. Clearly, Husband knew the potential result of his participation in IVF was going to be a child at some point in the future."[249] The dissent in *McQueen* similarly reasons that by "knowingly and voluntarily" going through IVF, "they made the reproductive decision that the majority asserts has yet to be made."[250]

More typical is the *Davis* court's dismissal of an argument that the parties had an "implied contract to reproduce using in vitro fertilization" that should be enforced even after their divorce.[251] The *Fabos* court explicitly rejected "[the] wife's argument that [the] husband waived his right to avoid procreating when he agreed to create the pre-embryos through IVF."[252] That court cited *Rooks*, which noted that "[w]e do not interpret a party's commencement of the IVF process, on its own, to establish the party's automatic consent to become the genetic parent of all possible children that could result from successful implantation of the pre-embryos."[253] The *Witten* court dismissed the wife's framing of her ex-husband being "allowed to back out of his agreement to have children."[254] The most abrupt dismissal appears in *Roman v. Roman*, in which the court notes that the ex-wife argued that her ex-husband "breached the intent and purpose of the IVF agreements" but rejects her arguments

247. Patel v. Patel, No. CL16000156-00, 2017 WL 11453591, at *6 (Va. Cir. Ct. Sept. 7, 2017).

248. Reber v. Reiss, 42 A.3d 1131, 1140 (Pa. Super. Ct. 2012).

249. *Id.*

250. McQueen v. Gadberry, 507 S.W.3d 127, 158 (Mo. Ct. App. 2016) (Dowd, J., dissenting).

251. Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992), *on reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

252. *In re* Marriage of Fabos & Olsen, 451 P.3d 1218, 1224 (Colo. App. 2019).

253. *Id.* (citing *In re* Marriage of Rooks, 429 P.3d 579, 592 (Colo. 2018)).

254. *In re* Marriage of Witten, 672 N.W.2d 768, 773 (Iowa 2003).

out of hand, stating the ex-wife "does not cite any argument or authority for this proposition. Therefore, we will not consider it on appeal."[255]

Obviously, there are significant differences between a sexual interaction that leads to pregnancy and the intentional creation of embryos that are in a freezer rather than developing in a woman's uterus. But these differences are precisely the point: the inconsistent treatment of men's intent in the two contexts demonstrates that the law does not view embryos as persons and that the bodily autonomy of a pregnant person should be understood to simply outweigh anyone else's desire to continue or terminate her pregnancy. The inconsistency in treatment of men, in other words, strengthens feminist arguments in favor of an individual woman's right to abortion.

First, it is clear that a majority of jurisdictions and courts do not view stored embryos as persons. As discussed above, there have been some efforts with isolated success to legislate treatment of embryos as persons and to forbid their destruction. But the end result of this will likely simply be more frozen embryos, not more children.

The goal for such programs is embryo adoption, a concept pioneered in 1997. Marlene Strege was diagnosed with premature ovarian failure, meaning that she could not be a genetic parent. One option would have been to use a donor egg fertilized with her husband's sperm, but they preferred not to create an unequal biological link between each parent and child, so they instead "adopted" an embryo that Marlene carried to term.[256] Since then, Nightlight Christian Adoptions has created the Snowflakes Program, devoted to promoting and facilitating embryo adoption.[257] The Snowflakes Program is explicit about its personhood viewpoint, stating on its website that "[w]hen the egg and sperm are joined a new life has been created."[258] Such adoptions are administered more like the adoption of a child than donation of gametes. The organization screens potential adopting couples by conducting home studies and other measures similar to those that take place for potential adoptive parents.[259] The couple donating their embryos is also allowed to select and even meet the potential recipient of the embryos.[260]

President George W. Bush promoted embryo adoption in the early 2000s,[261] and since then the Department of Health and Human Services has supported such efforts,

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255. 193 S.W.3d 40, 54 (Tex. App. 2006).

256. Noah Geldberg, *Zygote Zeitgeist: Legal Complexities in the Expanding Practice of Embryo Donation*, 49 LOY. L.A. L. REV. 813, 819 (2016).

257. *See* Katz, *supra* note 9, at 191.

258. *What is Embryo Adoption?*, NIGHTLIGHT CHRISTIAN ADOPTIONS, https://nightlight.org/snowflakes-embryo-adoption-donation/what-is-embryo-adoption/ [https://perma.cc/C9Z8-LVWW].

