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TEST TUBE BABIES, SURROGATE MOTHERS, FROZEN EMBRYOS: SEARCHING FOR SOLUTIONS

ANTOINETTE SEDILLO LOPEZ*

I am pleased that Scott Taylor has started this public lecture series. It is important for law professors to interact with members of the community. I think we can get isolated in our little, I wouldn't say ivory tower, our little "adobe" tower. It is good to get some feedback from the community and to share what we are doing with the community.

Test tube babies—surrogate mothers—and frozen embryos. I have to tell you that the title was Scott's idea for the presentation. He wanted something that would get people's attention. The title does conjure up scary images, doesn't it? Babies floating around in test tubes, heated and juicy custody battles and states of suspended animation. You might think of this as the stuff of TV movies or a science fiction novel of the month. But it is not—it is becoming more and more an aspect of modern life.

Recently, in the context of a divorce, a Tennessee trial court was faced with the issue of whether to permit the implantation of currently frozen embryos in Mary Sue Davis' body, or to prohibit the implantation in accordance with Junior Davis', her husband's, wishes.¹ Another couple in California has successfully settled with an *in vitro* fertilization clinic in Virginia for the release of their frozen embryo for implantation by a clinic in California.² In addition to this environment of technological developments, lawyers have constructed creative new ways of becoming a family. We have recently been regaled with detailed information about Mary Beth Whitehead's refusal to turn her daughter over to Mr. Stern, the man who provided the sperm for her artificial insemination and who promised to pay her \$10,000 for her agreement to terminate her parental rights and relinquish her child to Mr. Stern and his wife.³

Remember, when you read about these stories in the paper, that it is only twelve years after Louise Brown, the first baby conceived outside

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1. *Davis v. Davis*, No. E-14496 (Cir. Ct. for Blount County, Tenn. Eq. Div. 1 1989).

2. After a four month legal battle, Steven and Risa York were allowed to take their single frozen embryo to California. Under the settlement, the clinic was released from any liability concerning the embryo and the Yorks dropped their \$200,000 claim for alleged emotional distress. Miller, *Couple Returns to California With Frozen Embryo*, United Press International, Sept. 26, 1989. The clinic was concerned that the embryo would be at risk if moved. The couple "simply wanted recognition that something was owned." Miller, *Clinic Releases Couple's Frozen Embryo*, United Press International, Sept. 19, 1989.

3. *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128, *order modified*, 537 A.2d 1227 (1987); *see also Rust, Whose Baby Is It? Surrogate Motherhood After Baby M*, A.B.A. J., June 1, 1987, at 52.

her mother's body, was born.⁴ Things have been moving very, very quickly. I want to pose some questions about these new developments. What is it that we really know about these newest miracles of modern medicine? How will the legal system respond to these modern miracles? How will the law handle the legal issues raised by how individuals "use," "abuse" or "are used" by the new technology? I think that the answers can be informed by looking at recent history to see how reproductive technology has developed and how the government and the legal system have responded.

I also think that you and I, as members of the public, can profoundly affect the answers to these questions. I'll explain why and how in just a minute. The other point I want to make in my discussion of the history of the development of reproductive technology is that one group of people is most obviously affected by the technology: that half of our population that is uniquely capable of reproducing our species—women.

In an article that I wrote, I stated that the constitutional theory of individual rights or individual autonomy/privacy in the area of human reproduction has empowered women, by giving them more control over their bodies and, as it follows, their lives.⁵ I now realize that the reasons behind the development of the *doctrines* of autonomy and privacy weren't particularly for women, and I believe that this was also true with respect to the development of the *technology* affecting reproduction. That is, the technology and the legal doctrines have had incidental benefits and burdens on women's lives. However, the primary drive for technological advances was not to enhance women's self-determination, but was motivated by other forces. I also think, and it is the thesis of my presentation, that the autonomy women have gained by the development of technology and in the legal system, is in danger of being eroded, and perhaps lost, as the inevitable march of progress produces further technological evolution and the legal system, as it must, grapples with the problems raised.

