REPRODUCTIVE INDETERMINACY AND RIGHTS DISCOURSE IN FROZEN EMBRYO DISPUTES

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Abstract

The lived experience of reproduction is infused with indeterminacy. Judicial rhetoric, in contrast, operates in absolutes. Litigants are perceived in binary terms as fertile or not, trying to procreate or not, pregnant or not, and parents or not—when the reality of their situations is far more complicated. Rights are similarly perceived in binary terms, such that a litigant seeking procreative autonomy may assert either the "right to procreate" or the "right to avoid procreation"—even if neither accurately describes what she wants. Disputes over frozen embryos provide unique insight into this problem because they involve parties who have experienced months, if not years, of reproductive indeterminacy and who, at the point of litigation, make opposing rights claims. When a couple disagrees about the disposition of jointly created frozen embryos and the disagreement is not resolved by contract, most courts apply a balancing test: the interests of the party asserting the "right to procreate" are weighed against the interests of the party asserting the "right to avoid procreation." Ordinarily, the latter prevails, unless the party wishing to procreate lacks a "reasonable" path to parenthood without the embryos. Whether a "reasonable" path exists often turns on whether the party wishing to use the embryos is perceived as fertile, in which case her claim will likely be denied, or sterile, in which case it may succeed.

This framework misses the complexity, contingency, and uncertainty intrinsic in all reproductive endeavors. The decision to procreate or avoid procreation is rarely singular

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or stable. People undergoing in vitro fertilization are rarely either fertile (able to establish a pregnancy) or sterile (permanently unable to establish a pregnancy). They are, instead, infertile, and their infertility has led them to make many decisions over the course of many months and often years about how, when, and whether to proceed with treatment. And if they achieve pregnancy—not to mention parenthood—they will make many more decisions. To describe these individuals, in the context of a frozen embryo dispute, as choosing "to procreate" or "to avoid procreation" trivializes the complexity of their circumstances. Similarly, to assume that a party experiencing infertility has a "reasonable" path to parenthood without the embryos is to ignore the reality that, even if she has the resources (physical, emotional, and financial) to undergo further treatment, there is no guarantee that it will produce gametes, that the gametes will create embryos, that the embryos will lead to pregnancy, or that the pregnancy will result in childbirth. By erasing inherent indeterminacy, existing judicial rhetoric offers a disappointingly limited vision of reproductive potential and reproductive rights. This article draws on multiple lines of work, from postmodern feminism to reproductive justice, to argue for a new doctrine in which reproductive rights exist not within a binary system but rather along a multi-dimensional spectrum.

INTRODUCTION

By exposing the deep indeterminacy inherent in the lived experience of reproduction, we can create a positive space for rethinking reproductive rights. Courts typically view reproduction through a distinctly modern lens, wherein it is comprised of two rights locked in a binary opposition: the right to procreate and the right to avoid procreation. While these two rights have historically inhabited separate doctrinal spheres, with the former focused on avoiding sterilization and the latter on accessing abortion, they presently intersect in a unique subset of cases involving frozen embryos. When a divorcing or otherwise separating couple disagrees about the disposition of jointly created embryos and no contract resolves their disagreement, courts typically "balance" the interests of the party seeking to use the embryos to procreate against those of the party seeking to prevent their use and avoid procreation. While the outcomes vary across cases, the success of the party wishing to procreate often turns on whether the court views her as "fertile" or "sterile." She will rarely succeed unless she is perceived by the court as "sterile" or, in other words, permanently unable to establish a pregnancy.[1]

[1] Fernando Zegers-Hochschild et al., *The International Glossary on Infertility and Fertility Care*, 108 FERTILITY & STERILITY 393, 401 (2017). I have used the pronoun "she" because it is reflective of the set of cases this article discusses. However, it is important to note at the outset that pregnancy is gendered in ways that can be problematic for transgender men, nonbinary people, and those with intersex variations, all of whom might become pregnant. Jessica Clarke, *Pregnant People?*, 119 COLUM. L. REV. F. 173, 179–80 (2019). To

This system is built upon multiple false dichotomies. First, rarely is it accurate to describe a party wishing to use embryos as definitively fertile or sterile.[2] More often, that party occupies the interstitial state of infertility,[3] wherein her chances of achieving parenthood by any means are uncertain: there is no guarantee that further treatment will produce either gametes or embryos, that embryos will lead to pregnancy, or that pregnancy will result in childbirth. Nevertheless, courts rest their decisions on the availability of a "reasonable" alternative path to parenthood. Second, rarely is it accurate to describe the parties as invoking singular rights "to procreate" or "to avoid procreation." Their intentions are far more complex: Both parties, by the point of litigation, have made many highly contextual decisions over the course of many weeks, months, and often years of fertility treatment about how, when, and whether to proceed. And if they achieve pregnancy (not to mention parenthood), they will make many more. For example, a woman who has undergone fertility treatment and achieved a much-desired pregnancy might, if faced with a devastating diagnosis, choose abortion. To describe her simply as having chosen "to procreate" would be as inaccurate as to describe her as having chosen "to avoid procreation." Nevertheless, courts allow this reductive rights discourse to drive their decisions.

Judicial rhetoric in frozen embryo disputes erases indeterminacy and, as a result, offers an overly simplistic view of reproductive potential and reproductive rights. Postmodern feminism and reproductive justice advocacy, however, create space for a more expansive discussion that acknowledges complexity, indeterminacy, and lived experience. We can rarely know whether a party in a frozen embryo dispute has a "reasonable" path to parenthood without (or even with) the contested embryos. If a court believes there is a path to parenthood without the embryos and rules against a woman wishing to procreate, there remains a very real chance that she will not become a parent—especially if doing so entails in vitro fertilization (IVF). For women under thirty-five who have the resources necessary to pursue IVF, the live birth rate is 41–43%; for women over thirty-five, it is significantly

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understand the complexity of reproduction, one must understand—among other things—the complexity of the link between gender and pregnancy. Professor Jessica Clarke writes that those "who seek to be more inclusive of transgender, nonbinary, and intersex identities and variations ought to take seriously the idea of formally disentangling binary concepts of 'sex' and 'gender identity' from pregnancy." *Id*.

[2] Zegers-Hochschild et al., *supra* note 1.

[3] Infertility is typically defined as a "disease characterized by the failure to establish a clinical pregnancy after 12 months of regular, unprotected sexual intercourse or due to an impairment of a person's capacity to reproduce either as an individual or with his/her partner." *Id.*

lower.[4] Even if a court believes there is no path to parenthood without the embryos and rules in favor of a woman wishing to procreate, there remains a very real chance that she will not become a parent. The embryos may not survive thawing, may not be genetically viable, may not implant when transferred, or may not produce a live birth. Acknowledging the complexity and indeterminacy of these lived experiences illuminates alternative possibilities for our rights discourse.

This Article is divided into three major parts: Part I uses postmodern feminist theory and reproductive justice advocacy as lenses through which to explore reproduction. It begins with an introduction to postmodern feminism: Whereas the law (a solidly modern institution) demands certainty and organizes the world into binary oppositions, postmodernism is skeptical of and resistant to such constructions. In its feminist iterations, postmodernism dismantles patriarchal hierarchies (e.g., men/women) through the process of "deconstruction." Marginalized narratives are thereby uncovered and diversity, complexity, and indeterminacy are revealed. Having drawn on postmodern techniques to dismantle existing structures, Part I turns to the reproductive justice movement to construct a new framework: Growing from the work of Black feminists, the movement teaches us to acknowledge the full spectrum of reproductive barriers (not just abortion) and to honor the full spectrum of reproductive experiences. It attends to the intersectionality of gender with race, class, and other traits and seeks out holistic solutions. Finally, Part I argues that these two lines of work can together serve to dismantle oppressive categories and expose the inherent complexity and indeterminacy that are ever-present in the lived experience of reproduction.

Part II begins by exploring frozen embryo disputes. It observes how state courts deciding these disputes heavily rely on a false sense of certainty and an uncritical embrace of binary oppositions. First, these courts speak as if they can assess with certainty whether a party wishing to use contested embryos has a reasonable chance at achieving parenthood without the embryos. This is implicitly an inquiry into whether the party is fertile or sterile. It ignores the reality that assessing even a fertile person's chances at parenthood is quite difficult, and that the typical difficulties are often magnified for the infertile parties involved in frozen embryo disputes. Courts seem to categorize anyone not proven to be sterile as fertile (and able to achieve parenthood without the contested embryos). There is, in these cases, a disjunction between judicial discourse and reality. Second, these courts collapse reproductive rights into a binary where parties may assert either a "right to procreate" or a "right to avoid procreation." This reductive framing fails to capture the parties' complex intentions and thus creates another disjunction between judicial discourse

[4] *IVF – In Vitro Fertilization*, AM. PREGNANCY ASS'N, https://americanpregnancy.org/infertility/in-vitro-fertilization/ [https://perma.cc/J6VJ-P3A6].

and reality. Part II then turns to the source of the binary rights-framing, which lies in Federal Supreme Court doctrine. From a federal-constitutional perspective, there are essentially two sets of reproductive rights cases: those considering the right to avoid state sterilization, and those considering the right to avoid state interference with access to contraception and abortion. These cases, like their state court counterparts, create a disjunction between judicial discourse and reality.

Part III seeks to eliminate the disjunctions. It begins by exploring the complexity, contingency, and indeterminacy of the reproductive experience from the moment a couple begins trying to conceive, through the months and years an infertile couple may pursue fertility treatments, and (if successful in those treatments) through the following pregnancy, childbirth, and neonatal period. While it discusses the diagnosis of infertility, a variety of treatments, and some of the challenges of pregnancy, childbirth, and the neonatal period, it focuses on IVF and embryo creation—experiences shared by all the couples involved in the frozen embryo disputes described in Section II.A. It details the five phases of the process: (1) pre-cycle preparation, (2) ovarian stimulation, (3) egg retrieval, (4) fertilization and embryo development, and finally (5) either embryo transfer or cryopreservation for later embryo transfer. Having exposed the inherent complexity and indeterminacy of reproduction, Part III concludes by drawing on the feminist frames discussed in Part I to argue for a move beyond the binary vision of rights described in Part II. It asserts that an accurate understanding of the lived experience of reproduction weighs in favor of a more expansive and holistic vision of reproductive rights.

I. Feminist Frames for Reproductive Technology

Part I draws on postmodern feminist theory and reproductive justice advocacy to illuminate the lived experience of reproduction and its inherent indeterminacy. Section I.A discusses postmodern theory and its feminist iterations, which teach us that the binary oppositions around which much of Western thought is organized—e.g., male/female, fertile/sterile, pro-life/pro-choice—are artificial constructions that ignore the full spectrum of human experience. The postmodern technique of "deconstruction"—sometimes described as a "process of demonstrating indeterminacy"[5]—dismantles binary oppositions, problematizes categories, and uncovers marginalized narratives. For example, when courts treat litigants as if they are either fertile (able to establish a pregnancy) or sterile (permanently unable to establish a pregnancy), they erase the uncertainty of infertility, which is experienced by 12–13% of couples.[6] Similarly, when courts treat litigants as

[5] Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 536 (1984) ("The process of demonstrating indeterminacy is sometimes referred to as 'deconstruction.'").

exercising either a right to procreate or a right to avoid procreation, they erase the complexity of pregnancy intentions.

Section I.B discusses the reproductive justice ("RJ") movement, the lessons of which overlap with and complement postmodern feminist theory. While reproductive justice advocates are more overtly political, they (like postmodern feminists) resist universalism. The RJ movement acknowledges the ways in which our reproductive experiences are shaped by the intersection of many traits, including age, race, class, gender, disability, and sexual orientation. Like postmodern feminists, RJ advocates resist over-simplification and binary thinking. They recognize the traditional focus on abortion and "choice" as both too shallow and too narrow. And they recognize the binary conception of rights—in which there is a "right to procreate" and a converse "right to avoid procreation"—as inadequate. As a result, RJ advocates push for a more holistic and inclusive approach.

Section I.C engages the principles discussed in Sections I.A and I.B to better understand the lived experience of reproduction, specifically IVF and the surrounding processes. First, it shifts our focus away from the relative absolutes of fertility and sterility and contemplates the in-between state of infertility. Second, it recognizes the pervasive ambiguity in not only reproductive potential but also reproductive intentions. It argues that, just as reproductive potential cannot be reduced to fertility or sterility, reproductive intentions cannot be reduced to the desire to procreate or avoid procreation. Neither concept is as singular or stable as the law depicts. Finally, Part I concludes by gesturing to the idea—developed more fully in Part III—that reproductive rights are similarly non-binary. To limit parties to asserting a "right to procreate" or "right to avoid procreation" is to ignore the complexity and indeterminacy that they actually experience.

A. Postmodern Feminist Theory

Postmodern theory begins from a place of skepticism.[7] Although it resists definition, philosopher Elizabeth Anderson describes it as "stress[ing] the locality, partiality, contingency, instability, uncertainty, ambiguity and essential contestability of any particular account of the world, the self, and the good."[8] Although defining postmodernism

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[6] *Understanding Fertility: The Basics*, OFF. OF POPULATION AFFS. OF THE U.S. DEP'T OF HEALTH & HUM. SERVS., https://opa.hhs.gov/reproductive-health/understanding-fertility-basics [https://perma.cc/8XH2-92VB].

[7] Calvin Massey, *The Constitution in a Postmodern Age*, 64 WASH. & LEE L. REV. 165, 166–67 (2007) ("[Postmodernism] is thought to be an attitude of extreme skepticism about meaning, reality, knowledge, and truth.").

by reference to its differences from modernism risks falling into the type of binary thinking postmodernists reject, such a comparison is common and in some respects useful. After all, to entirely reject modernist thinking is modernist in its absolutism.[9] One key distinction, then, between modernism and postmodernism is the "attitude" toward incoherence, indeterminacy, and other realities.[10] While modernism perceives these aspects of the world as "tragic" and strives "to reestablish a coherence of meaning from fragmentary forms," postmodernism celebrates them.[11] As a result, while modernism embraces binary oppositions (either/or ways of thinking[12]) because they offer at least the illusion of coherence and determinacy, postmodernists deconstruct such oppositions.[13] It is through this technique of deconstruction that postmodern thinkers are able to uncover previously marginalized experiences and promote diversity and equality.

Whereas much of modern thought is organized around the desire for certainty—for clear categories that can be organized into binary oppositions with hierarchical structures (e.g., white/Black, man/woman, straight/gay)—postmodern thought recognizes that any sense of certainty, as well as all categories, oppositions, and hierarchies, are to some degree artificial constructions.[14] The selection of any one category represses others, and the

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[8] *Id.* (quoting Elizabeth Anderson, *Feminist Epistemology and Philosophy of Science*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2004), https://plato.stanford.edu/archives/sum2004/entries/feminism-epistemology/ [https://perma.cc/7RXD-VVZB]).

[9] Adam Todd, *Neither Dead nor Dangerous: Postmodernism and the Teaching of Legal Writing*, 58 BAYLOR L. REV. 893, 907 (2006) ("A complete rejection of modernism is itself a modernist act."). As Professor Elizabeth Anderson explains, "There can be no complete, unified theory of the world that captures the whole truth about it." Anderson, *supra* note 8.

[10] Massey, *supra* note 7, at 169–70 (citing Mary Klages, *Postmodernism*, UNIV. OF IDAHO (Dec. 6, 2001), https://www.webpages.uidaho.edu/~sflores/KlagesPostmodernism.html [https://perma.cc/E3ZU-EAQK]).

[11] *Id.*

[12] Stephen M. Feldman, *Can Law Be a Source of Insight for Other Academic Disciplines?*, 8 WASH. U. JURIS. REV. 151, 158 (2016).

[13] Stephen M. Feldman, *An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship*, 54 VAND. L. REV. 2351, 2366 (2001).

[14] As Professor Elizabeth Anderson explains, according to postmodern principles, "the world does not dictate the categories we use to describe it." In fact, "words get their meaning from their relations to other words rather than from their relation to some external reality[.]" Ultimately, "innumerable incompatible ways of classifying the world are available to us, and . . . the selection of any one theory is a choice that cannot be justified by appeal to 'objective' truth or reality." Language is powerful, and the selection of any particular set of categories

hierarchical opposition of any two categories continues to reside in that same repressive system.[15] Such a system cannot reflect reality and, to uncover the full spectrum of human experience, must be deconstructed. Although deconstruction, like postmodernism, resists definition, Derrida described it as involving both "a reversal of the classical opposition and a general displacement of the system."[16] A completed deconstruction, in other words, both inverts the hierarchy within the opposition and renders the categories themselves meaningless.[17] According to Professor Pierre Legrand, deconstruction "pushes away from simplification and (binary) reduction towards complexification and expansion."[18] It "moves beyond dualism towards something that is neither A nor B and that is not a third term (such as C) that would provide a resolution of the A-B antagonism."[19]

Deconstruction can be thought of as a "process of demonstrating indeterminacy."[20] From a technical perspective, it begins by illustrating that the categories in any opposition are interdependent, such that any hierarchy between them is unstable. The dominant category (e.g., white, man, straight) is shown to depend on the opposing and "supposedly subordinate" category (e.g., Black, woman, gay).[21] This dependence illustrates that the hierarchy could actually be inverted.[22] Yet, as previously mentioned, a single inversion

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is an exercise of power that "exclude[s] certain possibilities from thought and . . . authorize[s] others." Massey, *supra* note 7, at 167–68 (quoting Anderson, *Feminist Epistemology and Philosophy of Science*, *supra* note 8).

[15] Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631, 698 (2005) (explaining that "one must recognize that within a text there is a structure whereby one term hides, represses, or prohibits another" and that "one cannot . . . continue to operate within the deconstructed system – to 'reside' within it", quoting JACQUES DERRIDA, POSITIONS 56 (1972)).

[16] JONATHAN CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 85–86 (1982) (quoting Jacques Derrida, *Signature Event Context*, *in* LIMITED INC 21 (Samuel Weber trans., Nw. Univ. Press 1988) (1972)).

[17] Jessica Knouse, *Using Postmodern Feminist Legal Theory to Interrupt the Reinscription of Sex Stereotypes Through the Institution of Marriage*, 16 HASTINGS WOMEN'S L.J. 159, 165 (2005).

[18] Legrand, *supra* note 15, at 698.

[19] *Id.*

[20] Spann, *supra* note 5, at 536 ("The process of demonstrating indeterminacy is sometimes referred to as 'deconstruction.'").

[21] Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2527–28 (1992).