259. Eric Blyth, Lucy Frith, Marilyn S. Paul & Roni Berger; *Embryo Relinquishment for Family Building: How Should It be Conceptualised?* 25 INT'L J.L. POL'Y & FAM. 260, 265 (2011); *see also* Alexia M. Baiman, *Cryopreserved Embryos as America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights?*, 16 WM. & MARY J. WOMEN & L. 133, 141 (2009).

260. *See* Blyth et al., *supra* note 259, at 265.

261. *See* June Carbone & Naomi Cahn, *Embryo Fundamentalism*, 18 WM. & MARY BILL RTS. J. 1015, 1030 (2010).

creating an Embryo Adoption Awareness program[262] that has administered grants to organizations including the Snowflakes Program.[263] Despite this support, the numbers of such adoptions seem to be low. Counts vary, ranging from 128 embryo adoptions in 2006,[264] to fewer than 250 children alive as of 2010 who had been born through an embryo adoption,[265] to the relative high point claiming about 400 births per year in 2012.[266] Couples going through IVF also seem to disfavor donating their embryos to other families, generally choosing it the least frequently as the ultimate disposition of any surplus embryos.[267] And as mentioned previously, if a couple successfully has a child through IVF, their ability to think of additional, stored embryos as siblings for their child makes them *less* likely to be willing to donate those embryos.[268]

Instead, IVF occupies an uneasy position, somewhat under the radar, of antiabortion rhetoric that would treat any fertilized egg as human life. It is very clear as a conceptual matter that if a fertilized egg is a person, then IVF is at best a dystopian procedure in which people are created to live in stasis indefinitely.[269] Yet for the most part, IVF has not become part of the abortion debates.[270] It is one thing to characterize women seeking abortions as irresponsible; it is another to deny people yearning for children access to a leading treatment method that could lead to a successful childbirth.[271]

Second, the time between creating embryos and actually implanting them allows for a moment of decision that sexual reproduction does not. For couples who have intercourse and become pregnant, there is no opportunity to specifically decide whether to move forward with the pregnancy (for the man, at least). IVF provides a moment of redecision, confirming that the original intent to create a child is still present.[272] If we really meant to make people liable for all the obligations of

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262. *About EAA*, OFFICE OF POPULATION AFFS., https://opa.hhs.gov/grant-programs/embryo-adoption-awareness-eaa/about-eaa [https://perma.cc/U866-TFSR]; *see also Embryo Adoption Awareness Program*, HHS OFFICE OF POPULATION AFFS., https://opa.hhs.gov/sites/default/files/2020-10/embryo-adoption-awareness-program-50th-2020.pdf [https://perma.cc/T3QU-4WN5].

263. Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 AM. U. L. REV. 515, 520–21 (2018).

264. Katheryn D. Katz, *The Legal Status of the Ex Utero Embryo: Implications for Adoption Law*, 35 CAP. U. L. REV. 303, 336–37 (2006).

265. Blyth et al., *supra* 259, at 265.

266. *See* Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 377 (2012).

267. Blyth et al., *supra* note 259, at 266.

268. *See supra* note 18 and accompanying text.

269. *See* Carbone & Cahn, *supra* note 261, at 1019; Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J.L. & MED. 573, 601–14 (2013); *see also* Anthony Jose Sirven, *Undue Process: A Father's Proprietary Interest in an Embryo and Its Clash with* Casey, 68 FLA. L. REV. 1469 (2016) (comparing abortion to embryo disposition to argue that abortion deprives men of property without due process).

270. See Carbone & Cahn, *supra* note 261, at 1022, 1024.

271. Janet L. Dolgin, *Embryonic Discourse: Abortion, Stem Cells, and Cloning*, 31 FLA. ST. U. L. REV. 101, 108–09 (2003).

272. *See* Robertson, *supra* note 4, at 454 ("When early embryos are or might be placed in the woman's body, the locus of authority over disposition of the embryo is easily

parenthood because they had engaged in behavior that might lead to pregnancy, we would never allow anyone to back out of implanting embryos. The fact that the trend has been to allow people to change their mind demonstrates that the real point of no return in reproduction is pregnancy.

Embryo disputes highlight the role of a pregnant woman's rights in a unique way, because it is otherwise unusual to be able to split off a claimed right not to be a parent from the bodily rights of the pregnant woman. Some self-professed men's rights activists, for example, have argued that gender equality demands they have an exit from parenthood, but even they rarely argue that a pregnant woman should be forced to have an abortion. Instead, they have proposed measures such as relieving a man of future child support obligations if he provides his sexual partner with funds sufficient to pay for an abortion.[273] Other attempts to reason through abortion decisions use thought experiments around artificial wombs.[274]

Some of the courts faced with embryo disputes have highlighted this difference. The *Davis* court, for example, noted that "[n]one of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here."[275] The ex-husband in *Szafranski* attempted to derive a right to control the embryos from his ex-wife's abortion right—as the court described it, he "derived a right for him to unilaterally prohibit the use of a pre-embryo created with his sperm and appellee's egg, without regard to appellee's interests in the pre-embryo, from the fact that a woman has a constitutional right to terminate her pregnancy."[276] The court rejected this argument as "without basis,"[277] rebuffing the comparison.