I think it is pretty clear, that a woman's quest for self-determination is grounded in her biological self to a greater extent than a man's quest for self-determination. Pregnancy, giving birth, motherhood, and the timing of these events, or remaining childless (or child-free), profoundly affect a woman's life experience. Her sense of self worth, her career, her status, her income, her sense of self-fulfillment are all related to the experiences around her procreative capacities. A woman's ability to choose for herself whether and when to experience her procreative potential has always been contingent on her ability to choose whether or not to have sex, of course, and also on reproductive technology and the legal controls of that technology.

I want to examine the latter two aspects of control over reproduction—the technology and the legal controls—by discussing what many believe

4. G. COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* 115 (1985).

5. Sedillo Lopez, *Privacy and Regulation of the New Reproductive Technologies: A Decision-Making Approach*, XXII(2) *FAM. L.Q.* 173, 180 (1988).

to be a relatively "old" reproductive technology—birth control, and a relatively "new" reproductive technology—in vitro fertilization. I will then describe how the legal response and the subsequent framework set up in analyzing the state regulation of birth control is irrelevant to the issues raised by the new technology. We must have new legal responses.

To start my brief history about birth control, I want to point out that contraception has been practiced by a tiny proportion of the population from early in time. But effective family size limitation among significant numbers of people dates from the 1880's.⁶ In Britain, the twenty years before the turn of the century saw the marketing and sale of contraceptive and birth control techniques.⁷ The developed products were improved over the next 80 years partly because of innovations in other areas of technology, such as the vulcanization of rubber and the development of latex. Some newer spermicides were derived from the discovery of new chemicals and hormones.⁸ A great many trade names were registered and patents developed for the contraceptive devices.⁹ By 1938 it would have been possible to develop a birth control drug. Progesterone and other hormones had been isolated and their role in human reproduction understood. A cheap vegetable source of the hormone could have been manufactured on a large scale. However, until the 1950's, clinical studies of hormones were directed at curing infertility and treating other gynecological disorders. World War II, it is said, is also partly responsible for the delay, as research was primarily diverted to the war effort. Other reasons, however, were social judgments, both by the public and within the medical profession. The medical profession was for years strongly opposed to birth control on both moral and medical grounds.¹⁰ During the 1920's one physician wrote that contraception is "dangerous to health, [and causes] sterility and mental degeneration in subsequent offspring" in discussing the effects of birth control.¹¹ Also, the concept of controlling birth conflicted with established social mores and doctors tended to distance themselves from anything sounding like lay medicine or quackery.¹² This was considered lay medicine or quackery because there was an absence of studies or reliable ways of analyzing the effectiveness of birth control techniques. Since the demand for birth control was not satisfied with traditional scientific knowledge and effort, a market riddled with dishonesty and quacks exploited people's interest and demand for birth control.¹³ Finally, I think doctors had a more narrow view of their

6. Walsh, *Contraception: The Growth of a Technology*, in ALICE THROUGH THE MICROSCOPE: THE POWER OF SCIENCE OVER WOMEN'S LIVES 182-83 (L. Birke, W. Faulkner, S. Best, D. Janson-Smith, K. Overfield eds. 1980). See also L. GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 4-6 (1976).

7. Walsh, *supra* note 6, at 183.

8. *Id.*

9. *Id.*

10. Walsh, *supra* note 6, at 183-84; L. GORDON, *supra* note 6, at 160.

11. Walsh, *supra* note 6, at 185 (quoting in part from *The Practitioner*, July 1923 special issue on contraception).

12. Walsh, *supra* note 6, at 185.

13. *Id.* at 185-87.

profession. The medical profession at that time viewed itself as curative rather than preventative and did not expend great efforts on preventative health techniques. Thus, involvement with birth control threatened the medical profession's privileged professional status. All of these factors came into play to slow the development of the technology.¹⁴

