IN THE SUPREME COURT OF THE
STATE OF TENNESSEE

BLOUNT LAW, NO. 180

MARY STOWE, F/K/A MARY SUE DAVIS, Appellant/Defendant, JUNIOR LEWIS DAVIS, Appellee/Plaintiff.	)	Case No. 34

On Appeal from a Judgment by the Court of Appeals
for the State of Tennessee, Eastern Division

BRIEF OF THE AMERICAN ACADEMY OF MEDICAL ETHICS AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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INTEREST OF THE AMICUS CURIAE

The American Academy of Medical Ethics (AAME) was incorporated in 1986 in response to an adversely changing medical and ethical environment in the American professional medical community. As an educational association of over 20,000 physicians from Tennessee and throughout the country, the AAME seeks to influence the medical-ethical debate through the co-publication of Issues in Law and Medicine, the sponsorship of fora for dialogue and, where appropriate, serving as a "friend of the court" in litigation bearing directly on the Academy's specialized interest in seeing a restoration of traditional medical ethics.

The AAME exists to reaffirm enduring principles of traditional medical ethics to help resolve the medical, and increasingly legal, dilemmas created by a distancing of medicine from foundational ethical guidelines. Law and medicine have been historically intertwined; developments in one area inevitably influence the other. The AAME believes that the Court of Appeals' decision in this case -- announcing a constitutionally protected paternal right to destroy embryos consensually created through in vitro fertilization (IVF), over the objection of the mother -- would serve to legitimize a callousness toward human embryos and compromise the ability of many physicians, in good conscience, to assist infertility patients through IVF. Further, for the Court to discount or ignore the uncontroverted medical and scientific evidence presented in the record of this case would contribute to the further erosion of patient care -- including care for the

I. SUMMARY OF ARGUMENT

> The challenge "is not...to overcome the failure of the law to keep pace with medical technology. The challenge is to prevent the dilemmas of medical decision-making from forcing upon us undesirable changes in the law."[1]

Litigants in this case ask the Court to fill a Solomonic role in deciding the fate of seven cryopreserved human embryos. The issues presented are complex: what is the nature of the embryos; what, if any, legal rights should they be accorded; specifically, what is to be done with human embryos when their parents have divorced and disagree over their disposition.

While the American Academy of Medical Ethics (AAME) makes no attempt to provide facile answers to these hard questions, your amicus submits that certain medical, scientific, ethical and legal considerations should guide this Court in its ultimate resolution of this case. First, these embryos represent human life at its earliest stage; as such, they should not be treated as the "property" of either, or both, parties. Throughout their briefs, parties refer to the embryos as "potential life;" their unique nature must be reflected in the Court's judgment.

Second, the United States Supreme Court's contraception cases concerned only the invalidation of contraception laws barring the consensual use of contraceptives and have no logical application to a post-conception dispute between parents. It would be a gross

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[1] Cruzan v. Harmon, 760 S.W.2d 408, 426-27 (Mo. 1988), aff'd sub. nom., Cruzan v. Director, Missouri Dept. of Health, 110 S.Ct. 2841 (1990).

oversimplification of the facts of this case to apply these precedents woodenly.

Third, the Supreme Court's abortion jurisprudence fails to articulate any principles that control this Court in the resolution of this difficult case. The constitutionally protected abortion right is tied to the woman's interest in freeing herself from the physical burdens of pregnancy. Mr. Davis cannot claim any such burdens.

Fourth, at common law, the unborn were accorded legal rights in various contexts. Recognition of their rights has been commensurate with medical understanding. The advances in medical technology that precipitated this dispute provide the Court with the opportunity to address this medico-legal intersection and to perform the familiar task of balancing rights, albeit in a novel context.

Finally, at its essence, Mr. Davis' argument is that this Court should be the first in the nation to articulate a father's right to interrupt a consensually-initiated procreative process, over the objection of his ex-wife. This cannot be confused with the protected decision to use contraception free from state interference. Mr. Davis' asserted right is unsupported by any of the physical privacy interests the Supreme Court found warranted a woman's right to abortion. The unstructured male procreational privacy right articulated by the Court of Appeals should accordingly be rejected.