Disputes over stored embryos thus create a paradox relating to men's consent to become fathers—irrelevant in the context of sexual reproduction, but significant in the context of stored embryos—and point towards an explanation underlying the inconsistency—the autonomy rights of pregnant women. The lesson from men's intent is that pro-choice advocates should be talking about IVF and stored embryos more.

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answered . . . . The locus of decisional authority, however, is less clear when the early embryo is outside of the body.").

273. *See* Dara E. Purvis, *Expectant Fathers, Abortion, and Embryos*, 43 J.L. MED. & ETHICS 330, 333–34 (2015); *see also* Appleton, *Reproduction and Regret*, *supra* note 31, at 294.

274. *See, e.g.*, Julia Dalzell, *The Impact of Artificial Womb Technology on Abortion Jurisprudence*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 327, 346 (2019); Jennifer S. Hendricks, *Not of Woman Born: A Scientific Fantasy*, 62 CASE W. RES. L. REV. 399 (2011). *See also* Stephen G. Gilles, *Does the Right to Elective Abortion Include the Right to Ensure the Death of the Fetus?*, 49 U. RICH. L. REV. 1009, 1066 (2015).

275. Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992), *on reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

276. Szafranski v. Dunston, 993 N.E.2d 502, 516 (Ill. App. Ct. 2013).

277. *Id.*

IV. PRACTICAL IMPLICATIONS

The inconsistent treatment of men's consent as illuminated by comparing the two contexts of embryo disputes and nonconsensual parenthood through statutory rape thus highlights two related issues: the uneven treatment of men's and women's emotions in embryo disposition disputes and the unacknowledged proof that courts already reject a personhood theory of embryos. The Conclusion outlines practical implications from these lessons, pointing to how embryo disputes should be resolved, how to change the abortion debate, and broader implications for family law.

A. How to Solve Disputes Over Stored Embryos

The masculinities lens, turned towards embryo disputes, generates several lessons. First, the modern trend towards broader adoption of the balancing approach is fatally flawed. Assessing and comparing men's and women's interests in parenting versus not becoming parents is inextricably tangled up in gendered stereotypes about fatherhood and motherhood, as well as hegemonic masculinity's rejection of the concept of men's emotions. Contemporaneous mutual consent, by contrast, simply ignores the emotions and preferences of both partners in favor of giving both partners a constant veto power over the other's ability to use stored embryos.

This leaves the contractual approach as the "least worst" option. The contractual approach has several elements in its favor: it at least allows for the possibility of each partner to weigh their own preferences and emotions around parenthood and memorialize their plans in the agreement. Family law, in general, has embraced private agreements in other contexts such as premarital and separation agreements, and scholars such as Deborah Forman[278] and Mary Ziegler[279] have looked to other family law agreements as models for reforms to agreements regarding embryos.

Literature analyzing such agreements also provides a foundation to assess and criticize existing embryo disposition agreements. Melvin Eisenberg's seminal article *The Limits of Cognition and the Limits of Contract* shows how badly individuals in the real world conform to traditional expectations around rational actors, given our inability to predict future events, behavior, and preferences.[280] Specifically, people are far too optimistic, particularly about how stable their personal relationships with a spouse or partner are.[281] This optimism exists in spite of awareness about the overall stability of relationships—for example, Eisenberg cites a survey in which respondents accurately predicted the overall risk of divorce at fifty percent, yet estimated their own individual risk of divorce as zero.[282] As Eisenberg describes it, using the term "thick relationships" to mean personally significant relationships:

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278. Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 380 (2013).

279. *See* Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 AM. U. L. REV. 515, 559 (2018).

280. *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 213 (1995).

281. *See id.* at 216; *see also* Ziegler, *supra* note 263, at 561.

282. *See* Eisenberg, *supra* note 280, at 217.