There were other forces at play in the political and legal arena, however. Until 1873, birth control in the United States was unregulated. But, in 1873, Anthony Comstock, the President of the New York Society for the Suppression of Vice, was influential in getting what are now known as the Federal Comstock Laws passed. Various states followed the federal lead and banned the sale, the display, and the advertising, and also of course, the use of contraceptives.¹⁵ Laws passed after the Federal Comstock Laws seemed to be more of an attempt to safeguard or regulate the public morals rather than to increase our population size. About this time, Margaret Sanger began speaking out about the benefits of birth control, specifically for women.¹⁶

In other countries, restrictions on contraception were not to safeguard morals but were more explicitly population policy. For example, France had the *Code de la Famille* which was passed in 1940 in response to a depression era decline in the fertility rate in France. The Code encouraged marriage and childbearing with various welfare and tax benefits, while contraception and abortion were restricted.¹⁷ At the same time, Germany had the most abhorrent form of state intervention under Fascism. The racially inferior were sterilized and/or killed. Aryan women were prevented from working and from using contraceptives. They were subjected to intensive propaganda in an attempt to get them to bear as many Aryan children as possible.¹⁸

Gradually, however, among the general population an unusual coalition of interest groups began forming. Feminists, demanding birth control for women, found themselves on the same side as eugenists who were emphasizing their concern with the overbreeding of the poor and the underbreeding of the higher classes.¹⁹ What you had was a coalition of feminists saying we need birth control so that women can have more control over their lives,²⁰ and eugenists saying we need birth control because we've got to stop this population explosion among the poor and the lower classes.²¹ In addition, Western political leaders began worrying about the overpopulation problem and they began pushing for measures to limit reproduction in the poverty-stricken countries of the third world.²² It became harder, once they were pushing population limits in the third

14. *Id.*

15. *Id.* at 188.

16. *Id.*; L. GORDON, *supra* note 6, at 206-24.

17. Walsh, *supra* note 6, at 189.

18. *Id.*

19. See L. GORDON, *supra* note 6, at 259-87.

20. See Walsh, *supra* note 6, at 196.

21. See *id.* at 195-96.

22. *Id.* at 190; GORDON, *supra* note 6, at 392-93.

world, to sustain moral or social opposition to contraception domestically.²³ This in turn, spurred the scientific push for pursuing birth control research. At the time research was increasing, the popular press started publishing articles about the population "explosion."²⁴ As the research was continuing, the "pill" as it ultimately became known, was undergoing clinical testing prior to marketing. By 1959 the Draper Report was issued.²⁵ The Draper Report stated that the United States should support the United Nations' plan for supporting birth control in underdeveloped countries.²⁶ So everything was coming together.

Consider this contrast: in 1959 Eisenhower said of birth control: "I cannot imagine anything more emphatically a subject that is not a proper political or governmental activity, or function or responsibility."²⁷ Eisenhower wanted nothing to do with it in 1959. Six years later, Eisenhower and Truman became co-chairpersons of the Honorary Sponsors of Planned Parenthood—World Population.²⁸ Things changed very quickly.

The same year that Eisenhower became a co-chairperson of Planned Parenthood, 1965, Estelle Griswold won a landmark decision against the state of Connecticut.²⁹ She challenged the constitutionality of Connecticut's law prohibiting the sale of contraceptives to married couples. In Justice Douglas' now famous opinion, he described penumbras emanating from the Constitution.³⁰ He viewed the Constitution, as a whole, as creating a zone of privacy of the individual into which the state had no authority to intrude.³¹ The Court struck down Connecticut's law prohibiting the sale of contraceptives to married couples.³² However, in neither the majority opinion nor the concurrences, was there any discussion of what this decision meant for women. The ability of a woman to choose whether or not to have children as a decision separate from the decision whether or not to have sex, was an incredible milestone in a woman's quest for self-determination. However, the primary focus of the opinion was not what this meant for women. Rather, the Court was concerned about the state's intrusion into the intimate marital relationship. In other words, what the court was worried about was what it meant to live in a society where the state was controlling the decisions made in the privacy of the bedroom of a married couple. The opinion was followed by constitutional invalidation or *striking down* many similar laws and a concurrent growth in the birth control industry. Remember, the pill had been undergoing clinical marketing in 1959. By 1965, it was being marketed worldwide.³³

23. Walsh, *supra* note 6, at 190-91.

24. *Id.*

25. *Id.* at 191.