[22] *Id.*

does not complete the process because the newly dominant category is also subject to deconstruction.[23] Only through repeated inversion of the hierarchy is the system displaced.[24] And as the system fails, so do its categories. They are shown to be inaccurate, because the experience they describe is neither binary nor universal (as they suggest), but instead multiple, individual, and highly contextual. Deconstruction thus exposes categories as "insensitiv[e] to context."[25] As Professor Jack Balkin explains, categories "lump some things together as similar and exclude others as different, without attending to the similarities across, or the differences within, the boundaries that they establish."[26] They are "a sort of falsification or oversimplification of the situation."[27] What they attempt to describe with clarity and certainty is, in fact, indeterminate.

Although deconstruction is often attacked as nihilistic,[28] it can provide a meaningful path toward justice. Professor Balkin explains that "we deconstruct legal categories because they deviate from what is just."[29] In describing what he calls "transcendental deconstruction," he writes:

> [The] goal is not destruction but rectification. The deconstructor critiques for the purpose of betterment; she seeks out unjust or inappropriate conceptual hierarchies in order to assert a better ordering. Hence, her argument is always premised on the possibility of an alternative to existing norms that is not simply different, but also more just, even if the results of this deconstruction are imperfect and subject to further deconstruction.[30]

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[23] *Id.* (explaining that "the new dominant concept can itself be deconstructed").

[24] *Id.*

[25] J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131, 1173 (1994). Professor Balkin is specifically talking about categorical judgments.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 1132–34.

[29] *Id.* at 1174.

[30] *Id.* at 1141.

By this account, deconstruction creates space to rethink systems. Once we acknowledge that our current categories overlook inherent diversity, multiplicity, and indeterminacy, we can work to expose and honor the erased meanings, identities, and experiences.

Some feminists have built upon this postmodern framework to reveal the particular ways that categories have harmed women. While a complete rejection of gender categories is politically problematic, skepticism of such categories is productive. Postmodern feminism targets categories that have historically subordinated women and exposes these categories as porous and unstable. Professor Judith Butler, for example, warns us against erasing diversity and complexity within gender categories. Professor Butler writes:

> [T]he category of women is internally fragmented by class, color, age, and ethnic lines, to name but a few; in this sense, honoring the diversity of the category and insisting upon its definitional nonclosure appears to be a necessary safeguard against substituting a reification of women's experience for the diversity that exists.[31]

Professor Johanna Bond, writing about this work, says that the category of women "must remain fluid and permeable" with "boundaries . . . flexible enough to accommodate the experiences of a diverse group of women."[32]

It should be noted that many scholars reject postmodernism, arguing that its adherents "deconstruct[] everything and refus[e] to construct anything."[33] Legal scholars are particularly hostile to postmodernism, perhaps because law is so distinctly modern.[34] Yet Professor Balkin, in *Deconstruction's Legal Career*, traces the unique ways that legal scholars—including some in the Critical Legal Studies movement and, later, some critical race theorists and feminists—have deployed deconstruction.[35] Focusing on feminist legal theorists, Professor Maxine Eichner has observed that because the law "is so closely

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[31] Judith Butler, *Gender Trouble, Feminist Theory, and Psychoanalytic Discourse*, *in* FEMINISM/POSTMODERNISM 324, 327 (Linda J. Nicholson ed., 1990).

[32] Johanna E. Bond, *Intersecting Identities and Human Rights: The Example of Romani Women's Reproductive Rights*, 5 GEO. J. GENDER & L. 897, 901 (2004).

[33] Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 SIGNS 405, 418 (1988).

[34] Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 1, 4 (2001).

[35] Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719, 733–34 (2005).

associated with the vision of modernity against which postmodernists are reacting[,] . . . feminists who subscribe to postmodern tenets may . . . avoid considering legal solutions."[36] Her work identifies three ways in which postmodern ideas are used by feminist legal theorists: first, in considering the role of "discursive practices . . . in constructing gender oppression[;]" second, in resisting gender-based generalizations and moving toward a "politics of diversity;" and third, in developing "positive feminist legal projects."[37] She then offers a way forward, which entails "the pursuit of heterogeneity," "revaluation of differences," and "the pursuit of equality and a material politics."[38]

This Article embraces the idea that postmodern feminist theory can be useful in legal reform efforts, in part because deconstruction clears space for positive change: When we dismantle the patriarchal categories that have long subordinated women and controlled their reproductive lives, we create room for new possibilities. Although some categories will inevitably remain, the law should not force people into them. By consciously creating space for diversity, complexity, and indeterminacy, the law can avoid erasing individuals and their experiences. As Section I.B will show, some postmodern feminist insights resonate with the reproductive justice movement. Finally, as Section I.C will show, postmodern feminist techniques can be applied not only to gender categories but also to categories relating to reproduction.

B. Reproductive Justice Advocacy

The reproductive justice ("RJ") movement originated with Black feminists and teaches us to expand not only our vision of women but also of reproductive rights. The term "reproductive justice" was coined in 1994 to describe an already ongoing effort by Black women to resist racism and reproductive oppression.[39] As Professor Dorothy Roberts—whose work was instrumental in moving RJ into legal scholarship—explains, the RJ movement "reposition[s] reproductive rights in a political context of intersecting race, gender, and class oppressions."[40] It adopts a capacious understanding of reproduction that

[36] Eichner, *supra* note 34.

[37] *Id.* at 6.

[38] *Id.* at 67–76.

[39] Leigh Creighton Bond & Monika Taliaferro, *The Continued Rise of the Reproductive Justice Lawyer*, 23 CHAP. L. REV. 299, 305–06 (2020).

includes "not only a woman's right not to have a child, but also the right to have children and to raise them with dignity in safe, healthy, and supportive environments."[41] Whereas the mainstream pro-choice movement focuses on "choice," which effectively "privilege[s] predominantly white middle-class women" (i.e., women with choices), the RJ movement extends to encompass women who lack privilege, including "poor and low-income women, women of color, queer women, women with disabilities, and women whose lives revolve around caregiving."[42] And whereas the mainstream pro-choice movement "advocates almost exclusively for the legal right to abortion," the RJ movement encompasses a broader array of reproductive possibilities. Rather than focusing on one negative right, it recognizes a spectrum of positive rights.[43] In sum, the RJ movement decenters the privileged and rejects narrow rights discourse.

These features of reproductive justice—decentering the privileged and rejecting narrow rights discourse—are in some ways consistent with postmodernism. Adherents of each movement seek to transcend binary oppositions and "escape[] the frame of either/or."[44] Yet postmodernism is largely theoretical, whereas reproductive justice is overtly political. While a postmodern feminist would use the process of deconstruction to reveal the category of "women" as masking internal hierarchies and erasing existing diversity, an RJ advocate would actively insist on equity and inclusion. While a postmodern feminist would expose the negative "right of abortion" as an insufficient descriptor of reproductive liberation,[45] an RJ advocate would actively expand the scope of rights claims

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[40] Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT (Fall 2015), https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights [https://perma.cc/YM34-YDFM].

[41] *Id. See also* Cyra Akila Choudhury, *New Approaches and Challenges to Reproductive Justice*, 12 FIU L. REV. 1 (2016).

[42] Roberts, *supra* note 40. *See also What Is Reproductive Justice?*, IF/WHEN/HOW, https://www.ifwhenhow.org/about/what-is-rj/ [https://perma.cc/997Q-W33W] ("[The movement] recognizes the ways race, class, sex, age, sexual orientation, gender expression, immigration status, and ability impact access, agency, and autonomy in shaping one's reproductive destiny.").

[43] Lauren Paulk explains that "rights without access mean very little to a majority of the population." Lauren B. Paulk, *Embryonic Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law*, 22 AM. U. J. GENDER SOC. POL'Y & L. 781, 790 (2014).

[44] Lynne Henderson, *Flexible Feminism and Reproductive Justice: An Essay in Honor of Ann Scales*, 91 DENV. U. L. REV. 141, 143 (2013) (explaining that RJ escapes this frame).

[45] Not only is abortion a negative rather than positive right in our Supreme Court jurisprudence, but the scope of reproductive rights is much broader than just abortion.

in the courts and move into political fora.[46] Professor Robin West—whose work on RJ issues is widely cited within the legal academy—describes some concrete solutions the RJ movement embraces:

> Reproductive justice requires a state that provides a network of support for the processes of reproduction: protection against rape and access to affordable and effective birth control, healthcare, including but not limited to abortion services, prenatal care, support in childbirth and postpartum, support for breastfeeding mothers, early childcare for infants and toddlers, income support for parents who stay home to care for young babies, and high quality public education for school age children.[47]

As If/When/How explains, "Reproductive justice will exist when all people can exercise the rights and access the resources they need to thrive and to decide if, when, and how to create and sustain their families with dignity, free from discrimination, coercion, or violence."[48]

C. Applying Feminist Frames to IVF

Postmodern feminism and reproductive justice offer overlapping but distinct insights, and this section considers their application to IVF and related reproductive technologies. Whereas our laws and doctrine are composed of seemingly stable binary categories, our reproductive endeavors—especially those involving IVF—are infused with complexity and indeterminacy. While reproduction always entails some uncertainty, IVF increases that uncertainty and requires patients to make complicated decisions based on incomplete information. This section applies the feminist frames discussed in the previous two sections to the context of IVF and related reproductive technologies. It sits in line with the work of scholars like Professor Kimberly Mutcherson, who teaches us that thinking about justice is crucial in thinking about reproductive technologies, and that promoting justice requires attending to "lived complexity."[49]

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[46] Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1432 (2009) ("The reproductive justice that might be achieved through these coalitions—that is, achieved through ordinary modes of political persuasion—might prove more enduring than what we have garnered to date from the Court.").

[47] *Id.* at 1425.

[48] IF/WHEN/HOW, *supra* note 42.

[49] Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187, 195 (2013).

Postmodern feminist techniques, as previously mentioned, can be used to dismantle not only categories relating to gender and sexuality but also categories relating directly to reproduction. While modernism might lead us to describe reproductive potential as limited to either fertility or sterility, postmodernism reminds us of the in-between state of infertility and the artificial nature of all three categories. First, because fertility is the default until there is a different diagnosis, some people are labeled fertile who may actually be either infertile or sterile. Second, some people diagnosed with "unexplained infertility" conceive without treatment,[50] suggesting they may have been merely subfertile or just had "seriously bad luck."[51] Finally, sterility may be the most stable of the three categories, but it can be hard to say whether someone is permanently unable to establish a pregnancy. Some people—including one of the parties from a case discussed in Part II—may be sterile or may be technically infertile but have a less than one percent chance of establishing a pregnancy.[52] These examples reveal that reproductive potential is really a spectrum rather than a set of distinct categories. It is fluid over time, such that people move around on the spectrum. And because even a fertile couple has only a 20–30% chance per cycle of conceiving, there is a lot of luck involved.[53]

Postmodern feminist techniques can be used to dismantle categories relating not only to reproductive potential but also to pregnancy intentions. While modernist impulses might cause us to describe pregnancy intentions as either procreative or non-procreative, postmodern insights remind us that our desires are in fact much more complex. As research shows, "pregnancy intentions are complex and change over time."[54] People engaged in IVF may be categorized as planning a pregnancy, but in fact it is much more complicated. Anyone involved in IVF has made many decisions over the course of many months about how, when, and whether to proceed with treatment. And if they do proceed and establish a

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[50] Rachel Gurevich, *Understanding the Diagnosis of Unexplained Infertility*, VERYWELL FAM. (Mar. 4, 2021), https://www.verywellfamily.com/explanations-for-unexplained-infertility-4081776 [https://perma.cc/WW8S-HD7E].

[51] *Id.*

[52] Terrell v. Torres, 438 P.3d 681, 692 (Ariz. Ct. App. 2019), *vacated in part*, 456 P.3d 13 (2020).

[53] *A Patient's Guide to ART, General Information, Questions and Answers*, SOC'Y FOR ASSISTED REPRODUCTIVE TECH., https://www.sart.org/patients/a-patients-guide-to-assisted-reproductive-technology/general-information/questions-and-answers/ [https://perma.cc/448H-WKVG] [hereinafter SOC'Y FOR ASSISTED REPRODUCTIVE TECH., *ART Q&A*]; Gurevich, *supra* note 50.

[54] *Patient Pregnancy Intentions: Are Providers Asking?*, PLANNED PARENTHOOD (2018), https://www.plannedparenthood.org/uploads/filer_public/bb/5c/bb5ce0ac-b456-41b3-b0bf-7cb5eaa82d71/patient_pregnancy_intentions_november_2018.pdf [https://perma.cc/KF99-D7MK].

pregnancy, they will make many more decisions. As previously mentioned, a woman who used IVF to achieve a much-desired pregnancy might, if faced with a devastating diagnosis, choose abortion. To describe her simply as having chosen "to procreate" would be as inaccurate as to describe her as having chosen "to avoid procreation." Both reproductive potential and pregnancy intentions are, then, fluid, complex, and indeterminate. Part III will show that these same principles can be extended to critique the binary view of reproductive rights that is so often embraced by courts deciding frozen embryo disputes.

Reproductive justice, like postmodern feminism, can be applied to IVF and related reproductive technologies. The animating principles of the RJ movement are capacious enough to encompass an affirmative right to access IVF. The movement thinks beyond binary rights options, framed in the negative as rights against government intrusion, and imagines a system that recognizes positive rights to government assistance. Lauren Paulk, a member of the Research Council at If/When/How: Lawyering for Reproductive Justice, writes, "[U]nder RJ principles, all people who want to use IVF as a method of procreation . . . should be allowed access, including funding as necessary, to IVF treatments."[55] As Paulk explains, "RJ requires that the resources necessary for individuals to experience full reproductive autonomy and dignity are available, and this includes access to IVF and other ART [("assisted reproductive technology")]."[56] The revolutionary nature of this statement should be appreciated: Because IVF and many related procedures are extremely costly (IVF is around $20,000 per cycle) and often not covered by health insurance, they are not widely accessible.[57] Most often, they are used by married white women with high incomes.[58] Removing the financial barrier such that this treatment is accessible to all who wish to use it would, like many of RJ's aims, create a sea-change in existing doctrine.

Professor Kimberly Mutcherson, explaining that "justice is the most appropriate lens through which to consider the relationship between ART and the law,"[59] explores how

[55] Paulk, *supra* note 43, at 791.

[56] *Id.*

[57] Elissa Strauss, *40 Years Later, Why Is IVF Still Not Covered by Insurance? Economics, Ignorance, and Sexism*, CNN HEALTH (July 25, 2018), https://www.cnn.com/2018/07/25/health/ivf-insurance-parenting-strauss/index.html [https://perma.cc/3Y5W-BMBZ].

[58] Elpida Velmahos, *Fertile Ground for Change: Infertility, Employee-Based Health Insurance, and an Unprotected Fundamental Right*, 17 J. HEALTH & BIOMEDICAL L. 267, 291 (2021). *See also* Strauss, *supra* note 57.

differences based on race, class, gender, sexual orientation, age, disability, and other traits are relevant in the context of reproductive technology and have implications for "the social meaning of an act of procreation."[60] In her article titled *Transformative Reproduction*, Professor Mutcherson emphasizes the importance of context in reproduction: She reminds us to attend to "women's lived experiences and the realities of reproductive hierarchies."[61] And she explains, "The time period, place, and circumstances under which individuals initiate and pursue a procreative act matters for those doing the procreating and for the child or children produced from that act."[62] One of the core insights of *Transformative Reproduction* is that "the landscape of ART is highly complicated[, and a]ny attempts to strip it of this inherent complication, however useful, are simply unrealistic."[63] While Part II will review the ways legal thinking about frozen embryos is overly simplistic, Part III will explore the ways RJ's reimagining of rights would change the landscape of frozen embryo disputes.

II. Binary Thinking in Frozen Embryo Disputes

When divorcing or otherwise separating couples disagree about the disposition of jointly created frozen embryos, most courts seek to enforce any contracts the parties may have entered; but, if there are none or if they do not resolve the disagreement, the parties' interests are balanced to determine the proper outcome. The balancing process is most often guided by a standard articulated by the Supreme Court of Tennessee in its 1992 decision of *Davis v. Davis*. There, the court stated, "Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question."[64] In application, this has often meant that the party who wants to procreate loses, unless she is definitively sterile and thus unable to become a genetic parent without the embryos. Some courts have imposed the additional requirement that, to access the embryos, the party who wants to procreate must be unable or unlikely to become an adoptive parent. The balancing

[59] Mutcherson, *supra* note 49, at 190. Professor Mutcherson's work explains why it is so important to move beyond a rights framing to a justice framing. This does not, however, mean rejecting rights—rather, it simply entails recognizing that they are not "a singular end goal." *Id.* at 194.

[60] Mutcherson, *supra* note 49, at 198, 200.

[61] *Id.* at 196.

[62] *Id.* at 198–99.

[63] *Id.* at 232.

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

approach, in other words, places great weight on the court's ability to assess a party's chances at achieving parenthood. Yet even if the court believes a party cannot achieve parenthood without the embryos, that party may not prevail—however, her argument will at least be considered.

Section II.A focuses on the subset of frozen embryo disputes in which courts, for whatever reason, are unable to resolve the parties' disagreement based on contract principles and therefore turn to interest balancing. Taken together, these cases illustrate two points: First, courts often rest their decisions on flawed and incomplete assessments about whether a party is fertile or sterile, with unequivocally sterile parties having the best chance at accessing the contested embryos. This ignores the reality that infertile and even fertile parties may also be unable to achieve parenthood. Second, courts view their task as mediating between two parties asserting rights that are locked in a binary opposition. The party wishing to use the embryos is described as asserting the right to procreate, and the party wishing to prevent their use is described as asserting the right to avoid procreation. This framing ignores the nuance and complexity of the parties' intentions, which cannot reasonably be reduced to a desire to procreate or not procreate.

Section II.B surveys the Federal Supreme Court doctrine that provides the backdrop for virtually every state court case discussed in Section II.A. The impulse to view procreative autonomy as comprised of the right to procreate and the opposing right to avoid procreation derives from the fact that the Federal Supreme Court cases on reproductive rights inhabit two separate doctrinal spheres. First, there is the right to procreate, which derives primarily from *Skinner v. Oklahoma*, a case decided over seventy-five years ago that protected a "habitual criminal" against forced sterilization. Second, there is the right to avoid procreation, which derives from the long line of cases protecting access to contraception and (with some notable restrictions) abortion. While a few of the cases on the right to avoid procreation speak more broadly about protecting the "decision whether to bear or beget a child,"[65] this aspect has been largely ignored, to the detriment of reproductive rights.

A. Binary Thinking in State Courts

This section surveys some of the state court decisions that engage in interest balancing to resolve frozen embryo disputes. It is divided into three subsections: The first describes the seminal case of *Davis v. Davis*, decided by the Tennessee Supreme Court in 1992.[66]

[65] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[66] *Davis*, 842 S.W.2d at 588.