> The nature of thick relationships makes it virtually impossible to predict, at the time the contract is made, the contingencies that may affect the relationship's future course. Furthermore, at the time the contract is made, each party is likely to be unduly optimistic about the relationship's long-term prospects and the willingness of the other party to avoid opportunistic behavior or unfair manipulation of the relevant contractual rules as the relationship unfolds. Finally, because of defects in capability the parties are likely to give undue weight to the state of their relationship as of the time the contract is made, which is vivid, concrete, and instantiated; to erroneously take the state of their relationship at that point as representative of the relationship's future; and to give too little thought to and put too little weight on the risk that the relationship will go bad.[283]

Although Eisenberg was thinking of premarital agreements, the same reasoning applies to the agreements presented to couples seeking IVF. Couples seeking IVF procedures are thinking of the hope of becoming parents and their long-term dreams for such a family. It seems a safe assumption that no couple seeks IVF expecting the relationship to end, particularly before the IVF treatment is successful in resulting in a viable pregnancy.

Unlike the fatally flawed balancing approach, however, the contractual approach has a path for improvement. Thoughtful reform can, in the words of Brian Bix, "protect parties from most of the forms of unfairness that tend to result from . . . agreements, and still provide parties who have a good faith desire to order their own domestic lives with the necessary legal powers to do so."[284] A number of scholars have proposed importing protections developed in the context of premarital agreements into embryo disposition agreements. Deborah Forman, for example, would require that all such agreements be in writing and signed in consultation with an attorney, as well as include a waiting period between when the agreement is executed and when the medical procedure takes place to give participants time to reflect on their choices.[285] Mary Ziegler looks to proposed reforms of the Uniform Premarital and Marital Agreements Act to similarly focus on each intended parent having access to independent counsel to advise them on the agreement as well as clearly-conveyed information about the significance of each possible option in determining control of stored embryos.[286]

These procedural issues with embryo disposition agreements are low-hanging fruit in that there are obvious issues with the rushed and relatively uninformed way that paperwork is presented to couples that can be addressed with direct legislative intervention. There are a variety of ways to build in more time for couples to reflect upon their decision and to ensure they receive clear explanations of what choices they are to be presented with. It seems obvious to require that an embryo disposition agreement be completed in writing before a fertility treatment provider proceeds with IVF procedures, for example. Providers should also be required to provide direct

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283. *Id.* at 251–52.

284. Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 146 (1998).

285. *See* Forman, *supra* note 278, at 434–35.

286. *See* Ziegler, *supra* note 279, at 565.

language flagging the consequences of each disposition choice.[287] It would also be a significant improvement to break up the many consent forms and agreements so that couples are not surprised by having to decide the long-term disposition plan for any stored embryos while they sign medical consent forms immediately before a procedure begins. Questions regarding the disposition of embryos are typically presented to intended parents along with numerous other documents relating to the medical aspects of the IVF procedures. States could enact procedural protections requiring fertility clinics to present those documents separately and earlier than other documents.

More significantly, legislatures might require a certain period of time in between executing the agreement and undergoing IVF treatment. The time given to couples to consider a premarital agreement often has a significant impact on whether consent to the agreement is considered voluntary. An engaged person presented with a premarital agreement the morning of their wedding day, for example, is not simply faced with reading, understanding, and potentially negotiating a substantial legal document: if they fail to come to an agreement in a short period of time they suffer the personal embarrassment and financial harm of cancelling their wedding.[288] Couples who receive a stack of forms to fill out the morning of a procedure are faced with a similarly intense time pressure,[289] with little need for such a rush. Legislation could require a period of time in between giving patients the documents and when they are signed to guarantee a period of time when the intended parents can contemplate the decision, absent extenuating circumstances making a more rushed process necessary.

Several scholars have proposed requiring independent legal counsel or psychological counseling for both potential intended parents. Here, masculinities theories provide an additional justification for some form of counseling, although with more of a focus on family counseling or personal emotional work as opposed to legal advice. Decisions about the disposition of embryos raise deep questions about parenting that most people seeking IVF treatment have not yet had to confront. An intended parent is asked to weigh their own desire to become a parent, their partner's desire to become a parent, their feelings about genetic children with whom they might not share a personal or even legal relationship, and how those feelings might change over time, including as they do or don't have successful pregnancies with their partner. These are all emotional issues to wrestle with and getting a clear sense of such preferences is even harder when one has grown up in a society that tells boys and men that it is inappropriate and not manly to talk through their emotions. Some kind of counseling, either conducted by a psychologist or a licensed therapist, would help to ensure that each party to an embryo disposition agreement has given such decisions the thoughtful consideration they deserve.[290]

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287. *See* Carissa Pryor, *What to Expect When Contracting for Embryos*, 62 ARIZ. L. REV. 1095, 1111–12 (2020).