26. *Id.*

27. Walsh, *supra* note 6, at 191.

28. *Id.*

29. Griswold v. Connecticut, 381 U.S. 479 (1965).

30. *Id.* at 484-85.

31. *Id.* at 485.

32. *Id.*

33. Walsh, *supra* note 6, at 203-04.

Information about birth control became much more available to the general public.³⁴ Nationally, studies about overpopulation were published. Finally, the increasing industrialization of the country and the economy provided work place and financial incentives for couples to produce smaller families. Among the middle and upper classes, women began to exercise greater choices about their careers, their marriages, and the timing of their children, if they chose to have children at all.³⁵

There are two things that I would like you to notice about what I just summarized, and I could go into more detail, but I've given you the highlights. First, generally the law lagged behind public consensus on the use of the technology, but ultimately, public consensus prevailed. Justice Douglas did not write his famous opinion constitutionalizing the idea of a right of privacy in a vacuum. Much as some judges hate to admit it, judges are a product of their culture and their social environment. Justice Douglas' opinion could not have been written in the 30's. Not only was he not around to write it, but the public would not have accepted it. They were not ready to accept it. In other words, Justice Douglas was a product of his time and the times had changed. This was not necessarily a victory for feminists, because they were only one factor in the coming together of many social forces. Another thing that I'd like to point out is that among the poor and the educationally deprived in our country, information and access to birth control was and continues to be lacking.³⁶ This was despite the fact that many of the poor and many of the uneducated, were precisely the target of Margaret Sanger and her unusual coalition of feminists and proponents of eugenics.³⁷

I could tell you some other interesting stories about technologies, such as artificial insemination, and perhaps about the medicalization of child-birth itself, but rather, as a comparison for the story I just told you, I'll give you the history of the development of a "new" reproductive technology—that is the development of *in vitro* fertilization. In 1944, John Rock and Miriam Menkin and others published articles claiming that they had fertilized a human egg outside a woman's body. The published claims were ultimately challenged because human eggs often divide naturally when taken outside of the body. John Rock and Miriam Menkin had worked for over ten years observing fertilized eggs extracted from women undergoing hysterectomies. They had been looking at fertilized eggs, but they were not accomplishing the fertilization.³⁸ In 1951, Landrum Shettles claimed to have observed the fertilization of a human egg outside the body. His claim was disputed as undocumented.³⁹ Around the time that the birth control pill was undergoing development, there was another drive, a sort of parallel drive, to fertilize a human egg

34. *Id.* at 190.

35. *Id.* at 191-94.

36. See generally T. LITTLEWOOD, *THE POLITICS OF POPULATION CONTROL* (1977).

37. *Id.* Walsh, *supra* note 6, at 197.

38. G. COREA, *supra* note 4, at 101-03.

39. *Id.* at 103.

outside of the body—it didn't happen though, at least no one could document such a claim.⁴⁰

The early 1960's saw the development of fertility drugs, including Perganol, after extensive experimentation on mice. By the late 1960's, these drugs were being used on women. In 1971, using Perganol and other fertility drugs,⁴¹ Drs. Steptoe and Edwards decided that it was time to fertilize a human egg outside a woman's body and subsequently implant the product in the woman's body.⁴² In so doing, they could "accomplish a birth." If they did, they could prove, once and for all, that they had accomplished fertilization outside the body. That same year, however, Britain's Medical Research Council denied their request for funding. The Council denied the request because of reservations about the use of laparoscopy for purely experimental purposes and for proposing research on human subjects using *in vitro* fertilization.⁴³ They also were concerned about the lack of knowledge of possible hazards to the women or to the product of the fertilization. Further, the Council cited the lack of preliminary studies on primates.⁴⁴ Steptoe and Edwards apparently decided to continue their research without funding from the Council and began to perform their research on infertility patients.⁴⁵ Between 1971 and 1973, many ethicists and researchers were arguing that further animal research was needed before attempting embryo transfer in women. Between 1971 and 1977, Steptoe and Edwards implanted almost eighty women but were unsuccessful.⁴⁶ In 1977, they began another research project using different, and in their view, improved techniques—and I won't go into the details of what they thought was improved—but of the 68 women in this new study, four became pregnant. One miscarried a fetus with chromosomal irregularities and one miscarried an apparently normal fetus. In July of 1978, Louise Brown was delivered by caesarean section (another reproductive technology that I won't even get into right now). Six months later, Alistair Montgomery was born.⁴⁷ Accolades came from most quarters. The researcher/physicians achieved overnight fame. Other researchers and physicians became interested in following their lead.⁴⁸ Questions about the ethics of their research methods dissolved, by and large. However, in an account of Louise Brown's birth, I was surprised to learn Mrs. Brown didn't comprehend that she was the "first." She somehow believed that other women had given birth through *in vitro* fertilization, but had chosen to avoid the publicity.⁴⁹ Now this is interesting. Why did she