The second describes post-*Davis* cases where courts have balanced the parties' interests and ruled against using contested embryos. The third describes post-*Davis* cases where courts have balanced the parties' interests and ruled in favor of using the embryos. These cases collectively reveal a doctrine unable to grapple with the complexity and indeterminacy of reproductive potential, and unwilling to imagine nondual rights claims.

1. *Davis v. Davis*

Davis v. Davis, decided by the Tennessee Supreme Court in 1992, is the seminal case on frozen embryo disputes.[67] There, a husband and wife—who had endured five tubal pregnancies, a failed adoption, and six rounds of IVF—battled over seven frozen embryos in the context of their divorce.[68] Initially, the wife wanted to use the embryos herself, but by the time the case reached the state's high court she wished to donate them to another couple.[69] The husband wanted the embryos discarded based on his view, which developed as the result of traumatic experiences in his own childhood, that children should be raised within intact families.[70] Had the parties entered a contract dictating the embryos' disposition in the event of divorce, the court would have enforced it, unless both parties had agreed to its modification.[71] Because they had not entered any such contract,[72] however, the court cataloged a variety of possible approaches, including continued cryopreservation unless and until the parties agreed otherwise.[73] It rejected this approach because, given the current technology, the embryos might not remain viable longer than a couple of years, which would effectively give the party preferring non-procreation veto power.[74] The court ultimately decided to balance the parties' interests.[75]

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[67] *Id.*

[68] *Id.* at 589, 591–92.

[69] *Id.* at 590.

[70] *Id.*

[71] *Id.* at 597.

[72] *Id.* at 590.

[73] *Id.* at 590–91, 598.

[74] *Id.* at 598. The court placed the viability of the embryos at somewhere between two and ten years. *Id.*

[75] *Id.* at 590–91, 603–04.

As a preface to the balancing process, the court discussed "the right of procreation," which it described as "a vital part of [the] right to privacy."[76] After reviewing *Meyer*, *Buck*, *Skinner*, *Eisenstadt*, *Roe*, and other cases (discussed in Section II.B, *infra*),[77] the court declared, "[W]hatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation."[78] Observing that "[n]one of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here," the court concluded that the wife and husband were, in the unique context of frozen embryo disputes, "entirely equivalent gamete-providers."[79] The court further observed that the right to make decisions about the embryos "rests in the gamete-providers alone," rather than (for example) with the state.[80] Finally, the court observed that while previous cases "have dealt with the child-bearing and child-rearing aspects of parenthood," this case differs in that it deals with "the question of genetic parenthood."[81]

In balancing the parties' interests, the court considered the burdens that an undesired decision would impose on each party.[82] For the husband, who wanted the embryos discarded, an undesired decision would force him into "unwanted parenthood," which could have "financial and psychological consequences."[83] For the wife, who wanted the embryos donated to another couple, an undesired decision would impose the "emotional burden" of "knowing that the lengthy IVF procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never become children."[84] The court concluded that the husband's interest in avoiding parenthood outweighed the wife's interest in donating the embryos.[85] It added, however, that "[t]he case would be

[76] *Id.* at 600.

[77] *Id.* at 599–601. *See also infra* Section II.B for a description of these cases.

[78] *Id.* at 601.

[79] *Id.*

[80] *Id.* at 602.

[81] *Id.* at 602–03.

[82] *Id.* at 603.

[83] *Id.*

[84] *Id.* at 604.

[85] *Id.*

closer if [the wife] were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means"—including adoption.[86]

The opinion ends by articulating a process for resolving future cases: agreements between the parties are binding, but where there is no agreement, the court should balance the parties' interests.[87] In balancing the interests:

> Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered.[88]

This passage clearly favors non-procreation. It begins from the premise that the party wishing to avoid procreation wins. Even when the other party has no "reasonable alternatives" to achieve parenthood, she acquires no more than the opportunity for her argument to be "considered." This passage from *Davis* is almost invariably quoted when subsequent courts encounter similar disputes. While it does offer a thoughtful treatment of the issues, it is remarkable that courts have relied so heavily on these words rather than furthering the conversation with their own independent analyses.

Davis reflects binary thinking about fertility status, pregnancy intentions, and reproductive rights, and misses at least three important nuances: First, it overlooks the difficulty of assessing fertility status (i.e., reproductive potential). Determining whether a person has a "reasonable possibility of achieving parenthood" is rarely a simple task. Unless a party is definitively sterile, describing her chances of achieving either genetic or adoptive parenthood is difficult if not impossible. This query about "reasonable possibility"—at least as operationalized in *Davis*—invites a categorization in which if a party is not definitively sterile, she will be viewed as having a reasonable possibility of achieving parenthood (i.e., as fertile). Second, *Davis* oversimplifies pregnancy intentions by assuming parties either want to become parents or not become parents. For many parties, however, the question is not just whether to become a parent, but when, with whom, of how many children, via genetic versus adoptive connections, and so on. Third and finally,

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[86] *Id.*

[87] *Id.*

[88] *Id.* The quote continues, "However, if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail." *Id.*

Davis (in keeping with Federal Supreme Court doctrine) limits rights claims to procreation or avoidance of procreation, when in reality parties' desires are, as previously discussed, much more complicated.

2. Post-*Davis* Cases Barring Embryo Use

Davis has been tremendously influential. Courts deciding cases in its wake are generally described as having adopted one of three approaches commonly referred to as the contract approach, the balancing approach, and the contemporaneous mutual consent approach.[89] All three, to varying degrees, have roots in *Davis*. First, the contract approach honors agreements regarding the disposition of frozen embryos, so long as they do not result in public policy violations.[90] *Davis*, as previously discussed, would have enforced a contract had one existed.[91] Second, the balancing approach similarly honors contracts regarding the disposition of frozen embryos, but where there is no contract or the contract does not speak to the existing circumstances, the parties' interests are balanced.[92] *Davis*, of course, employed the balancing approach.[93] Third, the contemporaneous mutual consent approach disregards contracts and directs that embryos only be used, donated, or destroyed with the present consent of both parties.[94] Although *Davis* differed in that it would have honored a contract had one existed, it would have allowed a modification to that contract had both parties agreed.[95]

Inasmuch as these three approaches are somewhat overlapping, it may be useful to reduce them to a single analytical process that explains how a judge faced with an embryo dispute would ordinarily proceed. First, she would assess whether there is a contract that

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[89] Szafranski v. Dunston, 993 N.E.2d 502, 506 (2013).

[90] *Id.*

[91] *Davis*, 842 S.W.2d at 597.

[92] *Szafranski*, 993 N.E.2d at 512 ("Under this approach, courts enforce contracts between the parties, at least to a point, then balance their interests in the absence of an agreement.").

[93] *Davis*, 842 S.W.2d at 590–91, 603–04.

[94] In re Marriage of Witten, 672 N.W.2d 768, 778 (2003) (citing Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 110–12 (1999)).

[95] *Davis*, 842 S.W.2d at 597 ("Providing that the initial agreements may later be modified *by agreement* will, we think, protect the parties against some of the risks they face in this regard. But, in the absence of such agreed modification, we conclude that their prior agreements should be considered binding.").

speaks to the existing circumstances. If there is, she would ask whether it is against public policy. In a contemporaneous mutual consent state, she would always answer in the affirmative, disregard the contract, and (absent mutual consent to take other action) continue cryopreservation. If, however, the contract was not against public policy, the judge would order its enforcement—which could result in use, discard, or donation of the embryos. Second, if no contract spoke to the existing circumstances, the judge would, depending on her jurisdiction, either balance the parties' interests according to the *Davis* standard or ask whether there was contemporaneous mutual consent to a given action. Notably, except in situations where a court is enforcing an existing contract, the result will often be non-procreation. If a balancing of interests follows *Davis*, it begins from the premise that "[o]rdinarily, the party wishing to avoid procreation should prevail[.]"[96] And if contemporaneous mutual consent is required, procreation can only occur by agreement—but, as many have pointed out, if the parties agreed, they would not be litigating.[97]

This analytical process illustrates, among other things, that the cases do not really represent three distinct approaches. There are, at most, two—the contract/balancing approach and the contemporaneous mutual consent approach. In terms of popularity, the former far outstrips the latter, which has been expressly adopted only by the state of Iowa.[98] The remainder of this section focuses on decisions that employ interest balancing or search for mutual consent, and that represent victories for the party wishing to avoid procreation. In chronological order, it surveys six cases, which collectively illustrate several points: First, *Davis* has been deeply influential in creating a broad presumption against embryo use, qualified by a narrow exception for parties lacking a reasonable path to parenthood without the embryos. The exception is "narrow" in that it seems to cover only parties who are clearly sterile, and thus discounts the challenges of infertility. This evinces binary thinking about fertility and sterility and the effective erasure of infertility. However, some cases hold that not even clearly sterile parties fall within the exception if they are able to pursue adoption.[99] Second, these cases illustrate the embrace of binary thinking about the

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[96] *Id.* at 604.

[97] The Superior Court of Pennsylvania, for example, characterized the contemporaneous mutual consent approach as "totally unrealistic," saying, "If the parties could reach an agreement, they would not be in court." Reber v. Reiss, 42 A.3d 1131, 1135 n.5 (2012).

[98] *Szafranski*, 993 N.E.2d at 511 (reviewing all three approaches and noting which states have adopted them).

[99] *See*, *e.g.*, Terrell v. Torres, 438 P.3d 681, 692 (2019) (vacated in part by 456 P.3d 13 (2020)). See *infra*, text accompanying note 258 (describing the family court opinion). The intermediate appellate court (whose opinion was vacated on appeal) in *Terrell* stated:

right to procreate and the right to avoid procreation. The parties, and often the courts as well, frame the rights at issue as binary and opposite. Third, these cases suggest that the right to procreate is more accessible to parties who are not already parents. Courts often (but not always[100]) consider in interest balancing whether a party already has children. Fourth and finally, these cases show that courts are deeply concerned about not "forcing" parties to procreate, even when those parties have willingly engaged in IVF for the purpose of procreation. This commitment to allowing certain parties to control the context of procreation—whether, when, and how they will have children—might be contrasted with other areas of doctrine.

a. *A.Z. v. B.Z.*

In the 2000 decision of *A.Z. v. B.Z.*, the Supreme Judicial Court of Massachusetts invoked a public policy against "forced procreation" in ruling against a wife who wanted to use frozen embryos she and her husband had jointly created during their marriage.[101] From early on, they had experienced fertility issues.[102] The wife had suffered two ectopic pregnancies, each of which required the removal of one of her fallopian tubes.[103] Subsequently, three years of IVF treatments resulted in the birth of twin daughters as well as two vials of frozen embryos.[104] When the twins were approximately three years old,

> The trial court erred by improperly concluding Torres' 'less than one percent' chance of becoming pregnant through normal means and the remote possibility of adoption or insemination with a donor embryo negated her claims to these embryos. The trial court overstated Torres' ability to become a parent through means other than the use of the disputed embryos. Moreover, the court gave insufficient weight to Torres' desire to have a biologically-related child—which was the entire purpose of engaging in IVF in the first place.

Id. at 692. *See also* J.B. v. M.B., 783 A.2d 707, 720 (2001) ("We express 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, noting only that the possibility of adoption also may be a consideration, among others, in the court's assessment.").

[100] *In re* Marriage of Rooks, 429 P.3d 579, 581 (Colo. 2018) ("[T]he sheer number of a party's existing children, standing alone, [shall not] be a reason to preclude implantation of the pre-embryos.").

[101] A.Z. v. B.Z., 431 Mass. 150, 160 (2000).

[102] *Id.* at 151–52.

[103] *Id.* at 152.

[104] *Id.* at 152–53.

without notifying her husband, the wife had one of the vials thawed and one of the embryos transferred.[105] No pregnancy resulted, and the parties' relationship "deteriorated" to the point that the wife sought and received a protective order against the husband and the husband filed for divorce.[106] At divorce, the wife wanted to use the remaining vial and the husband wanted to enjoin her.[107] While their consent forms indicated that upon separation, the embryos would be returned to the wife "for implant," the probate court ruled for the husband.[108] It held that significant changes in circumstances (including both the birth of the twins and the deterioration of the parties' relationship) rendered the form unenforceable, such that the parties' interests should be balanced.[109] Upon balancing, it ruled that "the husband's interest in avoiding procreation outweighed the wife's interest in having additional children."[110]

On appeal, the high court expressed skepticism that the form actually represented the true intent of the parties, but added the following: "[E]ven had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, [as a matter of public policy,] we would not enforce an agreement that would compel one donor to become a parent against his or her will."[111] The *AZ* court noted it did not "necessarily subscribe" to the *Davis* court's views,[112] but its strong statement against the use of frozen embryos whenever parties disagree—even if they have entered a contract otherwise—goes at least as far as *Davis's* presumption against embryo use when interest balancing. It is also notable that the parties in *AZ* were already parents with twin daughters. Thus, the wife had already exercised her right to procreate, and at least at the probate court level her right to have "additional children" was weaker than the husband's right to "avoid[] procreation."[113] This case, like some others, gives the impression that the right to procreate diminishes with use.

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[105] *Id.* at 153.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 154–55.

[109] *Id.* at 155.

[110] *Id.*

[111] *Id.* at 159–60.

[112] *Id.* at 157, n.19.

b. *J.B. v. M.B.*

In the 2001 decision of *J.B. v. M.B.*,[114] *Davis's* influence is even more apparent. There, the Supreme Court of New Jersey balanced the parties' interests and ruled in favor of a wife who wanted jointly created embryos discarded and against her husband who wanted them donated to another couple.[115] Following a miscarriage, the wife discovered she had fertility issues and the couple underwent IVF.[116] The procedure resulted in the birth of a daughter as well as the creation of seven frozen embryos.[117] Before their daughter was a year old, however, the couple separated.[118] While the wife wanted the embryos discarded, the husband wanted them either "implanted or donated to other infertile couples" on the basis of his religious convictions.[119] Their consent forms offered little guidance, indicating that upon divorce their embryos would be "relinquished to the IVF Program," unless a court ruled otherwise.[120] The trial court—noting that the husband was already a parent, was fertile and so could have additional children, and wanted the embryos to be used by another couple rather than himself—ruled for the wife and ordered the embryos discarded.[121] The intermediate court affirmed, observing that donating the embryos would violate the wife's right not to procreate, whereas discarding them would not violate the husband's right to procreate.[122] The intermediate court, however, formally decided the case not on these

[113] *Id.* at 155.

[114] J.B. v. M.B., 783 A.2d 707 (N.J. 2001).

[115] The opinion is somewhat unclear as to the husband's specific desires. It quotes from his counterclaim, in which he asked for the embryos to be "implanted or donated to other infertile couples." *Id.* at 710. The "implanted" language presumably refers to them being transferred to the wife, which was not a possibility given her opposition. While the high court mentioned the possibility of transferring the embryos to a surrogate, it did not indicate that this was something the husband proposed or desired. *Id.* at 717. I have therefore accepted the trial court's characterization that the husband wanted the embryos "merely to donate them to another couple." *Id.* at 711.

[116] *Id.* at 709.

[117] *Id.* at 710.

[118] *Id.*

[119] *Id.* at 710, 712.

[120] *Id.* at 713.

[121] *Id.* at 710, 712, 720.

[122] *Id.* at 711.

constitutional grounds but rather on the public policy ground that contracts to procreate are unenforceable.[123]

On appeal, the high court began its analysis with the consent form, which it held did not "manifest a clear intent" regarding what should happen to the embryos upon divorce.[124] Even if the form had manifested a clear intent, however, the court stated it would remain "subject to the right of either party to change his or her mind[.]"[125] The court then balanced the parties' interests. Reciting *Davis's* statement that "[o]rdinarily, the party wishing to avoid procreation should prevail," it emphasized that the wife could not be "force[d] . . . to become a biological parent[.]"[126] In ruling for the wife, the court reiterated that the husband "is a father and is capable of fathering additional children."[127] Because the husband did not seem to wish to use the embryos himself (e.g., with the assistance of a surrogate), but rather wanted them donated to another infertile couple, this case does not on its facts show bias against a party wishing to procreate. Nevertheless, its dicta may suggest such a bias. The court stated that in a case where it was called upon to balance the interests of a party who was infertile and wished to use jointly created embryos against the interests of a party who wanted the embryos discarded, the court could consider whether the former party could become a parent through adoption.[128] While it did not elaborate, the chance of a New Jersey court ruling in favor of a party wishing to use embryos appears small.

c. *Marriage of Witten*

In the 2003 decision of *Marriage of Witten*, the Supreme Court of Iowa applied the contemporaneous mutual consent approach and ruled against a wife who wanted to use frozen embryos she and her husband had jointly created during their marriage.[129] Because of the wife's fertility issues, the couple underwent IVF.[130] At the time of their divorce, after

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[123] *Id.* at 711–12.

[124] *Id.* at 713.

[125] *Id.* at 719.

[126] *Id.* at 716–17.

[127] *Id.* at 719–20.

[128] *Id.* at 720.

[129] Marriage of Witten, 672 N.W.2d 768 (Iowa 2003).

[130] *Id.* at 772.

several failed embryo transfers, they had no children but seventeen embryos remained.[131] The wife wished to use the embryos to become a parent; the husband did not want her to use them, but would allow their donation to another couple.[132] The high court held that public policy precluded the enforcement of a contract regarding reproduction when one of the parties had changed their mind.[133] It further held that, rather than substituting itself as the decision-maker (which would occur if it adopted the balancing approach), the parties ought to retain control.[134] The court therefore adopted the contemporaneous mutual consent approach and ordered that the embryos be stored indefinitely such that neither party could "use or dispose of [them] without the consent of the other[.]"[135] As previously discussed, this approach effectively prevents procreation whenever there is a dispute between the parties.

d. *Findley v. Lee*

In the 2016 case of *Findley v. Lee*, the Superior Court of California ruled against a wife (Lee) who wished to use embryos to procreate and in favor of her husband (Findley) who wanted them discarded.[136] While the court's decision rested on contract law, it engaged in an extensive discussion of balancing and concluded that it would reach the same result under either approach.[137] Findley and Lee, who had known each other for years, became romantically involved in early 2010 when Lee was forty-one years old, and they made plans to marry in September.[138] During the summer of 2010 (before their marriage), some evidence showed they were trying to conceive.[139] Also that summer, Lee was diagnosed

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[131] *Id.*

[132] *Id.* at 772–73.

[133] *Id.* at 781–82.

[134] *Id.* at 783.

[135] *Id.* at 772, 783.

[136] Findley v. Lee, No. FDI-13-780539, 2016 WL 270083, at *1–2 (Cal. Super. Jan. 11, 2016).

[137] *Id.* at 2, 39–40.

[138] *Id.* at 4. The dates are slightly unclear, but Lee was around forty-one years old.