288. *See* J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL'Y 83, 90–91 (2011).

289. *See supra* note 9.

290. One might ask, as an incisive commenter did, whether such counseling would only be necessary for intended parents containing at least one man, if the justification for needing

The proposals thus far have concentrated on the initial execution of the embryo disposition agreement. If such agreements are to capture the meaningful consent of the participants, however, the parties should be encouraged or even required to revisit that consent as time passes and allowed to change their minds as memorialized in the agreement. The agreements could build in cues, for example, to revisit disposition plans after specified periods of time or events: after every attempt at implantation of stored embryos, whether the attempt results in a viable pregnancy or not, and in the absence of implantations after specified time periods such as once per year. Such reevaluations of disposition plans should not be necessary to renew the original agreement—if a couple revisits their plans and realizes that one person wants to change the plans and the other does not, this later disagreement should not void the original agreement. To do so would destabilize the agreement and function like a modified requirement of contemporaneous mutual consent. If such a disagreement were to arise, however, being aware of the disagreement might save later litigation or frustration. For example, being alerted earlier that their partner would not allow them to control embryo disposition might give someone more time to try a second egg retrieval. Furthermore, prompting reevaluations would allow partners to evaluate how ongoing events change their preferences, such as shifting disposition from one party's control to destroying them if a successful pregnancy led the partners to view the embryos in a more individualized way.

In addition, two more substantive changes to how disposition agreements operate could allow more flexibility and equity in how the consent of the potential intended parents is assessed. First, a reoccurring argument throughout many of the stored embryo cases is the higher investment of the person whose eggs are used in the IVF process as compared to the person whose sperm is used. The process of retrieving eggs is much more physically and mentally burdensome on the partner with ova than on the partner whose sperm is used, and many litigants argued that the suffering they went through to create the stored embryos justified giving them control over the remaining embryos. In addition, although societal perceptions of diminishing female fertility versus more permanent male fertility are overblown, many of the litigants had persuasive evidence to show that the stored embryos represented their last opportunity to be a genetic parent. People having eggs retrieved could opt to freeze the eggs themselves rather than the embryos, but frozen embryos have a higher rate of success in leading to births than frozen eggs do, so people at the outset of their fertility journey are forced to weigh the chances of becoming a parent against the chances of their relationship ending when deciding whether to freeze eggs or embryos.

One response to this different burden put forward by scholars is to propose that in disputes between members of an opposite-sex couple, the woman receive control over the embryos.[291] Such a bright-line rule is problematic for a few reasons,

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greater prods to consider the emotions of parenthood is that men are taught by hegemonic masculinity not to acknowledge emotion. Although hegemonic masculinity affects men the most, norms of masculinity and shortcomings of the contractual process around IVF operate such that even a pair of female intended parents would likely benefit from such a process. Indeed, all parents would likely benefit from such advance discussions, but only in the context of ART is such an intervention widely feasible.

291. Marina Merjan, *Rethinking the "Force" Behind "Forced Procreation": The Case for*

however. For one, it offers no ability for a couple to customize their choices, should the couple agree at the outset to a different plan. More globally, although the published embryo dispute cases involve opposite-sex couples, people in same-sex relationships face both social and medical infertility and are frequent users of IVF. Additionally, transgender men and nonbinary people may have ova and choose to be the partner from whom eggs are harvested, and any use of gendered language excludes them. Finally, such a firm preference risks underscoring gendered presumptions about mothers being the real, natural parent as compared to fathers, the more reluctant and more disposable parent.

That said, it is true that the person from whom eggs are harvested must undergo an intrusive and often painful process. Additionally, private agreements within family law are often criticized for allowing or even facilitating men in opposite-sex couples to use their greater resources or legal sophistication to exploit their women partners.

Reflecting upon masculinities theories gives a third option. Masculinities recognizes the harm that hegemonic masculinity works upon people of all genders by imposing a single vision of manhood and fatherhood. Leaving couples to assess and negotiate their own agreements aids the hegemonic man in some ways by encouraging strategic actors, competition, and dominance of one party over the other. Setting the default with the person from whom eggs are harvested but allowing for negotiated changes to that default strikes a balance that respects biological differences without giving voice to gendered stereotypes.