The Court of Appeals' solution was for the law to abandon this

area of medicine and the human products of this technology. The Court of Appeals extended Tennessee constitutional and statutory protection to a father seeking to unilaterally destroy the human embryos created through non-coital reproductive technology. The Court of Appeals' decision ushers in a Brave New World wherein legal developments are driven by innovations of technology; one in which ethics is relegated to the role of interested, but disabled, spectator.

The importance of this case lies not only in <u>what</u> is decided; but, also, and perhaps more importantly, in <u>how</u> it is decided. The attendant issues provide the Court with the opportunity to clarify or further confuse the ethical and legal implications of recent advances in medical technology. The AAME submits this brief in an effort to assist the Court in separating fact from fiction and the relevant from the merely interesting. This case presents to the Court serious questions raised by recent developments in medical technology. The questions posed are not easy ones; however, neither are they ones that warrant the creation of new constitutional law. Awarding the embryos to Ms. Stowe for anonymous donation, with the proviso that Mr. Davis be absolved of financial liability, is consistent with current Tennessee law and public policy and properly accounts for the interests of all parties to this dispute.

II. THE COURT OF APPEALS ERRED IN TREATING CRYOPRESERVED HUMAN EMBRYOS CREATED THROUGH IN VITRO FERTILIZATION AS PROPERTY.

In concluding that Mr. Davis has a constitutionally protected interest in preventing the implantation of the embryos he and Ms. Stowe created, the Court of Appeals treated the embryos as marital property. The court stated that the "parties share an interest in the seven fertilized ova.... Accordingly, the cause is remanded to the trial court to enter a judgment vesting Mary Sue and Junior with joint control of the fertilized ova and with equal voice over their disposition." Slip Op. at 6 (emphasis added). Human embryos existing in a state of cryopreservation at the four to eight cell stage are clearly not "children" in the traditional sense. The question before this Court, however, is whether the embryos created by Mr. Davis and Ms. Stowe are nearer to what one considers "children" or to what one considers chattel, i.e., a chair. In according the parties a shared interest in, with joint control over, the embryos, the Court of Appeals rejected the trial court's finding that the "[h]uman embryos are not property," Tr. Ct. Slip Op. at 2, and engrafted onto Tennessee law a position virtually without ethical support and with no legal foundation.[2]

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[2] A recognition that human embryos should not be treated as property is not outcome determinative. Such a finding does not require the Court to find that the embryos are "persons" or even children, as the trial court found. However, a finding that human embryos are not property is necessary to the factual and legal integrity of this Court's decision.

Ethicists agree that the human embryo is entitled to a unique and profound respect.[3] Governmental commissions in Australia[4], Great Britain[5] and the United States[6] agree that the human embryo created through IVF should not be treated as mere property.[7] The majority view among American legal scholars supports this

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[3] See e.g., Dickman, Social Values in a Brave New World: Toward a Public Policy Regarding Embryo Status and In Vitro Fertilization, 29 St. Louis L.J. 817 (1985); Kasimba & Buckle, Guardianship and the IVF Human Embryo, 17 Melbourne L. Rev. 139 (1989); Robertson, In the Beginning: The Legal Status of Early Embryos, 76 Va. L. Rev. 437 (1990).

[4] The Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, Report on the Disposition of Embryos Produced by In Vitro Fertilization (1984). Hereinafter, Waller Committee Report. The Waller Committee Report concluded that "[t]he couple whose embryo is stored [should not be regarded] as owning or having dominion over the embryo." The couple, therefore, may0X"not sell or casually730Xdispos◙f the embryo". Id. at 27-28, para. 2.8 The legislation finally enacted by the Victorian State Parliament incorporated substantial portions of the Waller Committee Report. However, the legislation was even more protective of the embryos than the Waller Committee Report in that it prohibits the destruction of embryos in situations where no plans have been made for their disposition and requires such embryos be placed in a pool for donation to another infertile couple. A Bill to Amend the Infertility (Medical Procedures) Act 1984, dated 25 October 1984, 1-543-1000/25.10.1984-80813/84 (Revision No. 5) (921).