40. *Id.* at 104-05.

41. *Id.* at 109.

42. *Id.* at 109.

43. *Id.* at 111-12.

44. *Id.* at 112.

45. *Id.*

46. *Id.* at 113.

47. *Id.* at 114-15. See also Short, *Summary of the Presentation by Dr. P.C. Steptoe and Dr. R.G. Edwards at the Royal College of Obstetricians* at 11, in HEW Report, *infra* note 50, Appendix.

48. G. COREA, *supra* note 4, at 117.

49. L. & J. BROWN, *OUR MIRACLE CALLED LOUISE* 153-57 (1979).

think that? Because of their desperation, infertile women are vulnerable to experimentation on their bodies. It raises the question of whether they could ever be adequately informed.

In the United States, the HEW Ethics Advisory Board, after the 1978 hearings on *in vitro* fertilization,⁵⁰ noted that experts agreed that there was insufficient controlled animal research designed to determine long-range impacts.⁵¹ HEW imposed a ban on federal funding.⁵² Since then, as you know, private *in vitro* fertilization clinics have opened up all around this country and around the world. Thousands of babies have been born through the process.⁵³ *In vitro* fertilization is widely hailed as the new hope for the infertile. We are all delighted with the photographs of the beautiful babies born to couples who had been close to losing the hope of ever becoming parents.⁵⁴

So far, *in vitro* fertilization has seemed to develop so quickly that there has been little public debate.⁵⁵ A few have pointed out the underside of the process—the apparent commercialization of children.⁵⁶ There are obvious disparities in terms of access since most insurance companies don't cover it,⁵⁷ since they consider it still experimental. In addition,

50. ETHICS ADVISORY BOARD, DEPT. OF HEALTH, EDUCATION, AND WELFARE, REPORT AND CONCLUSIONS: HEW SUPPORT OF RESEARCH INVOLVING HUMAN *In Vitro* FERTILIZATION AND EMBRYO TRANSFER (1979) (hereinafter HEW Report). The Board found that research involving human *in vitro* fertilization is acceptable from an ethical standpoint and that a broad prohibition of research involving *in vitro* fertilization is neither justified nor wise. *Id.* at 100-02.

51. *In Vitro Fertilization—Oversight, 1978: Hearing Before the Subcommittee on Health and the Environment of the Committee on Interstate and Foreign Commerce*, H.R. Rep. No. 134, 95th Cong., 2d Sess. 80 (1978) (statement of Dr. Benjamin Brackett, University of Pennsylvania School of Medicine). HEW Report, *supra* note 50, at 39-44.

52. G. COREA, *supra* note 4, at 118-19. In 1987 there were 169 clinics doing *in vitro* fertilizations. *Consumer Protection Issues Involving In Vitro Fertilization Clinics, 1988 Hearing before the Subcommittee on Regulation and Business Opportunities of the Committee on Small Business*, H.R. Rep. No. 49, 100th Cong., 2d Sess. 1 (1988) (hereinafter House 1988). By 1989 the number had grown to at least 224 clinics. *Consumer Protection Issues Involving In Vitro Fertilization Clinics, 1989 Hearing before the Subcommittee on Regulation, Business Opportunities, and Energy of the Committee on Small Business*, H.R. No. 5, 101st Cong., 1st Sess. 1 (1989) (hereinafter House 1989).