A legislature could set the default as giving sole control over stored embryos to the person from whom eggs were harvested, from which couples going through IVF could deviate through the agreement. At the moment, to the extent states specify a default, it is to give shared control to both partners. For example, Florida law states that "[a]bsent a written agreement, decisionmaking authority regarding the disposition of preembryos shall reside jointly with the commissioning couple."[292] A statute could similarly specify "absent a written agreement, decision-making authority regarding the disposition of preembryos shall reside with the person from whom eggs were removed, if that person is not an egg donor who is not an intended parent of the preembryos."

Finally, the embryo disposition agreement could allow couples to change their status and legal relationship to the embryos over time. Specifically, consent to use of the embryos could be split away from legal status as a parent, with the ensuing obligations and rights. A couple entering the IVF process could thus agree that Person A would have sole decision-making power over later use of the embryos, but if Person A chose to implant embryos without the contemporaneous consent of Person B, Person B would have the option to effectively revert to the status of gamete donor.

This option provides significantly more flexibility than existing agreements. It also allows for more customization that acknowledges the different potential harms of unwanted parenthood, allowing an individual to set different levels of opposition

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Giving Women Exclusive Decisional Authority over Their Cryopreserved Pre-Embryos, 64 DEPAUL L. REV. 737, 766 (2015).

292. FLA. STAT. ANN. § 742.17 (West 2020).

to unwanted legal parenthood and unwanted genetic parenthood. Importantly, this breaks apart use of the embryos and the obligations of legal parenthood, particularly financial obligations of support. As discussed above, courts hearing embryo disposition disputes have been quick to dismiss the emotional concerns of men opposing use of embryos and often reduce their objections to a worry about child support. With this option available as partners decide embryo disposition plans, they can each weigh whether they want to have the ability to absolutely block use of embryos in the future, allow use of the embryos only if they are not the legal parent, or allow use of the embryos without restriction. By breaking apart the use of the embryos and the ensuing obligations, particularly the financial obligations, it facilitates a more frank assessment of preferences on the part of both partners.

Although disclaiming parental status is not easily done in most contexts of family law, the concept operationalizes an instinct courts facing embryo disposition disputes have voiced by emphasizing where the partner wanting to use stored embryos has stated their intent not to pursue their ex-partner for child support.[293] It also fits into an existing framework of the law of legal parentage, by allowing people to convert their status from potential legal parent to egg or sperm donor. This would not be allowed if a pregnancy had already commenced, but because the decision would be made before a stored embryo was implanted, the context of assisted reproductive technology is consistent with other treatment of donors.

The flexibility that is allowed by making such decisions before pregnancy begins leads into the second set of implications arising from the significance of pregnancy, particularly in the context of abortion. The next section turns to the abortion debate, and why embryos and IVF have a more central role than previously contemplated.

B. Abortion and Embryos

Assisted reproductive technologies, particularly IVF and frozen embryos, challenge rhetoric around abortion. The different treatment of frozen embryos as compared to existing pregnancies demonstrates a rejection of the personhood perspective that would treat embryos as legal persons. Every court that has not been explicitly instructed by law to treat embryos as persons has instead treated them as property, albeit a particularly emotionally fraught type of property that represents much more than simple monetary value to the people fighting over it.

This rejection is significant not simply to show a greater judicial consensus than has previously been recognized, but also to give a more accurate and more complicated frame to the abortion debate. Certainly, the most ardent pro-life activists view embryos as human life to the extent that the destruction of a frozen embryo is akin to murder. But this group does not represent the broader American public, even the portion of Americans who would describe themselves as anti-abortion. In a 2013 Pew Research Center survey, forty-nine percent of respondents believed that abortion is morally wrong, but only twelve percent believed the same about IVF.[294]

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293. *See, e.g.*, Szafranski v. Dunston, 34 N.E.3d 1132, 1162 (Ill. App. Ct. 2015) ("She maintains that she does not expect Jacob to support any child born from the pre-embryos.").

294. Joseph Liu, *Abortion Viewed in Moral Terms: Fewer See Stem Cell Research and IVF as Moral Issues*, PEW RSCH. CTR. (Aug. 15, 2013), https://www.pewforum.org/2013/08/15/abortion-viewed-in-moral-terms/#morality-of-using-in-vitro-fertilization

In 2011, a personhood amendment in Mississippi that initially garnered support from over eighty percent of the electorate was thoroughly defeated, in part because activists flagged its potential impact on IVF services.[295] Despite efforts to destigmatize abortion, current popular discourse fails to see abortion care as one part of a broader interaction between reproductive healthcare and family life.[296] Including embryos, IVF, and the prospect of denying IVF to people yearning to become parents in the discussion of the impact of abortion restrictions is more accurate and more compelling to people who otherwise take anti-choice positions.