[5] M. Warnock, Report of the Committee of Enquiry into Human Fertilization and Embryology para. 10.11 (1984).

[6] Protection of Human Subjects; HEW Support of In Vitro Fertilization and Embryo Transfer: Report of the Ethics Advisory Board, 44 Fed. Reg. 35,033 (1979).

[7] The American Fertility Society (AFS), a trade association of IVF providers, on the other hand, takes the position that "concepti are the property of the donors." Ethical Statement of In Vitro Fertilization, 41 Fertility & Sterility 12 (1984). Among groups taking positions on the treatment of IVF created embryos, the AFS is nearly alone in its opinion that they should be treated as property.

position.[8] See, e.g., Andrews, The Legal Status of the Embryo, 32 Loyola L. Rev. 357 (1986) ("[T]he property approach has not been accepted as a satisfactory framework within which to analyze the legal status of the embryo." Id. at 368.)[9]

However, the Court of Appeals' decision fails utterly to account for the unique nature of the embryos at issue in this case, specifically, that these extracorporeal embryos embody the earliest stage of human life.[10] This vesting of property rights in that which is admittedly human is offensive, defies the collective guidance of major ethical studies, and is entirely unessential to a satisfactory resolution of this case.

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[8] Robertson, Decisional Authority Over Embryos and Control of IVF Technology, 28 Jurimetrics J. 285, 295 (Spring 1988).

[9] See also, Louisiana Rev. Stat. 9:120, et seq. (1986). Set forth in Appendix A. Louisiana is the only American state that has sought to address the legal questions raised by IVF. This statute specifically provides that "An in vitro fertilized human ovum is a biological human being which is not the property of the physician which acts as an agent of fertilization, or the facility which employs him or the donors of the sperm and ovum." La. Rev. Stat. § 9:126.

[10] The AAME does not believe that a clear recognition of the human nature of the embryos, without more, is dispositive of this case. The embryos are indisputably human; they are clearly alive. See e.g., Robertson, In the Beginning: The Legal Status of Early Embryos, 76 Va. L. Rev. 437, 444 (1990). While these facts do not draw the Court inexorably to a particular result, their significance cannot be ignored. The Court of Appeals' continuous use of the misnomer "fertilized ova", instead of the technically accurate "zygote" in referring to the embryos evidences the court's failure to grasp "that the human embryo is entitled to profound respect." Protection of Human Subjects; HEW Support of In Vitro Fertilization and Embryo Transfer: Report of the Ethics Advisory Board, 44 Fed. Reg. 35,033, 35,056 (1979).

The Court of Appeals sought support for its position in York v. Jones, 717 F.Supp. 421 (E.D. Va. 1989). However, York v. Jones was little more than a contract dispute in which the court permitted the terms of the contract to control the allocation of rights between the parties. York v. Jones involved a dispute between IVF participants and an IVF clinic; after numerous attempts at implanting embryos created at the clinic from the Yorks' gametes, the clinic retained one embryo which the couple sought to transfer to a clinic closer to their home after they moved from Virginia to California. The clinic refused to permit the transfer. Before engaging in IVF, the couple and the clinic entered a contract which described embryos created at the clinic as the property of the couple and which repeatedly referred to the embryo as belonging to the couple. In finding that the couple could maintain an action in detinue for the embryo still held by the clinic, the court relied heavily on the contract's consistent referral to the embryo as the property of the couple and found that the clinic held the embryo as a bailee for the couple and thus, could not refuse to relinquish the embryo to the couple at the couple's request.