53. The 146 U.S. clinics that provided complete data from 1987 and 1988 for a survey conducted by the House with the help of the American Fertility Society reported 2,463 live births. House 1989, *supra* note 52, at 1-2. Sally Squires reports that in the past decade over 4,600 babies have been born internationally through *in vitro* fertilization. Squires, *Whose Baby Is It, Anyway? Surrogates, Donors and Petri Dishes Are All in the Family*, Washington Post, April 12, 1988, (Health), at 15, col. 4.

54. See e.g., Goodman, *The Ethics of Marketing Babies*, The Boston Globe, April 13, 1989, at 17.

55. See Wagner, *The New Reproductive Technologies and the Law: A Roman Catholic Perspective*, 4 J. CONTEMP. HEALTH L. & POL'Y 37, 42-47 (1988) for one view of the societal consequences of the new reproductive technologies.

56. See Goodman, *supra* note 54; D. EVANS, WOMEN, REPRODUCTION AND THE NEW MEDICAL TECHNOLOGY 85 (1989).

57. According to the Office of Technology Assessment, many private health insurers do not cover infertility or provide only limited coverage. However, in practice, 70% of infertility expenditures are reimbursed. Individual procedures are covered, particularly if they are not identified as treatment for infertility. Insurance companies consider it to be an expensive procedure and are reluctant to underwrite such a large potential liability. Five states (Arkansas, Hawaii, Maryland, Massachusetts, and Texas) mandate that insurers cover *in vitro* fertilization in a limited fashion. House 1988, *supra* note 52, at 58 (prepared testimony of Gary B. Ellis, Office of Technology Assessment).

people are very worried about the *very* low success rate, about 15% nationally. The vast majority of women enrolled in the *in vitro* fertilization programs have not been helped by the process.⁵⁸ Some have pointed out and argued that the new technology, in addition to bringing new hope, brings new despair. Infertile women may now spend a good part of their adult lives and a lot of money in treatment in experimental programs. They are always searching for a promising new treatment, always searching for new hope.⁵⁹ In addition to the very real concerns that I just mentioned about the use of *in vitro* fertilization, and the questions about informed consent that I talked about earlier, think of the potential complications. What if the sperm and the egg, each of which supplies half of the genetic material, comes from donors rather than the couple seeking the treatment? Do the donors have claims on the child? What if only the egg, or only the sperm, comes from a donor? Does that person have a claim on the child? What is done with the extra embryos? Who "owns" them? The clinic, or the people who provided the genetic material, or the people who paid for the process?⁶⁰ Who decides? Since there is no public policy consensus, the political process (i.e., state legislatures) has not planned for the problems that could arise. That leaves judges with little guidance when the problems are dropped in their laps.

Some of the "ownership" issues that I alluded to were raised in the custody battle over frozen embryos in Tennessee. The trial court judge in Tennessee had to look to analogies in the law and his own moral values for how it should be decided. The mother in that case, Mary Sue, argued that she should have custody of the frozen embryos because it was obvious she had put more into the creation of the embryos. She ingested fertility drugs, she underwent the surgery, and she would provide the nurturance for their development until their birth.⁶¹ The father argued that it was not fair to force him to be a father against his will.⁶² Rather than looking to the mother's rights to the embryos and the father's rights to their destruction, the judge used a traditional family law principle which subsumes any rights of the parents to the best interests of the

58. Success rates are low. Forty-one U.S. clinics report success rates of 17% (clinical pregnancies) for 1985 and 1986. Of these, one in three will end in a miscarriage or stillbirth. *Id.* at 56. Couples are estimated to spend a billion dollars per year on infertility treatment, 30 to 40 million dollars of that for *in vitro* procedures. For the years 1987 and 1988, the success rate for 146 clinics that conducted 26,332 stimulations resulting in 20,483 egg recoveries and 2,463 live births for a success rate of about nine percent. House 1989, *supra* note 52, at 1-2. Ellen Goodman reports the success rate as one in five or six at the best clinics. The cost is between \$4,000 and \$6,000 for each attempt. Goodman, *supra* note 54.