Additionally, recognizing the contrasting treatment of men's consent in the context of IVF versus sexual reproduction highlights that the autonomy of the pregnant person is dispositive. The only reason that IVF allows for more recognition of intent or consent to become a parent is that no one is pregnant when consent is evaluated. A particularly pernicious strain of anti-abortion and anti-feminist rhetoric is to argue that if pregnant people can opt out of parenthood by terminating the pregnancy, men should also be able to opt out of the financial obligations of child support.[297] Although the argument seems laughable at first exposure, men's rights groups have made it in court, arguing that child support violates the Equal Protection Clause.[298]

This argument, though it was cast as "*Roe v. Wade* for men," illustrates the pervasive nature of hegemonic masculinity.[299] This view of the "harm" of unwanted fatherhood sees it as a purely financial injury, rather than the deeper emotional complexities described by litigants in embryo disposition disputes. It also casts the right to privacy and the bodily autonomy of the pregnant person in the competitive lens of hegemonic masculinity, in which any right that can be asserted by the pregnant person has a corresponding loss inflicted on their male sexual partner.

Centering the pregnant person in the context of unwanted pregnancies, and correspondingly recognizing the absence of a person in a similar position in embryo disputes, removes the framing of hegemonic masculinity. Instead of an unacceptable victory of the pregnant woman over a man,[300] acknowledging the dispositive rights of the pregnant person during their pregnancy moves discussion away from a gendered battle and towards a more rational analysis.

C. Embryo Disputes and Family Law

Finally, although frozen embryo disputes are uncommon in terms of raw numbers, they have implications that reverberate throughout how family law views legal parentage. Explanations of why men's consent is irrelevant for purposes of child

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[https://perma.cc/T3QU-4WN5].

295. *See* Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J.L. & MED. 573, 584–85 (2013).

296. *Cf.* Greer Donley, *Parental Autonomy over Prenatal End-of-Life Decisions*, 105 MINN. L. REV. 175 (2020).

297. Purvis, *supra* note 273, at 333.

298. *Id.* at 334.

299. *Id.*

300. I use the gendered framing of hegemonic masculinity here descriptively, as hegemonic masculinity is also transphobic and rests upon a belief in only two genders.

support, such as in the context of statutory rape, generally focus on the child's needs. The logic is whatever the circumstances of conception may be, the child requires support, and the state's privatization of dependency turns to the biological parents as the source of that support.

Embryo disputes, however, illustrate that the logic outlined above does not actually hold true. Instead, no matter the circumstances of conception, a man does not have the right to interfere in a pregnant person's control of their own body. This has two broader implications: first, it prompts reexamination of how and why the law imposes child support duties. If the law were to more explicitly acknowledge that the dispositive issue is the autonomy of the pregnant person—not the needs of the child—it potentially strengthens the argument that it is not always fair to impose child support as the price for sex. Although a full discussion of child support obligations imposed upon minors is beyond the focus of this Article, the contrasting treatment of male consent flags how problematic such obligations are. Assessment of the needs of vulnerable children and how society can meet those needs should not treat the victims of crime as responsible for those needs as a consequence of sexual activity. Doing so underscores harmful stereotypes about masculine sexuality that are inaccurate and offensive when used to further victimize.

Second, it cues reexamination of the law's conception of fatherhood from a new perspective. The harm that courts most easily grasp in the context of unwanted fatherhood is child support payments. But this is not the only harm that may come from unwanted parenthood. Frozen embryo disputes should generate not only a stronger recognition of men's emotions around parenthood, but further questions about how other aspects of family law reduce fatherhood to financial support.

CONCLUSION

When frozen embryo disputes are viewed in isolation, they appear to be extremely specialized. Such disagreements only arise in a relatively specialized medical circumstance, and the raw numbers and reported cases are both quite small. It might be hard to imagine, at least on first exposure, that analysis of such litigation would generate conclusions beyond an opinion about how to solve the very particular problem of embryo disposition disputes.

Similarly, statutory rape of boys is a minority of statutory rape cases, and such assaults are under-reported and under-prosecuted. Only a fraction of such events will result in a pregnancy that is brought to term, and few challenges to paternity determinations make their way into court.

When these two seemingly narrow corners of family law are set against each other, however, the inconsistency in how the law treats consent to become a father is striking. When that inconsistency is viewed through the lens of masculinities theories, the threads of commonality become even easier to identify. From seemingly discordant questions emerge far-reaching implications not only for how embryo disposition disputes should be resolved, but broader issues of reproductive rights, abortion, and the law's conception of fatherhood.