Unlike in York v. Jones, no contract between the clinic and the parties in this suit purports to consider the embryos the property of either, or both, parties. Slip Op. at 3 n.6. Likewise, there is no independent state law basis for treating the embryos as property. The Court of Appeals' treatment of the embryos as property lacks any factual or legal support and directly

contradicts substantial ethical guidance from the United States and abroad. Accordingly, this Court should reject the Court of Appeals' assumption that the human embryos at issue in this case are "property."[11]

Moreover, the structural context of the dispute in York v. Jones -- family versus third party -- is entirely different from that involved here -- a disagreement between ex-spouses. The law has traditionally accorded great deference to the family unit and its prerogative to be free from outside interference. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972). When a stranger -- whether the state, a creditor, or another third party -- attempts to interpose itself into the family structure, family and parental rights have been construed broadly to protect family integrity. However, the law has been considerably more reluctant to expand

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[11] The AAME knows of only one additional case in which human embryos were alleged to be property. Del Zio v. Presbyterian Hospital, 74 Civ. 3588 (S.D.N.Y. Nov. 14, 1978) (unreported). The Del Zios, the first reported couple in the United States to use IVF, sued the hospital after an employee of the hospital destroyed the embryo created from the Del Zios' gametes without the Del Zios' consent. The Del Zios sought recovery against the hospital for infliction of emotional distress and for conversion of property. A jury awarded the couple $50,000 on the emotional distress claim but rejected the conversion of property claim. At least one commentator states that Del Zio "held that the IVF embryo is not the property of the couple who provide the sperm and egg." Andrews, The Legal Status of the Embryo, 32 Loyola L. Rev. 357, 367 (1986).

Moreover, while Roe v. Wade held that the unborn are not "persons" under the Fourteenth Amendment, treating human embryos as property, is at least arguably, contrary to the spirit of Article I, §34 of the Tennessee Constitution. ("The general assembly shall make no law recognizing the right of property in man.")

rights for one family member to assert against another. In this case, Mr. Davis asks this Court to recognize a property right in human embryos that would frustrate Ms. Stowe's reproductive interests. Such a "property right" -- found nowhere in American law -- would grant to one IVF participant a unilateral veto power over the continuing reproductive intent of the other party and would ill-advisedly expand the arsenal of weapons at the disposal of warring ex-spouses.

III. THE FEDERAL REPRODUCTIVE PRIVACY CASES, INCLUDING ROE V. WADE AND ITS PROGENY, DO NOT SUPPORT A PATERNAL RIGHT TO PREVENT THE IMPLANTATION OF HUMAN EMBRYOS CREATED WITH MATERNAL AND PATERNAL CONSENT.

The U.S. Supreme Court's reproductive privacy decisions fail to provide this Court with a constitutional foundation on which to construct the right Mr. Davis asserts. In each of these cases, the right protected was the right of the individual to be free from undue state interference in procreational decisionmaking.[12] It was in this context -- the right of individuals to choose to use contraceptives and the right of the woman to free herself from the burdens of an unwanted pregnancy -- that the Court recognized a constitutionally protected privacy right. In the first line of

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[12] Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) and recent cases have left unclear the precise parameters of the federal abortion right. But it is now clear that the states have a "compelling interest" in protecting the unborn which exists throughout pregnancy. See e.g., Webster, 109 S. Ct. at 3057. Most recently, Justice Kenneddy wrote for four members of the Court that abortion involved "the origins of other human life that lie within the embryo." Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2983 (1990).

cases, those concerning contraception, the Court protected a couples' right to use contraceptives free from governmental interference. In the second line of cases, the Court held that a woman's right to obtain an abortion was part of her personal privacy and bodily integrity protected under the Liberty Clause of the Fourteenth Amendment. This case, however, does not present a situation in which the state is attempting to interpose itself between persons wishing to use contraceptives. Nor is this an instance wherein the state is seeking to limit a woman's access to abortion. Instead, this case presents the dissimilar scenario in which a father of embryos, after consensually engaging in their creation, seeks to have them destroyed against the wishes of their mother. The decisions of the Supreme Court preclude certain governmental interference in these areas; they do not dictate which of two private parties should be successful in a dispute over their use.