[139] *Id.* at 4.

with cancer.[140] They married in September as planned.[141] They then underwent IVF—signing a consent form in which they agreed that in the event of divorce the embryos would be thawed and discarded—and were able to create five embryos.[142] Due to Lee's cancer treatment, they froze all five embryos.[143] Three years into their marriage, when Lee was forty-four, Findley filed for divorce and the embryo dispute arose.[144]

While the court ruled based on the consent form that the embryos should be thawed and discarded, it discussed the interest balancing approach and concluded that it would lead to the same result. Weighing against Lee using the embryos were the following four factors: First, Lee had "failed to preserve her fertility between ages forty-three and forty-five,"[145] though she was "a Harvard educated physician *who worked infertility clinics* [sic]."[146] The court emphasized Lee's medical knowledge, noting in an earlier part of the opinion that she had at one point considered freezing her eggs.[147] It also found it worth mentioning early in the opinion that she had previously terminated four pregnancies, including one at age thirty-seven.[148] Second, Lee "ha[d] not established that she [was] absolutely infertile at age forty-six."[149] At trial, both parties had their own fertility experts, with Lee's testifying that she had a 0.03% chance of fertility (based on her age of forty-six) and Findley's testifying that Lee had a 0 to 5% chance of fertility.[150] Third, Findley had concerns about co-parenting

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[140] *Id.* at 5. She pursued treatments other than chemotherapy or radiation. *Id.* This is relevant because chemotherapy and radiation could impact fertility.

[141] *Id.*

[142] *Id.* at 1.

[143] *Id.* at 6, 10.

[144] *Id.* at 10, 33.

[145] *Id.* at 33.

[146] *Id.* at 3, 34.

[147] *Id.* at 4.

[148] *Id.* at 4. Her reason for terminating the earlier pregnancies was that "she had not yet found the right person with whom she wanted to have a child." *Id.*

[149] *Id.* at 34–35.

[150] *Id.* The court specifically noted that Lee's fertility expert made the assessment based on her age and not on her cancer treatment. *Id.* at 34.

with Lee, although she had offered not to seek child support.[151] The court noted that while his concerns were valid, they did not "dramatically weigh in his favor."[152] Finally, the court found Findley's testimony more credible than Lee's.[153] The court ultimately concluded that the balance weighed against using the embryos.[154]

Davis's influence on *Findley* is apparent. Both the breadth of the presumption against using embryos and the narrowness of the exception for parties without a reasonable path to parenthood without them are evident. The *Findley* court seemed to assume that a party who was not definitively sterile was effectively fertile.[155] Even though Lee was childless and highly unlikely to achieve genetic parenthood without the embryos, she did not prevail. Indeed, the fact that she was "unable to establish that she [was] now absolutely infertile"[156] seemed to weigh heavily against her. While the court did not discuss the possibility of Lee adopting a child, she likely would not have been a strong candidate for adoption due to her advanced age and cancer diagnosis.[157] In terms of the rights at issue, the parties viewed them in the usual binary terms: Lee invoked her right to procreate, and Findley invoked his right not to procreate. The court, however, held that both Lee and Findley had waived any constitutional rights related to procreation when they signed the consent form.[158] Perhaps anticipating that the parties might argue that the consent form, when judicially enforced, became state action, the court summarily declared that there was "no state action at issue."[159]

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[151] *Id.* at 36.

[152] *Id.* at 37.

[153] *Id.* at 37–39.

[154] *Id.* at 40.

[155] To reiterate, *Davis* stated that the party wishing to avoid procreation should ordinarily prevail, but that if the other party lacked a reasonable chance at achieving parenthood without the embryos, her argument to use them should be considered.

[156] *Findley*, 2016 WL 270083, at *35.

[157] *See, e.g.*, Reber v. Reiss, 42 A.3d 1131, 1139 (Pa. Super. Ct. 2012), *appeal denied*, 62 A.3d 380 (Pa. 2012) (noting that a similarly situated party would not be a good candidate for adoption).

[158] *Findley*, 2016 WL 270083, at *36.

[159] *Id.*

e. *Marriage of Guardado*

In the 2018 decision of *Marriage of Guardado*, the Court of Appeals of Washington awarded a husband and wife joint possession of an embryo created during their marriage, thereby effectively preventing its use by the husband.[160] The parties had pursued IVF at least in part because the husband had a vasectomy before their marriage.[161] Through IVF, they had one child and one frozen embryo remaining.[162] While they had signed a consent form, it stated only that, if they divorced, the court would determine the embryo's disposition.[163] At the time of divorce, the wife wanted the embryo destroyed, whereas the husband (at least according to the wife's testimony) wanted to use it himself with the assistance of a surrogate.[164] Because the consent form provided no specific guidance, the trial court balanced the parties' interests.[165] It awarded the embryo to both parties jointly, but required the husband (who sought to prevent its destruction) to pay the cost of continued storage.[166] It emphasized that the wife could not be forced to procreate.[167] In affirming, the intermediate court reiterated that the wife could not be forced to procreate, quoting *Davis's* statement that "[o]rdinarily, the party wishing to avoid procreation should prevail."[168] It did not discuss the husband's prospects for procreation without the embryo in question. This decision, like those previously discussed, interprets *Davis's* initial presumption broadly while seemingly neglecting its potential exception. Perhaps it made a difference that the parties had already had a child, and the husband had already exercised his right to procreate.

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[160] *In re* Marriage of Guardado, 2 Wash. App. 2d 1025, 1 (Ct. App. 2018), *appeal denied*, 421 P.3d 462 (Wash. 2018) (unpublished opinion).

[161] *Id.* at 6.

[162] *Id.* at 1.

[163] *Id.*

[164] *Id.* at 2.

[165] *Id.* at 6.

[166] *Id.* It further noted that the parties were free to later agree to a different disposition. *Id.*

[167] *Id.*

[168] *Id.*

f. *McQueen v. Gadberry*

In the 2016 decision of *McQueen v. Gadberry*, the Missouri Court of Appeals awarded contested embryos to a husband and wife jointly, thereby precluding their use by the wife.[169] The wife did not appear to have any fertility issues and had, after separating from her husband, given birth to another (her third) child as a result of sexual intercourse with another man.[170] Even under a broad reading of *Davis's* exception—wherein existing children did not count against the party wishing to procreate, complete sterility of the party wishing to procreate was not required, and adoption was not assumed to be a universally suitable alternative to genetic parenthood—the wife in this case would have a difficult argument: *Davis* asks whether the party wishing to use the embryos has a reasonable path to parenthood without them, and here the wife not only had another path to parenthood available, she had already taken it.

Because the husband was being deployed for military service,[171] the couple had frozen a sample of his sperm.[172] During their geographic separation, four embryos were created from the husband's sperm and the wife's eggs.[173] At that time, they had no discussions about the disposition of any unused embryos.[174] While two of the embryos resulted in the birth of twin boys, the remaining two were stored at a facility near McQueen's doctor's office.[175] Approximately three years later, when the embryos were being transferred to a different facility (due to the closure of the former), the parties were required to execute a directive about their disposition.[176] Although the wife handwrote that, upon divorce, she would receive the embryos, the evidence suggested the husband may not have known about this—possibly due to the wife's deception.[177] The trial court thus deemed the directive

[169] McQueen v. Gadberry, 507 S.W.3d 127, 132 (Mo. Ct. App. 2016).

[170] *Id.* at 145–46, 146 n.19.

[171] Although the opinion does not indicate how old the wife was, it notes that concerns about her age influenced their initial discussions about children. *Id.* at 133.

[172] *Id.* at 133.

[173] *Id.* at 133–34.

[174] *Id.* at 134.

[175] *Id.*

[176] *Id.* at 135.

[177] *Id.* at 153–54.

invalid and awarded the embryos to the husband and wife jointly, such that they could not be used without both parties' authorization.[178] It observed that, if the wife were allowed to use the embryos, the court would effectively be forcing the husband to procreate.[179] The appellate court affirmed.[180] While it noted that the parties initiated discussions about children in part due to concerns about the wife's age (which is not indicated), there did not appear to be any fertility issues.[181] While there are significant differences from some other cases due to the wife's apparent fertility, again in *McQueen* a party who was already a parent was denied use of the embryos.

These six decisions collectively reflect binary thinking about both reproductive potential and reproductive rights. Reproductive potential, which in reality exists along a spectrum, is implicitly reduced to either fertility or sterility, with infertile parties often being treated as fertile and, as such, denied access to embryos based on a perception that they have a reasonable alternative path to parenthood without the embryos. Some courts view adoption as a reasonable alternative path to parenthood, even though the parties in these cases would not be litigating if they wished to adopt. And some courts seem to entirely jettison the inquiry into alternative paths where a party is already a parent, which suggests that the right to procreate may expire or at least diminish once successfully exercised. Finally, oversimplification of reproductive potential leads to oversimplification of reproductive intentions and, by extension, of reproductive rights. Just as courts describe the parties and their desires in terms of binary oppositions, they describe the possible rights claims in terms of binary oppositions, recognizing only a right to procreate and a right to avoid procreation. This feature of state court decisions on frozen embryos derives, as Section II.B will show, from Federal Supreme Court doctrine.

3. Post-*Davis* Cases Allowing Embryo Use and Statutes Affecting Embryo Use

The above decisions illustrate the strength of *Davis's* presumption in favor of the party wishing to avoid procreation and the narrowness of *Davis's* exception for parties who lack a reasonable path to parenthood without the embryos. Whereas the cases in the previous section engaged in balancing and ruled against embryo use, the cases in this section engage in balancing but allow embryo use. Rather than ushering in a new era of more balanced

[178] *Id.* at 137.

[179] *Id.*

[180] *Id.* at 157.

[181] *Id.* at 133.

decision-making, however, two out of three of these cases factually fit within a very narrow reading of *Davis's* exception. These cases reaffirm that the exception is most likely to protect parties who are clearly sterile, presently childless, lacking in prospects for adoption, and who created the contested embryos in contemplation of those exact circumstances. Often, these parties have initiated IVF in response to a cancer diagnosis to preserve their ability to become a genetic parent after chemotherapy. This section surveys a set of three cases and two statutes to illustrate several points: First, *Davis* remains deeply influential. Second, the doctrine reflects binary thinking about reproductive potential. Courts implicitly categorize parties as either fertile or sterile and collapse infertility into fertility. Third, courts and parties alike accept binary thinking about reproductive rights.

a. *Reber v. Reiss*

In the 2012 decision of *Reber v. Reiss*, the Superior Court of Pennsylvania awarded frozen embryos to a wife who wished to use them over the objection of her husband, who wanted them donated to research or destroyed.[182] About one year into the parties' marriage, the wife learned that she had breast cancer.[183] Because she was thirty-six years old, she elected to delay cancer treatment while she and her husband pursued IVF to preserve her ability to have children.[184] After creating thirteen frozen embryos,[185] the wife began cancer treatment.[186] Time passed, and approximately four years into the parties' marriage, the husband filed for divorce.[187] Less than a year after filing, he intentionally conceived a child with another woman, with whom he planned to have more children.[188] The wife (now recovered), was forty-four years old at the time of trial, had no children, and wished to use the jointly created embryos.[189] Because the parties' consent form provided no guidance, both the master who initially heard the case and the trial court balanced the parties'

[182] Reber v. Reiss, 42 A.3d 1131, 1134 (2012), *appeal denied*, by 619 Pa. 680 (2012).

[183] *Id.* at 1132.

[184] *Id.* at 1132-33.

[185] *Id.* at 1133.

[186] *Id.* (The treatment included "two surgeries, eight rounds of chemotherapy and 37 rounds of radiation.").

[187] *Id.*

[188] *Id.*

[189] *Id.*

interests.[190] While the master ruled for the husband,[191] the trial court reversed and ruled for the wife.[192] While acknowledging *Davis's* admonition that "ordinarily the party wishing to avoid procreation should prevail," the trial court nevertheless held that because the wife could not "achieve biological parenthood" without the embryos, the scales tipped in her favor.[193]

On appeal, without deciding which approach (contract/balancing or contemporaneous mutual consent) should apply in future cases, the superior court approved both the trial court's decision to balance the parties' interests as well as the result of its balancing.[194] The appellate court first considered the wife's interests.[195] Although the husband argued that the wife had other paths to parenthood in that she could become a foster parent or adopt, the court held that the proper consideration was not whether the wife could achieve "any sort of parenthood," but rather whether she could "procreate."[196] Noting the wife's desire to experience pregnancy and genetic parenthood,[197] the court recognized that "[a]doption is a laudable, wonderful, and fulfilling experience[,]" but "occupies a different place for a woman than the opportunity to be pregnant and/or have a biological child."[198] It further recognized that, due to the wife's status as an older, single woman with a complicated health history, adoption might not be possible.[199] Ultimately, the court concluded that the

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[190] *Id.* at 1134, 1136. (The appellate court reported, "[N]either party had signed the portion of the consent form related to the disposition of the pre-embryos in the event of divorce or death of one party." *Id.* at 1136. Although the husband asked the court to enforce a provision of the consent form that indicated the embryos would only be stored for three years, the appellate court held that this provision was not an agreement between husband and wife, but rather between the couple and the storage facility, which was (according to the same form) supposed to provide the parties with notice when it was time to destroy the embryos. *Id.* The facility had not sent any notice. *Id.*)

[191] *Id.* at 1133.

[192] *Id.* at 1134.

[193] *Id.*

[194] *Id.* at 1136–37.

[195] *Id.* at 1137–40.

[196] *Id.* at 1138.

[197] *Id.* The wife stated, "I wouldn't have gone through . . . the whole IVF thing if I hadn't wanted children . . . . And I wanted that experience of being pregnant and that closeness, that bond." *Id*.

[198] *Id.*

contested embryos "likely [represented the wife's] only chance at genetic parenthood and her most reasonable chance for parenthood at all," and described the wife's interests as "compelling."[200]

Turning to the husband's interests in avoiding use of the embryos, the court observed that some of his concerns should be allayed by the wife's promise to allow him to develop a relationship with any child or children (if he wished to do so), but to hold him exempt from any child support obligation.[201] In response to the husband's claim that he "never intended actually to have a child with [the w]ife," the court reasoned that "the only reason one undergoes IVF is to have a child."[202] Finally, despite the husband's argument that allowing the wife to use the embryos would be tantamount to forcing him to procreate, the court held that the state had no public policy regarding "forced procreation under these circumstances."[203] It ultimately concluded that the husband's interests were lesser than the wife's. The husband appealed, but the Supreme Court of Pennsylvania declined to hear the case.[204]

Rather than altering prior doctrine, *Reber* illustrates that if a party genuinely falls within *Davis's* exception for parties who lack a reasonable path to parenthood without the embryos, she can potentially prevail. The fact that *Reber* is among the first cases allowing the use of contested embryos emphasizes the narrowness of the exception:[205] the wife was sterile due to advanced age and chemotherapy, presently childless, lacking in prospects for adoption, and had created the embryos in contemplation of those exact circumstances. Thus, while the result in *Reber* may have differed from prior results, the doctrine did not meaningfully evolve or move beyond the embrace of binaries.

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[199] *Id.* at 1139.

[200] *Id.* at 1139–40.

[201] *Id.* at 1140–41.

[202] *Id.* at 1140.

[203] *Id.* at 1142.

[204] Reber v. Reiss, 619 Pa. 680 (2012).

[205] While there was at least one earlier case, *Marriage of Nash*, that allowed the use of contested embryos, it differed in that the male genetic progenitor received embryos that were created with his sperm and donor eggs. *In re* Marriage of Nash, 2009 WL 1514842 (Wash. App. June 1, 2009) (unpublished opinion). I have excluded from my discussion cases in which both parties were not genetic progenitors.

b. *Szafranski v. Dunston*

In the 2015 decision of *Szafranski v. Dunston*, the Appellate Court of Illinois awarded frozen embryos to a woman who sought to use them over the objection of her former boyfriend and co-progenitor.[206] When Karla Dunston learned that she had non-Hodgkins lymphoma and that chemotherapy would likely destroy her fertility, she decided to undergo IVF.[207] Against the advice of her oncologist, she delayed cancer treatment to preserve her ability to "be a mother and have a biological child."[208] Although neither she nor her boyfriend, Jacob Szafranski, believed their relationship would ultimately endure, they jointly created three frozen embryos.[209] When their relationship ended and Szafranski's new girlfriend objected to Dunston using the embryos, Szafranski sued Dunston to prevent her from going forward.[210] Dunston counterclaimed, seeking "sole custody and control" of the embryos.[211] The trial court balanced the parties' interests and ruled in favor of Dunston.[212] The appellate court, however, reversed and remanded with the following instructions: the trial court should enforce any existing contracts but, if there is no contract, it should balance the parties' interests.[213]

On remand, the trial court again ruled in favor of Dunston. It held that the parties had agreed she would be able to use the embryos without Szafranski's consent.[214] To provide a complete record for appeal, however, the trial court also balanced the parties' interests.[215] It concluded that, inasmuch as Dunston's interests were weightier, she would prevail under either analysis.[216] In performing the balancing, the court emphasized that Dunston's

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[206] Szafranski v. Dunston, 34 N.E.3d 1132 (2015).

[207] *Id.* at 1136–37.

[208] *Id.* at 1137.

[209] *Id.* at 1136–37.

[210] *Id.* at 1136–37, 1146.

[211] *Id.* at 1136.

[212] *Id.*

[213] *Id.* at 1136–37.

[214] *Id.* at 1137.

[215] *Id.* at 1147.

specific desire for genetic parenthood could be achieved only by using the contested embryos.[217] On the other hand, Szafranski's concern that Dunston's use of the embryos would preclude him from finding love in the future was viewed as "speculative."[218] The fact that one subsequent girlfriend had a negative reaction to Szafranski's participation in IVF with Dunston did not foreclose all future romantic prospects.[219] The appellate court agreed with both of the trial court's conclusions—first, that Dunston prevailed under the parties' agreement; second, that Dunston would also prevail under the balancing test.[220] In discussing the balancing of interests, the appellate court reviewed each party's interests. With respect to Szafranski, it observed that he worried not only about his future romantic prospects, but also that he was being "forced to procreate with a woman whom he does not love."[221] With respect to Dunston, it observed that the embryos represented her only chance of achieving her desire for a biological child "'with part of' her father, who passed away when she was five years old" and that she did not expect Szafranski to provide support for any resulting children.[222]

Szafranski, like *Reber*, ultimately serves to emphasize the narrowness of *Davis's* exception for parties who lack a reasonable path to parenthood without the contested embryos. Like the wife in *Reber*, Dunston was clearly sterile due to chemotherapy, presently childless, and had created the embryos in contemplation of those exact circumstances. Thus, while *Reber* and *Szafranski* may seem to signal a change, their doctrine did not meaningfully evolve from *Davis* or move beyond the embrace of binaries.

c. *Mate v. Mate*

In the unpublished 2016 decision of *Mate v. Mate*, the Superior Court of Connecticut allowed a wife to use embryos that the parties had created during their marriage, but held

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[216] *Id.* at 1137.