APPENDIX

Case	Gender of Judge	Goal of Male Partner[301]	Goal of Female Partner	Rule Used	Prevailing Party
Reber v. Reiss[302]	Male	Discard	Use herself	Balance	Wife
Bilbao v. Goodwin[303]	Male	Preserve or donate	Destroy	Balance	Wife
Patel v. Patel[304]	Female	Discard	Use	Balance	Wife
In re Marriage of Rooks[305]	Female	Discard	Use	K,[306] then balance	(Neither, remand)
In re Marriage of Fabos and Olsen[307]	Male	Discard	Donate	K, then balance	Remand
Davis v. Davis[308]	Female	Discard	Donate to another couple	K, then balance	Husband
Szafranski v. Dunston[309]	Male	Discard	Use	K, then balance	Wife
J.B. v. M.B.[310]	Female	Donate to infertile couples	Discard	Contemp MC	Wife
In re Marriage of Witten[311]	Female	Donate or preserve	Use	Contemp MC	Husband
AZ v. BZ[312]	Female	Discard	Use	Contemp MC	Husband

301. None of the cases in this set involved a same-sex couple.
302. 42 A.3d 1131 (Pa. Super. Ct. 2012).
303. No. HHDFA166071615S, 2017 WL 5642280, at *2 (Conn. Super. Ct. Oct. 24, 2017), *aff'd in part, rev'd in part*, 217 A.3d 977 (Conn. 2019).
304. No. CL16000156-00, 2017 WL 11453591 (Va. Cir. Ct. Sept. 7, 2017).
305. 488 P.3d 116, 119 (Colo. App. 2016), *rev'd*, 429 P.3d 579, 588 (Colo. 2018).
306. K is short for contractual.
307. 451 P.3d 1218, 1224 (Colo. App. 2019).
308. 842 S.W.2d 588, 601 (Tenn. 1992), *on reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).
309. 993 N.E.2d 502, 516 (Ill. App. Ct. 2013).
310. 783 A.2d 707, 710 (N.J. 2001).
311. 672 N.W.2d 768, 772 (Iowa 2003).
312. 725 N.E.2d 1051, 1053 (Mass. 2000).

Case	Gender of Judge	Goal of Male Partner[313]	Goal of Female Partner	Rule Used	Prevailing Party
In re Marriage of Dahl and Angle[314]	Male	Donate to couple	Discard	K	Wife
Terrell v. Torres[315]	Female	Discard or donate	Use	K	Husband
Terrell v. Torres[316]	Female	Donate to another couple	Use	K	Husband
Kass v. Kass[317]	Female	Discard	Use	Enforces K	Husband
Roman v. Roman[318]	Female	Discard	Use	Enforces K	Husband
McQueen v. Gadberry[319]	Male	Discard (or donate)	Use	Contemp MC	Husband
Litowitz v. Litowitz[320]	Male	Donate	Use	K	Remanded for evidence as to whether embryos were already destroyed

313. None of the cases in this set involved a same-sex couple.

314. 194 P.3d 834, 837 (Or. Ct. App. 2008).

315. 438 P.3d 681, 684 (Ariz. Ct. App. 2019), *as amended* (June 6, 2019), *vacated in part*, 456 P.3d 13 (Ariz. 2020), *as amended* (Feb. 21, 2020).

316. 456 P.3d 13 (Ariz. 2020).

317. 696 N.E.2d 174, 175 (N.Y. 1998).

318. 193 S.W.3d 40, 54 (Tex. App. 2006).

319. 507 S.W.3d 127, 133 (Mo. Ct. App. 2016).

320. 48 P.3d 261, 262 (Wash. 2002), *amended sub nom.*, *In re* Marriage of Litowitz, 53 P.3d 516 (Wash. 2002).

Case	Gender of Judge	Goal of Male Partner[321]	Goal of Female Partner	Rule Used	Prevailing Party
Cahill v. Cahill[322]	Male	Give ownership to the University of Michigan	Use	K	(Husband, sort of)
In re Marriage of Findley v. Lee[323]	Female	Discard	Use	K, then balance	Husband
In re Marriage of Nash[324]	Female	Use	Discard	K	Husband

321. None of the cases in this set involved a same-sex couple.
322. 757 So. 2d 465, 466 (Ala. Civ. App. 2000).
323. No. FDI-13-780539, 2016 WL 270083, at *3 (Cal. Super. Ct. Jan. 11, 2016).
324. No. 62553-5-I, 2009 WL 1514842, *1 (Wash. Ct. App. June 1, 2009).