Moreover, the right established in the abortion decisions is narrower than that which Mr. Davis urges on this Court. The Supreme Court held that a woman's privacy right in her physical integrity protected a decision to remove a fetus from her body, i.e., to obtain an abortion. While this right permits the woman to decide to terminate a pregnancy, it does not include the right to demand the death of the fetus. Mr. Davis' argument is thus twice flawed. First, he appropriates to himself the woman's legal right to unilaterally choose abortion -- a right the Court based entirely on the woman's right of physical integrity implicated in

pregnancy. Second, in demanding the destruction of the embryos, he claims a right that the Supreme Court has found unwarranted by the right to abortion. The Court has held that given the attendant physical burdens of pregnancy, a woman has the right to terminate a pregnancy; however, once relieved of those physical burdens, the woman has no constitutionally protected right to demand the destruction of the fetus.

A. The Supreme Court's Contraception Decisions Do Not Support a Paternal Right to Prevent the Implantation of Human Embryos Created with Maternal and Paternal Consent.

In holding that Mr. Davis has a constitutionally protected right to prevent the implantation of the embryos, the Court of Appeals' reliance on Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); and Carey v. Population Serv. Int'l, 431 U.S. 685 (1977), is misplaced. At issue in these cases was the state's right to limit couples' access to, or their consensual use of, contraceptives. This case does not concern a state's attempt to interpose itself between partners who have agreed to utilize contraceptives. Instead, Mr. Davis seeks to enlist the aid of the state in frustrating the continuing reproductive intent of his ex-wife.

In Griswold v. Connecticut, the Supreme Court invalidated a Connecticut statute forbidding the use of contraceptives. The Court found that the marital relationship was "intimate to the point of being sacred," 381 U.S. at 486, and that in attempting to regulate "the use of contraceptives . . . [Connecticut] seeks to

achieve its goals by means having a maximum destructive impact on that relationship. Id. at 485 (emphasis in original).[13] Griswold dealt with the intrusion of the state into a married couple's contraceptive use; it provides no support to Mr. Davis.

In Eisenstadt v. Baird, a majority of the Supreme Court extended to unmarried couples the principle established in Griswold. At issue was a Massachusetts statute criminalizing the distribution of contraceptives to unmarried persons but which carried no such limitation for married couples. The Court concluded that "by providing dissimilar treatment for married and unmarried persons who are similarly situated, [the statutes] violate the Equal Protection Clause." 405 U.S. at 454-55. As in Griswold, the privacy protected was that of persons to be free from governmental interference in their decision to use contraception.

In Carey v. Population Serv. Int'l, the Court invalidated a New York law forbidding the distribution of contraceptives to minors. In formulating the scope of this right, the Court rehearsed its earlier decisions: Griswold found married couples possessed the right to use contraceptives; Eisenstadt extended the right, rejecting the distinction between married and unmarried couples; and finally, Carey granted the right to minors.

The issues presented to this Court bear no resemblance to those in Griswold, Eisenstadt, and Carey. Mr. Davis nowhere claims

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[13] A constitutional right of privacy is not here in dispute. Whatever the scope of such a privacy right, it does not encompass Mr. Davis' contentions.

that the state of Tennessee has wrongfully interposed itself between he and his ex-wife to frustrate their decision to use contraceptives. Rather, he seeks to have the Court declare that he has rights to unilaterally frustrate Ms. Stowe's procreational intent and to unilaterally destroy human embryos that have been consensually created. Accordingly, he recharacterizes the principle from these cases as some broad, free-floating "right[] of the adult who selects not to be a parent," Davis App. Ct. Br., at 18. These decisions support no such generalized right.