[217] *Id.* at 1147.

[218] *Id.* at 1147, 1161. (This worry stemmed from his new girlfriend's negative reaction.)

[219] *Id.* at 1147.

[220] *Id.* at 1161-62.

[221] *Id.* at 1162.

[222] *Id.*

that the husband would not be the legal father or incur any child support obligations.[223] During their marriage, the parties underwent IVF, which produced one child and several frozen embryos.[224] In conjunction with the procedure, the parties filled out a form indicating that upon divorce, the wife would receive the embryos.[225] At divorce, the wife sought control over the embryos, while the husband asked that they be destroyed or, alternatively, that he not be the legal father of, or be required to pay child support for, any resulting children.[226] The court held that their disposition form was unenforceable, in part because public policy precluded "forc[ing] a person to parent a child."[227] Notwithstanding this pronouncement, the court allowed the wife to use the embryos,[228] but imposed the following requirements: should she decide to use the embryos, the wife must give the husband advance notice, allow him to terminate his parental rights, and hold him harmless from child support expenses.[229] While *Davis* is discussed in *Mate*, it does not seem to have the same pull as in some of the other decisions. It is notable that, although the wife was already a parent, she was able to use the embryos. However, it is worth reiterating that the *Mate* opinion is unpublished.

d. State Statutes Affecting Embryo Use

In addition to judicial decisions, there are at least two states with statutes that directly affect frozen embryo disputes. Both appear to be products of the pro-life movement's efforts. In 1986, as IVF became more widely available, Louisiana adopted a statute deeming a viable in vitro embryo "a juridical person which shall not be intentionally destroyed."[230] More recently, in 2018, Arizona adopted a statute directing courts adjudicating frozen embryo disputes between spouses to award contested embryos according to the following priorities: first, award the embryos "to the spouse who intends

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[223] Mate v. Mate, No. FBTFA156048231, 2016 WL 6603254 (Conn. Super. Ct. Sept. 23, 2016) (unpublished opinion).

[224] *Id.* at 6, 12.

[225] *Id.* at 8.

[226] *Id.* at 6.

[227] *Id.* at 8, 12 (also based on the lack of consideration).

[228] *Id.* at 18.

[229] *Mate*, 2016 WL 6603254.

[230] LA STAT. ANN. § 9:129 (1986). *See also* LA STAT. ANN. § 9:121 (1986) (definition of "human embryo").

to allow the[m] to develop to birth;" second, if both spouses wish to allow them to develop to birth and both have contributed gametes, award the embryos so as to "provide[] the best chance for the[m] to develop to birth;" and third, if both spouses wish to allow them to develop to birth but only one contributed gametes, award the embryos "to the spouse that provided gametes."[231] These statutes reveal the extent to which embryo disputes are influenced by the gravitational pull of abortion politics, which is of course dominated by binary thinking about rights. As much as the mainstream pro-choice movement may miss certain voices and experiences (see Part I, *supra*), the pro-life movement overtly deprives women of agency and dignity.

4. Post-*Davis* Cases Defying Easy Categorization but Illuminating Important Lessons About Interest Balancing

The two cases below defy easy categorization, but illuminate important lessons about interest balancing. The first elaborates new factors that courts should consider when they engage in interest balancing. The factors are significant in that they seem to start from a position closer to equipoise, rather than weighted against the use of contested embryos. Yet the court ultimately embraces a binary view of reproductive rights. The second case in this section was ultimately decided based on contract principles, but is included because the lower courts engaged in interest balancing. While the family court ruled against embryo use, the intermediate court vacated. The intermediate court's decision was reminiscent of *Reber* and *Szafranski* in that it allowed embryo use by a woman who was childless, effectively sterile due to chemotherapy, lacking in prospects for adoption, and had created the embryos in contemplation of those exact circumstances. It thus fits factually within a very narrow reading of *Davis's* exception. Ultimately, while there may be some movement, binary thought patterns remain strong in these cases.

a. *Marriage of Rooks*

Marriage of Rooks has not reached a reported conclusion, so it is difficult to categorize. The Supreme Court of Colorado's 2018 decision articulated new factors to be used in interest balancing and remanded for further consideration in light of those factors.[232] Every level of the case's trajectory is illuminating. At the time of their divorce, the parties had three children together—all of whom were the result of IVF—and six frozen embryos.[233]

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[231] ARIZ. REV. STAT. ANN. § 25-318.03 (2018).

[232] *In re* Marriage of Rooks, 429 P.3d 579 (Colo. 2018).

[233] *In re* Marriage of Rooks, 488 P.3d 116, 118 (Colo. App. 2016), *rev'd*, 429 P.3d 579 (Colo. 2018).

The wife, who had "undisputed[ly] . . . used her last eggs to create the embryos," wanted them preserved for her own future use.[234] The husband wanted them discarded.[235] Were the wife to remain in Colorado, state law "would relieve [the] husband of financial responsibility for a future child born using the embryos without his consent."[236] The wife, however, planned to move to North Carolina, which did not have a similar provision.[237] The parties had earlier signed an agreement stating that upon divorce or dissolution, the adjudicating court would determine the disposition of their embryos.[238] Because their agreement offered no guidance for determining the disposition, the trial court balanced the parties' interests and ultimately ruled in favor of the husband.[239]

Finding no abuse of discretion in the trial court's balancing, the intermediate court affirmed.[240] It held, among other things, that the trial court properly considered that the husband might feel a moral obligation to a future child, even if he had no legal obligation.[241] It further held that "the [trial] court could reasonably conclude that husband's interest in not producing additional offspring should prevail over wife's interest in having a fourth child."[242] The court, indeed, emphasized that this case differed from *Davis*, "where the woman's only opportunity to bear children would be foreclosed if the court did not award the embryos to her."[243] Thus, the court viewed *Davis's* exception for parties lacking "a reasonable possibility of achieving parenthood"[244] without the frozen embryos in question as only covering parties who are childless at the time of the litigation. Even though the wife

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[234] *Id.* at 117.

[235] *Id.*

[236] *Id.* at 118, 123.

[237] *Id.* at 123.

[238] *Id.* at 120.

[239] *Id.* at 121. It should be noted that the court suggested it would enforce a contract to procreate, stating, "Wife could have contracted to receive the embryos on dissolution of the marriage, but did not do so[.]" *Id.* at 124.

[240] *Id.* at 122.

[241] *Id.*

[242] *Id.*

[243] *Id.*

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

was sterile, the intermediate court ruled against her because she already had three children. While stating that the wife and husband had "corresponding and equal rights," it upheld the trial court's weighing of those rights in favor of the husband.[245] The intermediate court's opinion is yet another example of *Davis's* deep influence and the tendency toward anti-procreation outcomes.

On appeal, however, the Supreme Court of Colorado (as previously mentioned) reversed and remanded for further consideration in light of newly articulated factors for balancing. The court directed judges to consider: (1) whether the spouse seeking to preserve the embryos wishes to use them herself; (2) whether the spouse seeking to preserve the embryos can have genetic children via other means; (3) why the parties pursued IVF (e.g., due to chemotherapy); (4) the hardship for the spouse opposing embryo use; (5) a spouse's use of the embryos in bad faith or as unfair leverage; and (6) any other relevant factors. The court directed judges *not* to consider whether the spouse seeking to preserve the embryos "can afford a child" and whether she "could instead adopt a child."[246] Finally, the court said "the sheer number of a party's existing children, standing alone, [shall not] be a reason to preclude implantation of the pre-embryos."[247]

While the newly articulated factors appear to place the parties on more equal footing than previous examples of interest balancing (since most courts begin with the scales weighted against the use of contested embryos), the final outcome of this case has not been reported. And while this court appears to appreciate the complexity of reproductive potential to a greater degree than some others, it continues to embrace a binary view of reproductive rights. The case, it said, "pits one spouse's right to procreate directly against the other spouse's equivalently important right to avoid procreation."[248]

b. *Terrell v. Torres*

The 2020 decision of *Terrell v. Torres* is also difficult to categorize.[249] There, both lower courts engaged in interest balancing and one allowed the use of embryos, but the Supreme Court of Arizona held that the outcome was governed by a consent form the

[245] *In re Marriage of Rooks*, 488 P.3d at 123.

[246] *In re Marriage of Rooks*, 429 P.3d 579, 581 (Colo. 2018).

[247] *Id.*

[248] *Id.*

[249] Terrell v. Torres, 456 P.3d 13 (Ariz. 2020), *as amended* (Feb. 21, 2020).

parties had signed. Following contract principles, the high court ordered that the embryos be donated for use by another couple, despite Torres's wishes to use them herself.[250] The facts were as follows: In 2014, at the age of thirty-three, upon learning she had cancer and needed chemotherapy, Torres decided to create embryos to preserve her ability to have a genetic child.[251] Terrell, her then-boyfriend, initially declined to provide sperm, but later agreed.[252] The consent form they signed noted that embryos "could not be used to produce a pregnancy over the other partner's objection."[253] The parties checked the box stating that in the event of divorce or dissolution of their relationship, "[a] court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose."[254] The parties then married and underwent IVF, which resulted in seven frozen embryos.[255] Torres's chemotherapy "caused 'a significant drop in her reproductive function.'"[256] In 2017, when Terrell filed for divorce, Torres wanted to use the embryos herself, whereas Terrell wanted them donated to another couple.[257]

The family court, finding the consent form inconclusive, engaged in interest balancing and held that "[Terrell's] right not to be compelled to be a parent outweighs [Torres's] right to procreate and desire to have a biologically related child."[258] Although Torres had a "'less than one percent' chance of becoming pregnant through normal means and [only a] remote possibility of adoption or insemination with a donor embryo," it concluded that the possibility she could become a parent "negated her claims to [the] embryos."[259] The court

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[250] *Id.* at 14.

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] Terrell v. Torres, 456 P.3d 13, 14 (Ariz. 2020).

[256] *Id.*

[257] *Id.*

[258] *Id.* at 15.

[259] Terrell v. Torres, 438 P.3d 681, 692 (Ariz. Ct. App. 2019), *as amended* (June 6, 2019), *review granted in part* (Aug. 27, 2019), *opinion vacated in part by* 456 P.3d 13 (2020), *as amended* (Feb. 21, 2020). (The quoted language, it should be noted, comes from the court of appeals opinion.)

of appeals vacated.[260] While it agreed that the parties' interests should be balanced, it found that Torres's interests were stronger.[261] Of Terrell, the court observed that while he had married Torres and provided his sperm for IVF, he had later testified that he married her only because she needed health insurance and while "he hoped to have children with [her] '[i]f she survived,' . . . at th[e] time [he signed the consent form] he thought her survival unlikely."[262] Of Torres, the court observed that a fertility specialist's testimony showed, "without the embryos, Torres would be unable to have biological children."[263] The court noted it was unlikely Torres would obtain donor embryos or be approved for adoption.[264] The "waiting list for obtaining donated embryos was long," and Torres was not a good candidate for adoption given "her cancer diagnosis and a genetic mutation 'BRCA1' that increased her cancer risk."[265] Additionally, the court mentioned Torres's statement that "she would not seek child support from Terrell."[266]

The Supreme Court of Arizona, as previously mentioned, vacated in part.[267] It found that interest balancing was inappropriate because the consent form was dispositive and required that the embryos be donated for use by another couple.[268] It therefore did not engage in interest balancing, but the analysis of both lower courts is revealing in a variety of respects. First, under a balancing analysis with even a narrow reading of *Davis's* exception, it seems Torres should prevail: she was (similar to the parties in *Reber* and *Szafranski*) childless, was effectively sterile due to chemotherapy, was lacking in prospects for adoption, and had created the embryos in contemplation of these exact circumstances.

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[260] *Id.* at 684.

[261] *Terrell*, 456 P.3d at 15.

[262] *Terrell*, 438 P.3d at 685.

[263] *Id.* at 686. (Dr. Behera, the fertility specialist, further "testified that Torres' lab work indicated 'low to no' ovarian function. Behera also testified that if Torres took medication to stimulate her ovaries 'it probably would not result in any viable eggs.' Agreeing that only in a 'miraculous situation' Torres could achieve 'a postmenopausal pregnancy,' Behera testified that there was a 'less than 1 percent' chance of that occurring."). *Id.*

[264] *Id.* at 686.

[265] *Id.*

[266] *Id.*

[267] *Terrell*, 456 P.3d at 18.

[268] *Id.* at 14, 18.

Second, the lower courts took different approaches to thinking about reproductive potential: while the family court seemed to mistake sterility, or perhaps extreme infertility, for fertility, the court of appeals took a more nuanced approach and recognized the unlikelihood of Torres actually becoming a parent. Third and finally, the court of appeals took a somewhat atypical approach to the rights at issue: While the family court had "balance[d] what it construed as Torres' 'constitutionally established right to procreate' against Terrell's 'right not to procreate,'" the court of appeals said this was incorrect.[269] According to the court of appeals, there were no constitutional rights at stake. Constitutional rights are "directed at protecting an individual against government intrusion," but here "the parties [had] specifically empowered the court to decide [their] dispute."[270] Thus, the court should consider only the parties' interests.[271]

B. Binary Thinking in the Federal Supreme Court

The binary vision of rights embraced by the state courts discussed in Section II.A is reflective of Federal Supreme Court doctrine. When state court judges describe frozen embryo disputes as "pit[ting] one spouse's right to procreate directly against the other spouse's equivalently important right to avoid procreation[,]"[272] they mirror the Federal Supreme Court's partitioning of substantive due process rights into discrete categories. While the Supreme Court has had little occasion to consider the interrelationship of the right to procreate and the right to avoid procreation (since most litigation raises only one or the other), the opinions of state court judges faced with embryo disputes offer a unique window into that interrelationship when they engage in interest balancing. This section provides an overview of the Federal Supreme Court cases that inform state court decisions about frozen embryos.

Virtually all of the Federal Supreme Court cases reviewed in this section were discussed in the state court decisions described in Section II.A. It is important to note at the outset that the existing doctrine is imbalanced: while the Supreme Court has seldom addressed the right to procreate, it has often opined upon the converse right to avoid procreation. This section is divided into two subsections. The first reviews the right to procreate, and the second reviews the right to avoid procreation. Both attempt to understand

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[269] *Terrell*, 438 P.3d at 693.

[270] *Id.* This is similar to the discussion of the court in *Findley*, discussed above.

[271] *Terrell*, 438 P.3d at 693.

[272] *In re* Marriage of Rooks, 429 P.3d 579, 581 (2018).

the theoretical underpinnings of reproductive rights and the reasons these rights have been viewed as in opposition to each other rather than more holistically.

1. The Right to Procreate

This section explores the right to procreate, broadly conceived, through a survey of Supreme Court cases relating to reproduction. The intent is not to compile an exhaustive list of every reproduction-related decision, but rather to develop an accurate picture of existing doctrine and commonly cited rationales for respecting reproductive rights. Existing rationales are revealed to vary widely across cases: some opinions protect bodies, some protect spaces, some protect choices, and others seem to lack any coherent theorization. Ultimately, the lack of a robustly theorized right to procreate creates a vortex that warps other areas of doctrine.

This section is divided into four subsections: The first examines cases from the 1890s through the 1920s. While some of these early cases showed promise in that they protected bodily integrity and parental decision-making, the 1927 decision of *Buck v. Bell* infamously allowed a forced sterilization and energized the eugenics movement. The second subsection focuses entirely on the seminal 1942 decision of *Skinner v. Oklahoma*, which continues to be the United States Supreme Court's most significant treatment of the right to procreate. The third subsection explores cases on contraception and abortion spanning the 1960s through the present. While several of these cases describe a right to make decisions about procreation, which would presumably protect outcomes favoring procreation, on their facts they are all about the right to avoid procreation. These cases are, therefore, discussed more thoroughly in Section II.B.2. The fourth subsection suggests that there may be hope for a more robust right to reproductive choice in the future. The 2015 decision of *Obergefell v. Hodges*, some scholars have argued,[273] gestures toward this possibility. Were the doctrine thus developed, rights surrounding reproduction would be both expanded and strengthened.

a. The Early Cases (1890s–1920s)

The Supreme Court of the United States has long professed a respect for bodily integrity. In 1891, in *Union Pacific Railway Company v. Botsford*, it ruled that a woman could not be compelled to undergo a physical examination in a personal injury action.[274]

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[273] Courtney Megan Cahill, Obergefell *and the "New" Reproduction*, 100 MINN. L. REV. HEADNOTES 1, 6 (2016).

[274] Union Pac. Ry. v. Botsford, 141 U.S. 250 (1891).

Clara Botsford, who sued Union Pacific for injuries sustained while riding one of its trains, received a favorable verdict without her injury having been assessed in the context of the litigation.[275] In rendering its decision, the Court wrote, "No right is held more sacred . . . than the right of every individual to the possession and control of his own person."[276] It continued, "To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass . . . ."[277] Although the opinion is laden with gendered stereotypes about women and modesty, and although the rules for personal injury plaintiffs have since changed, the broader sentiments about privacy remain.[278] While bodily integrity is often cited as one rationale for respecting reproductive choice, it is strongest in the context of abortion where potential life resides within a woman's body. It does not as easily extend to the context of reproductive technology where gametes are handled outside of the body.

The Court has also long professed a respect for parental decision-making. The 1920s cases of *Meyer v. Nebraska* and *Pierce v. Society of Sisters* both recognize the right of parents "to direct the upbringing and education of children under their control."[279] In *Meyer*, the Court held that the State of Nebraska could not create a "homogenous people" by banning foreign language instruction.[280] In *Pierce*, the Court similarly held that the State of Oregon could not "standardize its children" by mandating public school attendance.[281] Based on this resistance to normalization, one could argue that we respect parental decision-making in part because it promotes diversity. And if we truly respect parental decision-making, perhaps we ought to respect the earliest parental decisions—i.e., decisions about whether, when, and how one becomes a parent. It is worth noting that both *Meyer* and *Pierce*, in dicta, also reference the right to "establish a home and bring up

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[275] *Id.*

[276] *Id.* at 251.

[277] *Id.* at 252.

[278] Anita L. Allen, *Undressing Difference: The Hijab in the West*, 23 BERKELEY J. GENDER L. & JUST. 208, 217 (2008) (book review).

[279] Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (discussing *Meyer*); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[280] *Meyer*, 262 U.S. at 402. The ban applied to children who had not yet completed the eighth grade. *Id*. at 397.