59. Patients seeking these services are particularly vulnerable because they are largely individuals who have tried for many years to achieve a pregnancy. House 1988, *supra* note 52, at 60 (prepared statement of Gary B. Ellis, Office of Technology Assessment); G. COREA, *supra* note 4, at 89-90.

60. See e.g., Grobstein, Flower & Mendeloff, *Frozen Embryos: Policy Issues*, 312 NEW ENG. J. OF MED. 1584 (1985); Wadlington, *Artificial Conception: The Challenge For Family Law*, 69 VA. L. REV. 465 (1983); D. EVANS, *supra* note 56, at 120-21; Goodman, *supra* note 54; Goodman, *An Embryonic Case Study in Ethics*, *Newsday*, March 10, 1989; Squires, *supra* note 53.

61. Davis v. Davis, No. E-14496 at App. B 12-13 (Cir. Ct. Blount County, Tenn. Eq. Div. 1 1989). See also Goodman, *supra* note 60.

62. Davis at App. B 3.

children in a divorce case.⁶³ He then decided, in evaluating the best interests of the embryos, that it was in their best interest to come into being, or to live.⁶⁴ Reasoning that you cannot let die something that has never lived, he found that life begins at conception.⁶⁵ He decided that Mary Sue should have temporary custody for nine months after implantation so that she could have the opportunity to bring them into being. If any were born, the judge would ultimately decide the custody and child support issues their existence would raise.⁶⁶ Junior Davis promised to contest custody if any of the embryos should develop and be born alive.

The media has loved the case and dutifully reported every development. Judge Douglas, the judge in the Tennessee case, is a product of his times,⁶⁷ but the times—they are confusing. There is now public division and public rhetoric that create a chaotic environment for decision-making. The rhetoric of the right-to-life movement that life begins at conception has some appeal, because you can identify that point,⁶⁸ but is a fertilized embryo any more or less alive than the egg and the sperm that created it? Some authors have written that life is continuous—that you can't pinpoint a definite time when it begins.⁶⁹ Yes, a frozen embryo has a genetic blueprint for a potential person, but each and every cell in your body has a complete genetic blueprint. Why draw the line there?

Additionally, the rhetoric of equality has surface appeal. It sounds reasonable at first to think that we shouldn't force fathers to become fathers against their will any more than we should force mothers to become mothers against their will. The problem with that position is that men and women are not alike in these circumstances. The legal doctrines talk about being similarly situated. Well, men and women are not similarly situated when it comes to reproduction.⁷⁰ The reality is that the physical, emotional, and psychological risks and burdens of pregnancy, childbirth and motherhood are far greater for women than for men. The reality is only women can get pregnant and give birth.

Also, what about the parent's rights? The judge seemed to ignore them in looking at the best interests of the embryo.⁷¹ Do parents have any

63. *Id.* at 19.

64. *Id.* at 20.

65. *Id.* at 2, 17.

66. *Id.* at 20.

67. *Id.* at 18.

68. See *Text of Vatican's Doctrinal Statement on Human Reproduction*, N.Y. Times, March 11, 1987, at A14, col. 4. "The human being must be respected—as a person—from the very first instant of his existence." See also Wagner, *supra* note 55, at 47-48, 58-61.

69. See Edwards, *Introduction: The Scientific Basis of Ethic*, in *In Vitro Fertilization and Embryo Transfer* (M. Seppala & R.G. Edwards eds.) 442 Ann. N.Y. Acad. Sciences 564 (1985). See also Kass, *Ethical Issues in Human In Vitro Fertilization, Embryo Culture and Research, and Embryo Transfer* at 2, pp. 6-7 in HEW Report, *supra* note 50, Appendix.

70. See *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 471 (1981). "Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity."