Moreover, the facts of this case further distinguish Griswold, Eisenstadt, and Carey. In these cases, the Court established that individuals had a right to decide free from state interference "whether to accomplish or to prevent conception." Carey, 431 U.S. at 684 (emphasis added). To the extent that these decisions vest in each party to sexual activity the right to determine "whether to bear or beget children", Id. at 685, the right is one concerning the prevention of conception. Under current constitutional law, once conception has occurred, the right to halt the procreative process lies exclusively within the woman because pregnancy uniquely affects her life and health. While couples may decide to use certain forms of birth control that, as a secondary function, may operate post-conceptively, e.g., the low dose birth control pill, the intrauterine device (IUD)[14], their protected right to do

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[14] Contrary to the assertions of Mr. Davis and amici American Fertility Society, et al., a recognition of the human nature of the embryos in this context -- a dispute between a mother who desires them and a father seeking their destruction -- does not jeopardize the legality of birth control methods which operate post-

so does not create in the father the unilateral right to destroy that which has been consensually conceived. Having long ago consensually initiated IVF to conceive these embryos, Mr. Davis' constitutionally protected rights to use contraception have been realized.

Moreover, even assuming Mr. Davis had a protected privacy right which were implicated in this case, he fails to provide any basis for a preference of his "right to choose not to be a parent," Davis App. Br. at 16, over Ms. Stowe's right to choose to bear a child. Unlike the right asserted by Mr. Davis, Ms. Stowe's right to realize the birth of a child has already been recognized by the Supreme Court. ("A woman has at least an equal right to choose to carry her fetus to term as to choose to abort it. Maher v. Roe, 432 U.S. 464, 472 n.7 (1976). "By giving priority to the husband's

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conceptively. The protection enjoyed by all methods of birth control lies in their consensual use. There is no constitutionally protected right to force the use of birth control on another to protect one's own self-interest -- which is the right Mr. Davis asserts before this Court. Moreover, recent research contradicts the assumption of Mr. Davis and the AFS that the IUD acts primarily to prevent the blastocyst from implanting into the uterine wall. "Traditionally, it was believed that the IUD made the uterus inhospitable to the blastocyst and thus prevented implantation.... However, recent studies have strongly suggested that this traditional, unproven belief is wrong, and that the IUD somehow prevents fertilization." Smolin, Abortion Legislation after Webster v. Reproductive Health Services: Model Statutes and Commentaries, 20 Cumberland L. Rev. 71, 124 (1989), citing, Alvarez, New Insights on the Mode of Action of Intrauterine Contraceptive Devices in Women, 49 Fertility & Sterility 768 (1988); Segal, Absence of Chorionic Gonadotropin in Sera of Women Who Use Intrauterine Devices, 44 Fertility & Sterility 214 (1985). See also, Brief for Association of Reproductive Health Professionals as Amicus Curiae in Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), at 34 ("The most likely working mechanism of an IUD is to prevent fertilization.")

interest in not reproducing, the court implicitly interferes with the wife's interest in having children... [I]t is not obvious why the wife's interest in reproducing should be subordinated to the husband's interest in avoiding reproduction." Robertson, Divorce and Disposition of Cryopreserved Embryos, 55 Fertility & Sterility 681, 682 (April 1991)).

The interests of the parties cannot be reconciled; the desires of one will be upheld over the wishes of the other. The Court of Appeals' attempt at recognizing joint interests in the embryos, Slip Op. at 6, is tantamount to their destruction, the result Mr. Davis seeks. However, if these embryos are destroyed, Ms. Stowe may be deprived of her last chance at reproduction. In vitro fertilization is the only avenue of reproduction available to Ms. Stowe as pursuant to her physician's advice, she underwent surgery to prevent natural conception following repeated ectopic pregnancies. Tr. Ct. Slip Op. At 3; Tr. Ct. App. B at 12. Dr. King, Ms. Stowe's physician, testified that there was no guarantee that she could ever produce another usable egg for IVF. Tr. Ct. Slip Op. App. B at 8.[15] In this situation -- where the disputed-over embryos represent Ms. Stowe's last clear chance at parenthood

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[15] Dr. King testified that he has treated Ms. Stowe for six years and has performed 21 aspirations on her to procure ova for use in IVF. While Dr. King knows of no physical reason why Ms. Stowe cannot undergo future ovum aspirations, her health varies from cycle to cycle and there is no assurance that any ova obtained in future aspirations will be of sufficient quality to be usable in IVF. Slip Op. at App. B-8. Dr. King also testified that in his opinion, a pursuant to a balancing of equities in this case, the greater benefit would be bestowed if Ms. Stowe were granted the embryos. Id.