[281] *Pierce*, 268 U.S. at 535.

children[,]" which could arguably encompass decisions about becoming a parent.[282] Courts continue to cite both cases, and parental decision-making continues to garner respect.[283]

In the later 1920s, the Court revealed that, despite its pronouncements in *Botsford*, it does not always protect bodily integrity. It is decidedly less respectful of certain bodies—for example, those of individuals with perceived disabilities. In 1927, it infamously upheld the sterilization of Carrie Buck, a woman who was wrongly labeled "feeble-minded" and confined to a state institution after being raped and bearing an "illegitimate" child.[284] *Buck v. Bell* is one of only two Supreme Court cases addressing the right to procreate, and it resoundingly rejects that right.[285] After wrongly portraying Carrie Buck as the "daughter of a feeble-minded mother" and the "mother of an illegitimate feeble-minded child,"[286] the Court proclaimed, "Three generations of imbeciles are enough."[287] Characterizing its ruling as beneficial not only to society but also to Carrie herself (because infertility would enable her to be released from confinement), the Court dismissed compulsory sterilization as no more burdensome than compulsory vaccination.[288] In sum, *Buck* provides no protection at all for individual choices relating to reproduction.

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[282] *Meyer*, 262 U.S. at 399; *see also Pierce*, 268 U.S. at 534–35 (referring to "the liberty of parents and guardians to direct the upbringing and education of children under their control").

[283] Troxel v. Granville, 530 U.S. 57, 65 (2000). The *Troxel* Court wrote, "More than 75 years ago, in *Meyer v. Nebraska*, we held that the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.' Two years later, in *Pierce v. Society of Sisters*, we again held that the 'liberty of parents and guardians' includes the right 'to direct the upbringing and education of children under their control.'" *Id.* (internal citations omitted).

[284] Buck v. Bell, 274 U.S. 200, 205 (1927); Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 454–55 (2019).

[285] The other case addressing the right to procreate is *Skinner v. Oklahoma*. It is worth noting that, as Professor Khiara Bridges explains, Carrie Buck's attorney "was actually allied with the persons who hoped to sterilize Carrie and others like her." Bridges, *supra* note 284, at 455. *See also* Paul Lombardo, *Facing Carrie Buck*, 33 HASTINGS CTR. REP. 14 (2003).

[286] *Buck*, 274 U.S. at 205. It is evident from Professor Khiara Bridges's account of the case that the tests used to determine intellectual capacity were questionable. Bridges, *supra* note 284, at 454 (citing ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 192 (2016)). Furthermore, Carrie's daughter, Vivian, was only six months old when tested. *Id.*

[287] *Buck*, 274 U.S. at 207.

[288] *Id.*

Yet, astonishingly, *Buck* has not been explicitly overruled.[289] It is cited in *Roe v. Wade* for the proposition that the "right to do with one's body as one pleases" is not "unlimited."[290] Thus, even as the Court handed down *Roe*—its most pro-choice decision to date—it approvingly invoked the memory of state-sponsored eugenics programs and the idea that procreation is only for certain populations. *Buck* was most recently cited in a majority opinion in 2001: the Court's decision in *Board of Trustees of University of Alabama v. Garrett* prevented individuals with disabilities from suing their state employers for violations of the Americans with Disabilities Act of 1990 (ADA).[291] The majority observed that, although *Buck* did not provide any constitutional protection against forced sterilization, states nevertheless appeared to have discontinued the practice by the time the ADA was passed in 1990.[292] Both *Roe* and *Garrett* signal that *Buck* remains valid, even though neither directly raised questions about the right to avoid sterilization or the broader right to procreate. Such questions were, however, raised by the 1942 case of *Skinner v. Oklahoma*,[293] which was the Court's most obvious opportunity to overrule and discredit *Buck*.

b. The Seminal Case—*Skinner* (1942)

Jack Skinner, convicted once of stealing chickens and twice of armed robbery, was labeled a habitual criminal and ordered to undergo sterilization by vasectomy—although a person who had been convicted three times for embezzlement (a white-collar crime) would not have been thus punished.[294] The Habitual Criminal Sterilization Act, in other words, discriminated between blue-collar criminals like Skinner, who were subject to sterilization, and white-collar criminals, who were not. Justice Douglas, writing for the Court, struck the Act as a violation of the fundamental rights prong of the Equal Protection Clause.[295] He observed that, in addition to discriminating, the Act also infringed "one of the basic civil

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[289] Derek Warden, *Ex Tenebris Lux:* Buck v. Bell *and the Americans with Disabilities Act*, 51 U. TOL. L. REV. 57, 62 (2019).

[290] Roe v. Wade, 410 U.S. 113, 154 (1973).

[291] Bd. of Tr. of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001).

[292] *Id.* at 369 n.6.

[293] Skinner v. Oklahoma *ex rel* Williamson, 316 U.S. 535 (1942).

[294] *Id.* at 537–39.

[295] *Id.* at 541.

rights of man"—i.e., "procreation," or "the right to have offspring."[296] He described the right as "fundamental to the very existence and survival of the race."[297] Thus, one reason to respect the right to procreate is that it helps to prevent underpopulation, which may be relevant given that birthrates in the United States have been falling for at least the past decade.[298] Yet, it is very different to refrain from sterilizing someone than to affirmatively assist them in procreating via reproductive technology.

While *Skinner* represents the Court's only direct recognition of the right to procreate, it does not expressly overrule *Buck*.[299] In his concurrence, Justice Stone pointed out that *Skinner* could be distinguished from *Buck* by the procedural protections.[300] While the *Buck* Court professed "no doubt" that Carrie Buck's due process rights had been respected (though in fact historians tell us her lawyer betrayed her),[301] Justice Stone observed that Skinner had not been afforded a similar process.[302] Skinner had not had an "opportunity to be heard on the issue as to whether he is the probable potential parent of socially undesirable offspring."[303] The majority opinion in *Skinner* discusses *Buck* at several points, each of which is carefully worded to avoid coming into conflict with the earlier decision. As Professor Paul Lombardo explains, "There is a common misconception that . . . *Skinner* all but overruled *Buck*[,]" but "[y]ears after the case, Justice Douglas himself reiterated that

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[296] *Id.* at 536, 541.

[297] *Id.* at 541.

[298] Melissa S. Kearney & Phillip Levine, *Will Births in the U.S. Rebound? Probably Not*, BROOKINGS INST. (May 24, 2021), https://www.brookings.edu/blog/up-front/2021/05/24/will-births-in-the-us-rebound-probably-not/ [https://perma.cc/595S-GZ2N] (suggesting that "low birth rates and below replacement level fertility rates in the U.S. are probably here to stay for the foreseeable future"). *See also* Karen Kaplan, *Americans Keep Having Fewer Babies as U.S. Birthrates Hit Some Record Lows*, L.A. TIMES (June 30, 2017), http://www.latimes.com/science/sciencenow/la-sci-sn-us-birth-rate-20170630-htmlstory.html [https://perma.cc/MBF8-TCXH] (explaining that while the U.S. birthrate has, since 1971, been lower than necessary to replace the previous generation, immigration has increased the population).

[299] Warden, *supra* note 289, at 62.

[300] *Skinner*, 316 U.S. at 543-45 (Stone, J., concurring); PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES 232 (2008).

[301] Buck v. Bell, 274 U.S. 200, 207 (1927). As Professor Lombardo tells us, Carrie Buck's lawyer "actually betrayed her, by neglecting to challenge the claims of eugenicists who testified at her trial and colluding with the state's lawyer to guarantee that the sterilization law would remain in force." Lombardo, *supra* note 285.

[302] *Skinner*, 316 U.S. at 544 (Stone, J., concurring).

[303] *Id.* at 538 (majority), 544 (Stone, J., concurring).

there was no desire by the *Skinner* [C]ourt to overrule *Buck*."[304] Thus, the two cases coexist despite the tension between them.

One of the more sustained discussions of these two cases appears in Justice Marshall's dissent, joined by Justice Douglas, in *San Antonio Independent School District v. Rodriguez*.[305] Decided in 1973 (the same year as *Roe*), *Rodriguez* upheld Texas's property tax reliant school financing system against an equal protection challenge.[306] Justice Marshall, in his dissent, used the right to procreate as an example in opining on "whether [a given] interest is fundamental for purposes of equal protection analysis."[307] He observed that, while the *Buck* Court had refused to recognize the right to procreate, the *Skinner* Court, "without impugning the continuing validity of *Buck*[,]" had pronounced procreation "fundamental to the very existence and survival of the race."[308] He continued by noting that, although the *Roe* Court had recognized the "importance of procreation," the "limited stature" of "any 'right' to procreate is evident from the fact that [the *Roe* Court] reaffirmed its initial decision in *Buck v. Bell*."[309] Justice Marshall, in other words, recognized the embattled status of the right to procreate.

Since 1973, the Supreme Court and various justices have occasionally referenced *Skinner* as protecting choices concerning procreation.[310] In *Zablocki v. Redhail* (1978), where the Court struck a statute limiting the marriage rights of parents under child support obligations, *Skinner* was cited as protecting "personal decisions 'relating to . . . procreation[.]'"[311] In *Planned Parenthood v. Casey* (1992), which will be discussed further

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[304] LOMBARDO, *supra* note 300.

[305] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 70–134 (1973).

[306] *Id.* at 100–01 (Marshall, J., Dissenting).

[307] *Id.* at 100.

[308] *Id.*

[309] *Id.* at 100–01.

[310] There are several more cases than are mentioned in this paragraph, which is focused on only the most significant instances. For example, in *Cruzan v. Director, Missouri Department of Health* (1990), as he dissented from the Court's decision, Justice Stevens commented that Skinner's sterilization had been barred because it would have interfered with "bodily integrity" as well as "'marriage and procreation,'" which concern "'the basic civil rights of man.'" Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 342 (1990).

[311] Zablocki v. Redhail, 434 U.S. 374, 385 (1978) (internal citations omitted). The full list is as follows: "[R]elating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.*

below, *Skinner* was cited by the joint opinion as limiting "a State's right to interfere with a person's most basic decisions about family and parenthood."[312] In *Washington v. Glucksberg* (1997), where the Court upheld a state ban on physician-assisted suicide, *Skinner* was cited as establishing that liberty "includes the right[] . . . to have children."[313] Justice Souter, concurring, described *Skinner* as having "added decisions regarding procreation to the list of liberties recognized in *Meyer* and *Pierce* and loosely suggested . . . a judicial obligation to scrutinize any impingement on such an important interest with heightened care."[314] Yet, despite these later opinions, *Buck v. Bell* has not been overruled and procreative rights remain enigmatic.[315]

c. *Obergefell* as a Right to Procreate Case?

Perhaps surprisingly, *Obergefell v. Hodges*—the 2015 decision that gave us nationwide marriage equality—may offer some guidance.[316] The *Obergefell* Court observed that "choices concerning . . . procreation . . . are protected by the Constitution."[317] According to Professor Courtney Cahill, "*Obergefell* suggests that procreation is a fundamental right under the Due Process Clause[.]"[318] She points in part to its description of *Skinner* as striking Oklahoma's sterilization policy because it violated guarantees of both

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It then observed, "[I]f [Redhail's] right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place." *Id.* at 386. At the time, Wisconsin banned fornication, though this would not be permissible under current doctrine. *Id.* at 386 n.11; Lawrence v. Texas, 539 U.S. 558 (2003) (striking a state sodomy ban on due process grounds); Martin v. Ziherl, 607 S.E.2d 367 (2005) (striking a state fornication statute based on *Lawrence*). The *Martin* court stated, "[A]pplying the reasoning of *Lawrence* as Martin asks us to do, leads us to conclude that [the challenged fornication statute] is unconstitutional because by subjecting certain private sexual conduct between two consenting adults to criminal penalties it infringes on the rights of adults to 'engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.'" *Martin*, 607 S.E.2d at 371.

[312] Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992).

[313] Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

[314] *Id.* at 762 (Souter, J., concurring).

[315] There is a rich scholarship exploring *Skinner* and its implications, but further discussion is beyond the scope of this article.

[316] Obergefell v. Hodges, 576 U.S. 644 (2015).

[317] *Id.* at 666.

[318] Cahill, *supra* note 273, at 6.

liberty and equality.[319] If *Skinner*, via *Obergefell*, protects a right to procreative liberty (rather than a more limited right to "equal liberty," which is only triggered when a particular group is targeted), she argues, "*Obergefell* provides an opening for . . . a robust articulation of procreation's substantive constitutional dimension."[320]

Obergefell is not directly about reproduction, so any commentary on the right remains dicta—"an opening," as Professor Cahill puts it, rather than a final conclusion. Yet her work illuminates the ways a more robustly articulated right could alter the state's ability to regulate reproductive technologies.[321] It also highlights *Obergefell's* important move toward "constitutional parity between sexual and alternative reproduction."[322] Both have transformative potential.

The extent to which the right to procreate is protected remains a matter of debate. *Skinner* was decided in 1942, and *Buck*—though it preceded *Skinner*—has not been overruled but instead has since been reaffirmed.[323] While some modern cases reference the right to "deci[de] whether to bear or beget a child,"[324] which would seem to protect either decision (to avoid or go forward with procreation), they all focus on the right not to procreate. Abortion debates loom large in our cultural and political landscape, and some scholars have argued that the presence of abortion-related issues in a case often "overwhelm[s]" a court and "distort[s] the doctrine."[325] The dominance and frequency of

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[319] *Id.* at 8.

[320] *Id*. The "equal liberty" reading of *Skinner* arises because, as previously discussed, it was decided under the fundamental rights prong of the Equal Protection Clause. *Skinner*, 316 U.S. at 541. Professor Cahill explains that "[t]his more restrained reading of Skinner avers that the Constitution prohibits the state from passing certain laws that curb the procreative liberties of particular groups, not from passing certain laws that curb the procreative liberties of everyone." Cahill, *supra* note 273, at 7.

[321] Cahill, *supra* note 273, at 2 (arguing that *Obergefell* "destabilizes both traditionalist and non-traditionalist justifications for alternative reproductive regulation").

[322] *Id.* at 8–10.

[323] Warden, *supra* note 289, at 62.

[324] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Roe v. Wade, 410 U.S. 113, 153 (1973) (stating that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); Lawrence v. Texas, 539 U.S. 558, 565 (2003) (quoting *Eisenstadt*, 405 U.S. at 453).

[325] Mark Rienzi, *Symposium:* NIFLA v. Becerra – *A Supreme Housecleaning Continues?*, SCOTUSBLOG (Dec. 14, 2017), http://www.scotusblog.com/2017/12/symposium-nifla-v-becerra-supreme-housecleaning-

cases involving abortion, coupled with the lack of Supreme Court cases involving parties who wish to have children, renders the right to procreate enigmatic. In an era where 1.5% of births are the result of reproductive technology,[326] a case directly addressing the right—and ideally, moving the doctrine toward a more inclusive and holistic view of reproductive choice—would be beneficial.

2. The Right Not to Procreate

In 1965, *Griswold v. Connecticut* became the first in a long series of cases addressing the right not to procreate.[327] Estelle Griswold and Lee Buxton, leaders within the Planned Parenthood League of Connecticut, advised married people on the use of contraception.[328] They were found guilty (as accessories) of violating a statute banning the use of contraception.[329] The Court struck the statute as infringing a constitutional right of privacy.[330] While the justices disagreed on the precise constitutional basis of the right, the majority viewed it as emanating from a variety of "specific guarantees in the Bill of Rights."[331] Yet the right recognized in *Griswold* was quite limited: the Court wrote, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[332] While *Griswold* evinced new respect for reproductive rights, its rationale of protecting married couples in their bedrooms was not easily extendible to other contexts. Its focus on marriage and the physical space of the bedroom was deeply conservative, even as the doctrinal leap into modern substantive due process suggested more progressive possibilities.

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continues/ [https://perma.cc/2VJ9-NBB7] (arguing that the presence of abortion-related issues has distorted free speech doctrine).

[326] *Number of Test-Tube Babies Born in U.S. Hits Record Percentage*, REUTERS (Feb. 17, 2014), https://www.reuters.com/article/health-testtube-babies/number-of-test-tube-babies-born-in-u-s-hits-record-percentage-idUSL2N0LL0A520140217 [https://perma.cc/3RQL-GB8F].

[327] Griswold v. Connecticut, 381 U.S. 479 (1965).

[328] *Id.* at 480.

[329] *Id.*

[330] *Id.* at 485–86.

[331] *Id.* at 484.

[332] *Id.* at 485–86.

Eisenstadt v. Baird, decided in 1972, was more transformative.[333] Like *Griswold*, it considered the constitutionality of contraception laws.[334] Bill Baird, a reproductive rights activist, was convicted of giving an unmarried woman contraceptives in deliberate violation of a Massachusetts law.[335] Because the law afforded married persons greater access to contraception than unmarried persons, the Court asked whether the law could survive rational basis review under the Equal Protection Clause.[336] While avoiding a direct due process analysis, the Court commented, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[337] This is significant for two reasons: First, it shifts the focus away from marriage. The Court observed that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[338] Second, it shifts the focus away from the bedroom. The right to decide presumably protects a decision not to procreate as well as a decision to procreate. It accompanies a person wherever she goes, such as (for example) the office of an abortion provider. Notably, when the Court decided *Eisenstadt*, it had already heard arguments in *Roe v. Wade*, which was decided the next term.[339]

Roe v. Wade was, of course, momentous.[340] It not only recognized the right to abortion, it also applied strict scrutiny to laws burdening that right, which it situated in the Due Process Clause of the Fourteenth Amendment.[341] The *Roe* Court emphasized that the right of privacy, which at the time was the anchor for the right to abortion, included not only a

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[333] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[334] *Id.*

[335] *Id.* at 440.

[336] *Id.* at 447.

[337] *Id.* at 453.

[338] *Id.*

[339] Roe v. Wade, 410 U.S. 113 (1973).

[340] *Id.*

[341] *Id.* at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

woman's right to "deci[de] whether or not to terminate her pregnancy,"[342] but also had "some extension to activities related to marriage, procreation, contraception, family relationships, and child-rearing and education."[343] The Court protected the right to abortion, in part, because of the psychological harm that could befall a woman forced to bear and care for an unwanted child.[344] Justice Stewart, concurring, noted that the right was protected because "'a woman [gives] of her physical and emotional self during pregnancy and . . . will be affected throughout her life by the birth and raising of a child.'"[345] While this language suggests some concern for the pregnant woman's ability to self-determine, part of the majority opinion (troublingly) confers substantial decision-making power on her attending physician.[346] As previously noted, the *Roe* Court declined to recognize "an unlimited right to do with one's body as one pleases."[347] The right to abortion was against various state interests, resulting in the well-known (but no longer current) trimester framework.[348]

To the extent that the right to abortion is a right to physical autonomy, it follows that it is a right held by the pregnant woman and not by the prospective father. In 1976, in *Planned Parenthood v. Danforth*, the Court invalidated a requirement of spousal consent prior to abortion.[349] It observed that "when the wife and the husband disagree on this

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[342] *Id.*

[343] *Id.* at 152–53 (internal citations omitted). Justice Stewart, concurring, placed the right of abortion among other "personal choice[s] in matters of marriage and family life" such as selecting one's own partner in marriage and directing the upbringing of one's own children. *Id.* at 168 (Stewart, J., concurring).