71. *Davis v. Davis*, No. E-14496 at 19-20 (Cir. Ct. for Blount County, Tenn. Eq. Div. 1 1989).

rights under the circumstances at all? Does the fundamental right to privacy I spoke of earlier have anything to do with the issues raised? As I briefly stated when I discussed *Griswold*, Justice Douglas found that the fundamental right to privacy protects a relationship—the intimate relationship between a married couple.⁷² In *Eisenstadt v. Baird*,⁷³ the Court spoke of the right of an individual to be free from governmental interference.⁷⁴ So it spoke of a zone of privacy, a zone of non-state interference. *Roe v. Wade*⁷⁵ mentioned three concerns which justify a zone of state non-interference in the abortion decision: 1) the relationship between a patient and her doctor,⁷⁶ 2) the right to bodily integrity, and 3) a woman's right to make decisions concerning the continuance or termination of her pregnancy.⁷⁷

This framework doesn't fit into the potential legal problems created by the new technologies such as *in vitro* fertilization. How can you speak of a privacy right when the decision to use a technology is not a private one, but made with doctors and researchers? How can you speak of a right to privacy which involves experimental medical treatment and raises public financing issues? How can you speak of family relationships when the definitions of families are so confused and undefined? How can you speak of a patient relationship when in many cases you are talking about experimentation, not treatment? How can you speak of bodily integrity when the embryos are not yet part of the mother's body? How can you speak of self-determination and decision making when there are so many potential decision makers? A court that views the doctrine of privacy as a zone of noninterference is not helpful in grappling with the issues that technology raises.

This is not to say that there are no fundamental rights at stake here. The trouble is that the court has yet to identify them. However, identifying the values is at the core of deciding the issues raised by the technology. What we need to do as members of today's public is to help provide a framework of values. This will help the discourse of courts in analyzing legal relationships between the embryos, fetuses and the children created by the technology and those whose bodies were used to create them.

Let's think about our values. Genetic relationships mean a lot to us.⁷⁸ Other things seem to mean a lot to us as well. The women whose bodies nurture and bring the children into the world are not to be ignored. Perhaps, as a society, we might decide to permit those who choose to terminate their parental rights, to do so. But what will we do if the genetic relatives choose to assert claims on the children created? What

72. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

73. 405 U.S. 438 (1972).

74. *Id.* at 453.

75. 410 U.S. 113 (1973).

76. *Id.* at 164.

77. *Id.* at 153.

78. See e.g., Comment, *The Use of In Vitro Fertilization: Is There a Right to Bear or Beget a Child by Any Available Medical Means?*, 12 PEPPERDINE L. REV. 1033 (1985); Kass, *supra* note 69, at 13-14.

are the attributes of parenthood that give rise to claims that we think should be protected? Is genetic relationship the thing we primarily value? Are birth and nurturance, financial outlays, the desire to parent, psychological needs, and financial interests important? These are some of the issues that we should consider in our search for solutions. I do think that the Constitution has something to say about whether the rights claimed should be terminated with the assistance of the state. I worry about the nature of the claims and why they are being asserted. I worry about the values inherent in the claims. How can the claims be accommodated in the manner most beneficial for the future children? What, after all, is a family?

Remember, in my history of the birth control movement, I said that ultimately the public view, the public perspective prevailed. Well, we are the public. We create society-wide attitudes and we define the values. I congratulate all of you for coming today. It means that you worry about some of the issues that I worry about. And I just want to tell you that you are not powerless in all of this. You should discuss the issues. Public policy is formed in public discourse. Be part of the public discourse. Look at how legislatures are turning around on the abortion issues. Think about that. They are changing because of public discourse and public opinion. Lawmakers are not doing it solely because they have had a change of heart. They are doing it because they are a product of today's society as well, and they listen to what is happening around them.

Let people know how you feel about these issues and why. I don't think that we should necessarily detach these issues from our spiritual selves. I think that this discourse needs to become public. The current state of affairs is chaotic. Perhaps it will remain that way for a very, very long time but it is not going to change until the public reaches consensus about some of these issues.