[344] *Id.* at 153 ("Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.").

[345] *Id.* at 170 (Stewart, J., concurring) (quoting Abele v. Markle, 351 F. Supp. 224, 227 (D.Conn. 1972)).

[346] *Id.* at 164 ("For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.").

[347] *Id.* at 154, *citing* Buck v. Bell, 274 U.S. 200 (1927).

[348] *Id.* at 154, 164–65.

[349] Planned Parenthood v. Danforth, 428 U.S. 52, 67-68 (1976) ("Section 3(3) requires the prior written consent of the spouse of the woman seeking an abortion during the first 12 weeks of pregnancy, unless 'the abortion is

decision, the view of only one of the two marriage partners can prevail."[350] And it continued, "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[351] The abortion decision, therefore, belongs exclusively to the pregnant woman. Yet this passage does not answer the question that arises in disputes over frozen embryos, where the potential life resides in a cryobank rather than in the woman's body. Of course, it does tell us that a woman could not be forced to undergo an embryo transfer and gestate the resulting fetus. But given the possibility of surrogacy, this would not be necessary for the male progenitor to exercise his procreative rights.

During the later 1970s and 1980s, the Court heard several more cases involving abortion regulations. The Court invalidated most of the regulations, with the notable exception of those that limited funding for abortions.[352] By 1991, it was clearly established that the right to abortion does not encompass a right to funding for abortion, and that the government may prefer childbirth over abortion.[353] While these funding decisions do not directly speak to whether there is a right to funding for procreation (for example, via IVF), they suggest that there is not—and, of course, in reality there is not. While some states have required that insurance companies cover the cost of certain infertility treatments, by default these treatments operate like abortion: a woman may access them if she can pay for them herself.[354] Yet perhaps, if the question had been whether the Constitution protects a right

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certified by a licensed physician to be necessary in order to preserve the life of the mother.'" (quoting MO. REV. STAT. § 559.100)).

[350] *Id.* at 71.

[351] *Id.*

[352] Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform*, 15 CUNY L. REV. 391, 395-96 (2012). Those that limited funding included Beal v. Doe, 432 U.S. 438 (1977), Maher v. Roe, 432 U.S. 464 (1977), and Harris v. McRae, 448 U.S. 297 (1980). *Id.* (also citing Linda J. Wharton et al., *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 324, 324 n.32 (2006)).

[353] Soohoo, *supra* note 352, at 408 ("Relying on *Maher*, in *Webster* and *Rust* the Supreme Court rejected the claim that 'unequal subsidization' violated the Constitution, finding instead that the government can 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'"). *See also* Webster v. Reproductive Health Services, 492 U.S. 490 (1989) and Rust v. Sullivan, 500 U.S. 173 (1991).

[354] Marissa A. Mastroianni, *Bridging the Gap Between the "Have" and the "Have Nots": The ACA Prohibits Insurance Coverage Discrimination Based Upon Infertility Status*, 79 ALB. L. REV. 151, 163–64 (2015-16). Health insurance companies typically do not cover treatments for infertility. Michelle J. Bayefsky et al.,

to funding for all choices surrounding procreation rather than whether it protects a right to funding for abortion, the debate would have unfolded differently—especially given the relatively deeper respect for reproductive autonomy that existed from the time *Roe* was decided until the late 1980s.[355]

When *Planned Parenthood v. Casey* reached the Supreme Court in 1992, many expected *Roe v. Wade* to be overruled.[356] Instead, the joint opinion authored by Justice O'Connor and joined by Justices Kennedy and Souter reaffirmed *Roe*'s "essential holding,"[357] even as it eroded many of the strong protections *Roe* had provided.[358] The joint opinion, importantly, contained expansive language about the liberty component of the Due Process Clause. Liberty, it explained, protects choices about procreation because those choices are "central to personal dignity and autonomy[.]"[359] Liberty also protects "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[360] This passage, which is incorporated into the majority opinion in *Lawrence v. Texas*,[361] evinces a deep respect for reproductive self-determination.

The undue burden standard developed in *Casey*, which remains the current standard for assessing abortion regulations, has been applied and elaborated in several subsequent cases.[362] While it has at times appeared substantially weakened—to the point that some have equated it with rational basis review[363]—it was reaffirmed in the 2016 decision of

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Compensation for Egg Donation: A Zero-Sum Game, 105 FERTILITY & STERILITY 1153, 1153–54 (2016). While fifteen states do require that insurance companies cover such treatments, most of them exclude IVF. *Id.*

[355] *Webster* signaled the end of this respect.

[356] Wharton et al., *supra* note 352, at 324–25.

[357] Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

[358] Wharton et al., *supra* note 352, at 330 ("[T]he joint opinion also altered key aspects of *Roe v. Wade*, rejecting *Roe*'s strict scrutiny standard as well as its trimester framework and adopting a more permissive 'undue burden' standard.").

[359] *Casey*, 505 U.S. at 851.

[360] *Id.*

[361] Lawrence v. Texas, 539 U.S. 558, 574 (2003).

[362] *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914 (2000).

Whole Woman's Health v. Hellerstedt.[364] There, the Court made clear that the standard is more stringent than rational basis review as it invalidated two TRAP ("Targeted Regulation of Abortion Providers") laws that imposed an undue burden on the right to a pre-viability abortion.[365] *Casey*'s protections, in other words, retained their power, albeit without robust theorization. As Linda Greenhouse and Reva Siegel have explained, although "*Whole Woman's Health* does not expressly discuss the constitutional values at the core of the abortion right . . . [c]oncern for protecting women's liberty, equality, and dignity guides the majority's [analysis]."[366] More recently, in *June Medical Services v. Russo*, the Court was deeply divided and failed to produce a majority opinion.[367] While *Casey* remains controlling, different justices read *Casey*'s joint opinion differently and the Chief Justice (who provided the fifth vote in *June Medical*) read it more narrowly than the plurality.[368] Ultimately, while these cases on the right to avoid procreation are relevant to frozen embryo disputes, the undue burden standard—organized as it is around the pre- and post-viability time periods—does not provide direct guidance.

Examining the right to procreate cases together with the right to avoid procreation cases, it becomes clear that the Court's vision of reproduction is binary, narrow, and insensitive to context. Parties are perceived as either wanting to procreate or wanting to avoid procreation, and courts are inattentive to the fluidity and complexity of pregnancy and pregnancy intentions. Ultimately, the reproductive rights doctrine protects two discrete, negative rights that are viewed by most judges as operating in a binary opposition. The primary beneficiaries of these relatively weak rights are those who already have the privilege and financial means to make choices about whether, when, and how they wish to have children.

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[363] Gonzales v. Carhart, 550 U.S. 124 (2007). *See* Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right after* Whole Woman's Health, 126 YALE L.J. F. 149, 149 (2016) ("Opponents of the abortion right asserted that after the Court decided *Gonzales v. Carhart*, upholding the Partial Birth Abortion Ban Act, the *Casey* framework meant little more than rational basis deference to legislative decision making.").

[364] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

[365] *Whole Woman's Health*, 136 S. Ct. at 2292; Greenhouse & Siegel, *supra* note 363, at 150 (stating that *Whole Woman's Health* "repudiates rational-basis claims about *Casey*").

[366] Greenhouse & Siegel, *supra* note 363, at 163.

[367] June Medical Services v. Russo, 140 S. Ct. 2103 (2020).

[368] *Id.*

III. Moving Beyond Binaries: Reproductive Indeterminacy

Given the binarism, narrowness, and non-contextual nature of judicial thinking, Part III deploys the feminist work described in Part I to deconstruct the discursive structures described in Part II and move us toward a more expansive understanding of reproduction and reproductive rights. Judicial discussions of reproduction are not reflective of its fluidity, complexity, and indeterminacy. Reproductive potential is not captured by either/or statements because infertility is difficult to diagnose and even with treatment outcomes are highly uncertain. Reproductive intentions are not experienced in either/or terms because procreative plans are highly contextual. It matters whether, when, and how one becomes a parent. Similarly, reproductive rights should not be limited to either the right to procreate or the right to avoid procreation, especially when both are narrow, negative rights and the former is doctrinally undeveloped. Using the work of postmodern feminists, we can deconstruct binary conceptions about reproduction and reproductive rights; using the work of reproductive justice advocates, we can expand our understanding of the reproductive experience and reproductive rights. These are not binary, but in fact exist along a multi-dimensional spectrum.

Part III is divided into two sections: The first explores the complexity and uncertainty of reproduction, with a focus on IVF and related reproductive technologies. It attempts to provide a window into the lived experience of the parties involved in frozen embryo disputes, including the uncertainty that lies ahead of them if they are able to either use the contested embryos or pursue further treatment. It shows the level of investment—physical, emotional, and in most cases financial—required of women going through IVF and (if successful) pregnancy and childbirth. The second section draws on the feminist work described in Part I to argue in favor of moving beyond the binaries described in Part II. Postmodern feminist theory reveals that the binaries judges so often embrace in discussing reproduction are not reflective of reality. Reproductive justice scholarship reminds us to attend to the lived experience of reproduction, which is full of complexity, contingency, and indeterminacy. Ultimately, Part III asserts that by cultivating a deeper understanding of reproduction, we can move toward a more expansive and holistic vision of reproductive rights.

A. The Lived Experience of Embryo Creation and Use

Virtually all reproductive endeavors are characterized by complexity and indeterminacy, and the IVF process (used by all the couples involved in the cases described in Section II.A) is especially so. But it is important to understand that IVF is not the beginning of fertility treatment—first, there is the diagnosis of infertility, and then there

are oftentimes lesser interventions like ovulation induction or intrauterine insemination.[369] This section reviews just some of the complexity and uncertainty that accompany the diagnosis of infertility, some of the less invasive treatments, the IVF and embryo creation processes, and finally pregnancy, childbirth, and the neonatal period. It reveals that there are no clear categories or predictable outcomes. Patients seeking fertility treatment engage in sustained decision-making over lengthy periods of time, and the decisions they must make are highly contextual and rest on information that is constantly evolving. Testing often leads to more testing, and may never reach a definitive conclusion. As mentioned earlier,[370] a woman who has used IVF to achieve a much-desired pregnancy might, if faced with a devastating diagnosis, choose abortion. Reproductive potential (e.g., fertile or not), intentions (e.g., to procreate or not), and outcomes (e.g., parent or not) are not binary or simplistic, despite their treatment in judicial opinions. This section—in recognition of lessons learned from postmodern feminism and reproductive justice—explores their complexities.

Reproductive potential is not fully captured by the terms fertility, infertility, or sterility—it exists on a spectrum, is fluid over time, and is difficult to pinpoint. This makes reproductive decision-making particularly challenging, including in the IVF context where patients must constantly consider whether they have the will and means to go forward by investing increasingly greater levels of physical, emotional, and financial resources. Patients (if they are well-informed) make these decisions with full knowledge that reproductive outcomes are never guaranteed. An example from one of the cases discussed in Section II.A is instructive: the doctor of a woman whose retrieval had produced eighteen eggs—twelve of which were successfully inseminated and five of which grew as desired over the following three days—estimated that if they had done a fresh transfer of the embryos at that point, "she would have had a 25 percent chance of a single live birth."[371] This reminds us that one cannot know in advance whether fertility medications will produce gametes, gametes will create embryos, embryos will lead to pregnancy, or pregnancy will result in a live birth. Indeterminacy and contingency are the norms in reproduction.

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[369] George Kofinas, *3 Fertility Treatment Options to Consider Before You Try IVF*, KOFINAS FERTILITY GRP. (Jan. 2, 2019), https://www.kofinasfertility.com/patient-info/3-fertility-treatment-options-before-ivf [https://perma.cc/79B8-WA65].

[370] *See supra* Section I.C.

[371] Findley v. Lee, No. FDI-13-780539, 2016 WL 270083, at *10 (2016). Note that this was a high number of eggs to retrieve for a forty-one-year-old woman. *Id.*

To understand the diagnosis of infertility, which led many of the parties in the cases from Section II.A to IVF, it is important to understand the terminology used to describe reproductive potential. Perhaps reflecting the Western impulse to organize the world into binary oppositions, the flagship journal of the American Society for Reproductive Medicine (ASRM) is titled *Fertility and Sterility*—although much of its content relates to the treatment and exploration of infertility.[372] Within the pages of *Fertility and Sterility*, one finds *The International Glossary on Infertility Care and Fertility Care, 2017* ("*The Glossary*"), which provides working definitions of fertility, sterility, and infertility.[373] According to *The Glossary*, fertility refers to the "capacity to establish a clinical pregnancy;" sterility is a "permanent state of infertility;" and infertility is a "disease characterized by the failure to establish a clinical pregnancy after 12 months of regular, unprotected sexual intercourse or due to an impairment of a person's capacity to reproduce either as an individual or with his/her partner."[374] The authors of *The Glossary* warn that "it is crucial to avoid the assumption that a diagnosis of infertility implies sterility."[375] However, as Section II.A illustrated, courts adjudicating frozen embryo disputes often implicitly make the opposite assumption—that anything short of sterility counts as fertility (i.e., suggests a reasonable path to parenthood). Ultimately, an assumption in either direction is problematic.

Even for fertile couples, there is a substantial amount of uncertainty. The monthly success rate for a fertile couple to conceive is only about 20%.[376] For the 12–13% of couples who experience infertility,[377] the success rate is much lower than that without

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[372] *Aims & Scope*, FERTILITY & STERILITY, https://www.fertstert.org/content/aims [https://perma.cc/RK64-W84C].

[373] Zegers-Hochschild, *supra* note 1.

[374] *Id.* at 399, 401, 405.

[375] *Id.* at 395.

[376] SOC'Y FOR ASSISTED REPRODUCTIVE TECH., *ART Q&A*, *supra* note 53; *Ovulation Induction and Intrauterine Insemination, Overview*, YALE MED., https://www.yalemedicine.org/conditions/ovulation-induction-intrauterine-insemination [https://perma.cc/2F5Y-4294] ("'[I]t's important to note that the chance of *any* pregnancy in a young, healthy couple with no fertility issues is, at best, about 20 percent each month.'").

[377] *Understanding Fertility: The Basics*, OFF. OF POPULATION AFFS., https://opa.hhs.gov/reproductive-health/understanding-fertility-basics [https://perma.cc/9FUY-W34K]. I have focused on couples in this statistic, because the parties involved in the cases I discuss were couples when they created the embryos in question. Notably, as many as 20-30% of this 12-13% receive no clear diagnosis, but are instead told that they have "unexplained infertility." Heather Huhman, *5 Frustrating Facts About Unexplained Infertility . . . and*

treatment.[378] With treatment, the chances of success vary widely depending on the patient and type of cycle (for example, the average success rate in a cycle using frozen embryos is higher than in a cycle using fresh embryos[379]), so it is almost meaningless to give an overall success rate for IVF. While the Society for Assisted Reproductive Technology (SART) reports that "[t]he average live delivery rate for IVF in 2005 was 31.6% per retrieval,"[380] their webpage on success rates provides little overall guidance.[381] Instead, their website offers patients a calculator called "What are my chances with ART?"[382] It asks the patient to report her age, height, weight, prior pregnancies (including ectopic and biochemical pregnancies, as well as pregnancies that ended in therapeutic or spontaneous abortion, stillbirth, or live birth), prior full-term births (including stillbirths and live births), type of infertility diagnosis, and whether she plans to use her own eggs or donor eggs.[383] The calculator then predicts the chances of a live birth after one, two, and three cycles of treatment. The website highlights that it does "not take into account all the possible factors that may influence the probability of a live birth" and that the estimates may or may not apply in a given case.[384]

How to Cope, HUFFPOST BLOG (June 23, 2015), https://www.huffpost.com/entry/5-frustrating-facts-about_b_7632640 [https://perma.cc/V9EZ-CYCD].

[378] SOC'Y FOR ASSISTED REPRODUCTIVE TECH., *ART Q&A*, *supra* note 53; Gurevich, *supra* note 50.

[379] IVF Delivery Rate / Cycle (infographic), *Deliveries*, SOC'Y FOR ASSISTED REPRODUCTIVE TECH., https://www.sart.org/globalassets/__sart/infographics/more-deliveries.png [https://perma.cc/J5YP-F5HU]. The rate of success with frozen embryos is close to 50%, whereas the rate using fresh embryos is close to 20%. *Id.*

[380] *Does In Vitro Fertilization Work?*, SOC'Y FOR ASSISTED REPRODUCTIVE TECH., https://www.sart.org/patients/frequently-asked-questions/ [https://perma.cc/E9V4-F4WL] ("The average live delivery rate for IVF in 2005 was 31.6 percent per retrieval – a little better than the 20 per cent chance in any given month that a reproductively healthy couple has of achieving a pregnancy and carrying it to term."). It should be noted that since the 1980s, SART has collected data on IVF outcomes. *Id.* Since the 1990s, fertility clinics have been federally mandated to report their IVF outcomes. Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. § 263a-1.

[381] SOC'Y FOR ASSISTED REPRODUCTIVE TECH., *ART Q&A*, *supra* note 53; SOC'Y FOR ASSISTED REPRODUCTIVE TECH., *Deliveries*, *supra* note 379.

[382] *What Are My Chances with ART?*, SOC'Y FOR ASSISTED REPRODUCTIVE TECH., https://www.sartcorsonline.com/Predictor/Patient/ [https://perma.cc/GQ7F-EADK].

[383] *Id.*

[384] *Id.*

Complicating the analysis is that not only are there many different reasons for infertility, but it is often difficult for doctors to identify the exact reason a couple has not conceived.[385] About 25% of couples having fertility issues are diagnosed with "unexplained infertility."[386] Some of them, without treatment, will conceive and give birth;[387] others will not. Following a diagnosis of infertility, people often assume IVF is the next step (assuming the resources are available), but IVF is not always necessary or appropriate. If a couple is trying to establish a pregnancy immediately (rather than preserve embryos for later use, for example after chemotherapy), they may pursue a different intervention like ovulation induction followed by timed intercourse.[388] This involves using fertility medications and monitoring follicle growth via ultrasound.[389] If and when a mature follicle develops, ovulation is triggered and the couple is directed to engage in intercourse on a timed schedule.[390] This method, some clinics report, can bring infertile couples up to a 20–25% success rate per cycle.[391]

If a couple decides to pursue IVF, they will (assuming treatment is successful) proceed through at least five phases.[392] Each phase has its own unique challenges and as Elissa Strauss, who writes articles and blog posts about parenthood, explained in a piece about IVF, "[E]ven the highest probability of success is not enough to combat the vulnerability one feels when pumped full of hormones and a longing to conceive."[393] She also observed

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[385] The SART calculator includes the following options for describing an infertility diagnosis: male factor, endometriosis, ovulation disorder, diminished ovarian reserve, uterine factors, tubal ligation, tubal hydrosalpinx, other tubal problems, two "other" categories, and "unexplained." *Id.*

[386] Gurevich, *supra* note 50.

[387] *Id.*

[388] Kofinas, *supra* note 369.

[389] *Ovulation Induction & Timed Intercourse*, VIOS FERTILITY INST., https://viosfertility.com/infertility-treatments/basic/ovulation-induction/ [https://perma.cc/H3L2-2LFG]; Kofinas, *supra* note 369.

[390] *Timed Intercourse: The Basics*, SHADY GROVE FERTILITY, https://www.shadygrovefertility.com/treatments-success/basic-treatments/timed-intercourse [https://perma.cc/J24U-A8KA].

[391] YALE MED., *supra* note 376.

[392] *See IVF Process*, ASPIRE FERTILITY (2021), https://www.aspirefertility.com/fertility-treatment/ivf/ivf-process [https://perma.cc/32RU-87L7]; *see also IVF Treatment*, CCRM FERTILITY (2021), https://www.ccrmivf.com/services/ivf-fertilization/ [https://perma.cc/8S44-EH4E].

[393] Strauss, *supra* note 57.

that some women diagnosed with infertility "are still embarrassed or ashamed to share the news with family and friends[, because of] stigma rooted in one of the oldest patriarchal tropes in the book: a woman's worth lies in the fecundity of her womb."[394] As difficult as IVF is to pursue, it is surely more difficult without a support system. The first phase of IVF is pre-cycle preparation. This phase can be extensive and typically includes blood testing, physical examinations, and taking oral contraception to "decrease the chances of forming cysts," "synchronize the egg follicles," and "allow the physician and patient to control the timing of the cycle."[395]

The second phase is ovarian stimulation. Whereas outside the IVF context, one cycle would typically produce one mature egg, in the IVF context, one cycle is intended to develop "as many mature eggs as possible."[396] To that end, the patient injects herself with a variety of hormones (including follicle-stimulating hormone (FSH) and luteinizing hormone (LH)) for around one to two weeks.[397] This requires some training, and specialty pharmacies make videos available online to guide patients through the injections.[398] Elissa Strauss writes of this phase:

> There are regular early morning visits to the doctor's office, where blood is drawn and vaginal ultrasounds are administered—often by perfect strangers. There are giant boxes of syringes, needles, powders[,] and diluents sent directly to your house, and you—who has never shot a needle into anyone before—are expected to mix, measure[,] and self-administer these crucial and expensive drugs on a regular basis.[399]

The medications used in IVF can cause "headaches, mood swings, abdominal pain, hot flashes, abdominal bloating, [and in rare cases] ovarian hyperstimulation syndrome

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[394] *Id.*

[395] ASPIRE FERTILITY, *supra* note 392.

[396] *See* ASPIRE FERTILITY, *supra* note 392. *See, e.g.*, *Fertility Injection Training Videos*, AVELLA SPECIALTY PHARMACY (2021), https://www.avella.com/fertility-injection-training-videos [https://perma.cc/JZG6-PNL7]; *Fertility Medication Information*, CCRM FERTILITY (2021), https://www.ccrmivf.com/medication-teaching/ [https://perma.cc/38AZ-2W6R] [hereinafter CCRM FERTILITY, *Fertility Medication Info.*].

[397] ASPIRE FERTILITY, *supra* note 392; CCRM FERTILITY, *Fertility Med. Info.*, *supra* note 396.

[398] *See, e.g.*, AVELLA SPECIALTY PHARMACY, *supra* note 396; CCRM FERTILITY, *Fertility Medication Info.*, *supra* note 396.

[399] Strauss, *supra* note 57.

(OHSS)."[400] Doctors must carefully monitor the ovaries via transvaginal ultrasounds and also track hormone levels via blood tests.[401] This second phase concludes with an injection of human chorionic gonadotropin (hCG), which helps the eggs mature and prompts ovulation.[402]

The third phase—the egg retrieval—must be carefully timed to occur at exactly the right interval after the injection of hCG (i.e., just before ovulation).[403] In this phase, a needle guided by ultrasound is inserted into each ovary to drain the "fluid and eggs from each mature follicle."[404] The retrieval is considered minor surgery,[405] and it is associated with a variety of risks, including "bleeding, infection, and damage to the bowel or bladder."[406] After an egg retrieval, patients may experience, among other things, "mild cramping [and/or] bloating, constipation, [and] breast tenderness."[407] The fourth phase is fertilization and embryo development. Once the embryologist has sorted, identified, and prepared the eggs, she fertilizes them using a technique called intracytoplasmic sperm injection (ICSI).[408] The embryos are then grown in the lab for five or six days,[409] at which point there can be genetic testing if the patient wishes.[410] The fifth and final phase can be immediate embryo transfer, cryopreservation of the embryos for later use (which is required for genetic testing), or some combination of the two.[411]

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[400] AM. PREGNANCY ASS'N, *supra* note 4.

[401] *Id.*

[402] ASPIRE FERTILITY, *supra* note 392.

[403] *See id.*

[404] *Id.*

[405] AM. PREGNANCY ASS'N, *supra* note 4.

[406] *Id.*

[407] *Id.*

[408] *See* ASPIRE FERTILITY, *supra* note 392.

[409] *Id.*

[410] *See* CCRM FERTILITY, *IVF Treatment*, *supra* note 392. For a discussion of some of the possibilities for genetic testing, see Jessica Knouse, *Reconciling Liberty and Equality in the Debate over Preimplantation Genetic Diagnosis*, 2013 UTAH L. REV. 107 (2013).

[411] *See* ASPIRE FERTILITY, *supra* note 392.

To cryopreserve embryos, an embryologist replaces the water in their cells with cryoprotectant and then flash-freezes them through a process called vitrification, which involves quick cooling to avoid the formation of ice crystals.[412] Embryo transfer, whether it occurs immediately after egg retrieval or following freezing and thawing, is a short procedure with "no anesthesia or recovery time."[413] A puff of air through a catheter pushes the embryo(s) into the uterus.[414] About two weeks later, a blood test examining the patient's hCG level will "determine if implantation was successful."[415] HCG levels should continue to rise in early pregnancy, so blood testing will be repeated every few days.[416] If the pregnancy continues, at around five weeks an ultrasound will be performed.[417] If everything appears normal on the ultrasound, the patient will be referred to her obstetrician.[418]

Pregnancy and childbirth themselves are, of course, complex and full of indeterminacy. In addition to all of the normal difficulties of pregnancy—e.g., morning sickness (nausea and vomiting); body aches; dizziness; constipation; nosebleeds; bladder control problems; swollen face, hands, and/or ankles; numb and/or tingling hands; leg cramps; constipation; hemorrhoids; fatigue; heartburn; difficulty sleeping; and breast tenderness[419]—there can be more serious complications, including but not limited to anemia, high blood pressure, gestational diabetes, and depression.[420] And, of course, there are no guarantees that a

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412 Jon Johnson, *Embryo Freezing: What You Need to Know*, MED. NEWS TODAY (Mar. 13, 2019), https://www.medicalnewstoday.com/articles/314662 [https://perma.cc/AWG4-Q6HY]. Embryos can also be preserved through a slow freezing process, but "[s]ome research indicates that, compared with slow freezing, vitrification increases an embryo's chance of survival, both at the freezing stage and during thawing." *Id.* Today, vitrification seems to have become standard. *See* CCRM FERTILITY, *IVF Treatment*, *supra* note 392.

413 ASPIRE FERTILITY, *supra* note 392.

414 *Id.*

415 *Id.*

416 *Id.*

417 *Id.*

418 *Id.*

419 *See* Off. on Women's Health, *Body Changes and Discomforts*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Jan. 30, 2019), https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/body-changes-and-discomforts [https://perma.cc/E8YT-RYEP].

pregnancy will result in a live birth: 10-15% of pregnancies end in miscarriage—i.e., loss before twenty weeks.[421] In the first six weeks of pregnancy, the risk of miscarriage is highest.[422] In weeks six to twelve, the risk drops to 10% or less, and in weeks thirteen to twenty, to 5% or less.[423] Furthermore, one in 160 pregnancies end in stillbirth—i.e., loss at or after twenty weeks.[424] Finally, childbirth and the period following childbirth are also uncertain. Neonatal death (within the first four weeks after birth) "happens in about 4 in 1,000 babies (less than 1 percent) each year in the United States."[425] Infant mortality—i.e., "the death of an infant before his or her first birthday"—accounted for 5.6 deaths per 1,000 live births in the United States in 2019.[426] And, notably, the maternal mortality rate in the United States was a shockingly high 17.4 per 100,000 pregnancies in 2018.[427]

In sum, reproduction—from the diagnosis of infertility, to treatments such as IVF and embryo creation, to pregnancy, childbirth, and beyond—is infused with indeterminacy. While our legal discourse, as exemplified by the frozen embryo disputes described above,[428] glosses over this indeterminacy, postmodern feminism and reproductive justice

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[420] *See* Off. on Women's Health, *Pregnancy Complications*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Apr. 19, 2019), https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/pregnancy-complications [https://perma.cc/54P7-KPYV].

[421] Rena Goldman, *A Breakdown of Miscarriage Rates by Week*, HEALTHLINE (Oct. 3, 2018), https://www.healthline.com/health/pregnancy/miscarriage-rates-by-week [https://perma.cc/7VN9-YEHT].

[422] *Id.*

[423] *Id.* It should be noted that there is some discrepancy among the numbers that are offered by various sources.

[424] Nat'l Ctr. on Birth Defects & Dev. Disabilities, *What Is Stillbirth?*, CDC (Nov. 16, 2020), https://www.cdc.gov/ncbddd/stillbirth/facts.html [https://perma.cc/FF79-9U9T].

[425] *Neonatal Death*, MARCH OF DIMES (Oct. 2017), https://www.marchofdimes.org/complications/neonatal-death.aspx [https://perma.cc/9P5T-NMFJ].

[426] Div. of Reproductive Health, Nat'l Ctr. for Chronic Disease Prevention & Health Promotion, *Reproductive Health, Maternal and Infant Health, Infant Mortality*, CDC (Sept. 8, 2021), https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm [https://perma.cc/MA24-RLBE].

[427] Eugene Declercq & Laurie Zephyrin, *Maternal Mortality in the United States: A Primer*, COMMW. FUND (Dec. 16, 2020), https://www.commonwealthfund.org/publications/issue-brief-report/2020/dec/maternal-mortality-united-states-primer [https://perma.cc/6AK7-ME26].

[428] *See supra* Section II.A.

work remind us to attend to the lived experience of reproduction. Acknowledging the indeterminacy and honoring lived experience, as Section III.B will illustrate, creates a positive space in which to imagine a more robust rights jurisprudence.

B. Expanding Our Vision of Reproductive Status and Rights

This section draws on the feminist work described in Part I to argue that legal discourse around reproduction should move beyond the binaries described in Part II. Postmodern feminist theory reveals that the either/or mindset embedded in much of our reproductive rights doctrine is inconsistent with the lived experience of reproduction. Parties involved in frozen embryo disputes illustrate this disjunction: rarely can they be accurately described as definitively "fertile" or "sterile," and rarely can their wishes be accurately captured through the assertion of a "right to procreate" or a "right to avoid procreation." Rather, their reproductive potential is fluid and uncertain, and their reproductive intentions are complex and contingent. Once postmodern theory has deconstructed these false binaries and revealed the categories to be inaccurate, reproductive justice work offers holistic solutions for reimagining our rights and discourse. Attention to context—whether, when, and how one wishes to form a family—and respect for lived experience are at the core of reproductive justice work. Rather than thinking of reproductive rights as limited to two possibilities within a binary opposition, we ought to understand them as existing along a multi-dimensional spectrum.

Postmodern theory, as described in Section I.A, teaches us that binary systems suppress diversity. Courts are effectively suppressing diversity when they describe reproductive potential by reference to either fertility or sterility, reproductive intent by reference to either procreation or non-procreation, and reproductive rights as limited to either a right to procreate or a right to avoid procreation. Beginning with reproductive potential, courts are quick to label parties as either having or not having "a reasonable possibility of achieving parenthood [without the contested embryos]."[429] But, in reality, the chances of achieving parenthood (with or without the embryos) is often highly indeterminate. The point is not that parties should necessarily be allowed to use contested embryos; rather, it is that the judicial rhetoric around reproductive potential—by imposing a false sense of certainty—is reductive, dismissive, and ultimately harmful to the surrounding doctrine. By forcing all aspects of reproduction—potential, intentions, and rights—into either/or categories, judges miss crucial context: just as reproductive potential is fluid, complex, contingent, and indeterminate, reproductive intention and, by extension, reproductive rights can be as well.

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

Both postmodern theory and reproductive justice advocacy focus on the importance of attending to context and building from lived experience. Here, attending to context means allowing all people to decide "if, when, and how" to become parents and form families;[430] building from lived experience means surfacing the complexity and indeterminacy of reproduction. As Mari Matsuda long ago explained: "The refusal to acknowledge context—to acknowledge the actual lives of human beings affected by a particular abstract principle—has meant time and again that women's well-grounded, experiential knowledge is subordinated to someone else's false abstract presumptions."[431] Our legal discourse around reproduction must be reformed to acknowledge that reproductive decisions are highly contextual—people do not simply want to be or not be parents; they want to be or not be parents under certain circumstances. People's physical, emotional, and financial resources, among others, evolve over time, along with their family status, their intentions, and their experiences. Judicial opinions that reduce the world to a set of binary oppositions do not truly comprehend reproduction.

Finally, both postmodern theory and reproductive justice advocacy appreciate that our existing reproductive rights are inadequate. Two narrowly framed options—a right to procreate and a right to avoid procreation (both of which are narrow, negative rights, and the former of which is doctrinally undeveloped)—can provide only *de minimus* protection. Rather than thinking of reproductive rights as operating in a binary system, we should recognize that they exist along a spectrum that is both rich and multi-dimensional. One person, over the course of her lifetime (or even, in some cases, over the course of a single cycle of fertility treatment or over the course of a single pregnancy), may wish to make decisions along the entire spectrum. These decisions may entail uncertainty, and they will necessarily often be made without perfect knowledge of their consequences. There are many ways in which reproductive rights can be re-conceptualized to be more attentive to context. Professor Yvonne Lindgren has, for example, argued in the abortion setting for a shift away from the narrow focus on decision-making and toward a broader understanding

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[430] IF/WHEN/HOW, *supra* note 42 ("Reproductive justice will exist when all people can exercise the rights and access the resources they need to thrive and to decide if, when, and how to create and sustain their families with dignity, free from discrimination, coercion, or violence."). *See also* MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 169 (2020) (suggesting a "Reproductive Justice New Deal or Bill of Rights" that would include "the right to decide if, when, how, or not to procreate").

[431] Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613, 619 (1986).

of abortion as an aspect of dignity and healthcare.[432] This shift, she explains, would help to ensure "the social, financial, political, and legal conditions required to make genuine choices about reproduction."[433] Such shifts in context can have deep significance.

Ultimately, there are no easy answers in frozen embryo disputes. Acknowledging this reality would be a step in the right direction. In writing opinions, judges ought to reframe the discourse around reproduction to be more honest and accurate. This would entail both dropping the pretense of certainty (a judge's pronouncement that someone has a "reasonable" path to parenthood does not make it so) and delving into the reproductive processes—both past and future, from IVF to pregnancy and childbirth—that parties involved in frozen embryo disputes experience. Understanding the full context of the parties' circumstances, medical and otherwise, is critical to rendering an informed decision. In addition to reframing the discourse around reproduction, judges ought to reimagine the universe of reproductive rights. The possible rights claims should be reflective of the possible intentions, which are many and varied, and the rights themselves should be accessible to everyone regardless of their resources. These reforms will not lead to simple tests that produce simple outcomes, but admitting that reproduction is in fact complex, indeterminate, and irreducible—despite judges' best efforts—will create space for a more capacious understanding of reproductive rights. Frozen embryo disputes, positioned as they are at the intersection of the existing rights binary, are a perfect place to focus our reform efforts.

CONCLUSION

Reproduction, as a lived experience, is complex and indeterminate. Judicial discourse around reproduction, in contrast, proceeds from a premise that reproductive potential and intentions—and, by extension, rights—can be captured by binary categories. Litigants in frozen embryo disputes are typically viewed as either fertile or sterile, as trying to either become parents or avoid parentage, and as asserting a right to either procreate or avoid procreation. But these are rarely accurate descriptors, given that—by the point of litigation—the parties may have experienced months or years of reproductive indeterminacy. Often, the party seeking to use the embryos is neither fertile nor sterile, but infertile—a status that is inherently uncertain and in between. Often, it is difficult to diagnose and treat infertility, and it can be nearly impossible to predict a given patient's chances of success. Just as the party seeking to use the embryos may be neither fertile nor

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[432] Yvonne Lindgren, *From Rights to Dignity: Drawing Lessons from Aid in Dying and Reproductive Rights*, 2016 UTAH L. REV. 779 (2016).

[433] *Id.* at 787 n.23.

sterile, her intentions may not be as simple as trying to become a parent. Often (but not always), it makes a difference to a party whether she might become a genetic parent, a gestational parent, or an adoptive parent. And often (but not always), it makes a difference whether becoming a parent will risk her health or the health of her potential child. Context matters.

To describe the parties involved in frozen embryo disputes as asserting a right "to procreate" or "to avoid procreation" trivializes the complexity of their circumstances. To assume that a litigant experiencing infertility has a "reasonable" path to parenthood without the embryos is to ignore the reality that, even if she has the resources (physical, emotional, and financial) to undergo further treatment, there is no guarantee that it will produce gametes, that the gametes will create embryos, that the embryos will lead to pregnancy, or that the pregnancy will result in childbirth. Again, the point is not that all parties who want embryos should be granted their use; the point is that judicial rhetoric, by erasing the complexity and indeterminacy, offers a disappointingly limited vision of reproduction and reproductive rights. Once we move beyond the binaries, we will be able to imagine a new doctrine in which reproductive rights exist along a multi-dimensional spectrum that is sensitive to context. Such a doctrine would promote access to the social, financial, and systemic resources necessary for true choice.