-- the equities balance in favor of the party interested in preserving the embryos.

> [W]here there is no prior agreement to disposition [of the embryos], however, the courts should resolve such disputes according to whether the party wishing to preserve the pre-embryos has a realistic possibility of achieving his or her reproductive goals by other means. If there are no alternative opportunities to reproduce, it may be fairer to award the pre-embryos to the party for whom they represent the last chance to have offspring.[16]

B. Roe v. Wade and Its Progeny Do Not Support a Paternal Right to Prevent the Implantation of Human Embryos Created with Maternal and Paternal Consent.

This case does not draw into question the legal status of abortion. The right to obtain an abortion, announced in Roe v. Wade, 410 U.S. 113 (1973), is not at issue. Accordingly, Mr. Davis' reliance on Roe v. Wade is misplaced. Fundamental to an understanding of the Supreme Court's abortion jurisprudence is that the right to abortion is derived from the woman's right to control her body. This right was found to be sufficiently fundamental so as to require the state to demonstrate a "compelling" interest to

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[16] Robertson, Divorce and Disposition of Cryopreserved Pre-embryos, 55 Fertility & Sterility 681, 682 (1991). Elsewhere Professor Robertson argues that this position is weakened when the party for whom the embryos represent the last clear chance at reproduction wishes to donate the embryos to another. See, Robertson, In the Beginning: The Legal Status of Early Embryos, 76 Va. L. Rev. 437, 481 (1990). This ignores, however, the legitimate reproductive intent Ms. Stowe has in affording the embryos she helped to create -- which she considers to be human life -- the opportunity to be implanted. While Robertson agrees with the Court of Appeals' decision, at least part of his support seems to be based on the erroneous assumption that Ms. Stowe will be able to produce additional embryos with her new husband. As Dr. King's testimony makes clear, such an assumption is false.

justify overriding it. Contrary to Mr. Davis' assertion, the right to an abortion, including the woman's right to an abortion over the objection of the husband, as in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), is tied to the pregnancy itself. Mr. Davis can no more assert the rights established under Roe and Danforth than he can claim to experience the burdens of pregnancy underlying these decisions. While Roe did state that a woman's constitutionally protected right to personal autonomy and bodily integrity encompassed the right to choose an abortion, it created no rights of any nature in the male. The self-serving confusion spawned by Mr. Davis and amici curiae American Fertility Society, et al., does not transform this case into one implicating the woman's right of bodily privacy at issue in the abortion cases. To the extent that Roe v. Wade and its progeny provide any guidance in this case, it is to establish beyond question that the constitutionally protected interests giving rise to an abortion right rest exclusively in the woman.

1. The Father's Asserted Right Does Not Implicate the Right Enunciated in Roe v. Wade -- a Woman's Right to Bodily Privacy.

In Roe v. Wade, the Supreme Court invalidated a Texas statute which criminalized abortion unless the abortion was necessary to save the woman' life. The Court held that women had a constitutionally protected right to free themselves from the physical, psychological and social burdens of pregnancy.

> The detriment the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in

> early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. . . . 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 will consider in consultation.

410 U.S. at 153 (emphasis added).

Legal scholars agree that the holding in Roe v. Wade is limited to the abortion context.[17] "Roe by its terms protects a woman's interest in terminating pregnancy. It says nothing about the right to cause the destruction of extracorporeal embryos." Robertson, In the Beginning: The Legal Status of Early Embryos, 76 Va. L. Rev. 437, 499 n.162. Roe provides no support for a right in either gamete provider to destroy the IVF created embryo.

> Roe's recognition of a woman's privacy interests cannot be extended to grant a woman, who has donated an egg for in vitro fertilization, an absolute right to terminate the existence of the resulting embryo once it has been fertilized and frozen outside of her body. No conflict exists between the existence of the embryo and the privacy concerns discussed by the Court... The principles of Roe v. Wade being inapplicable to a human embryo sustained indefinitely outside a woman's body, an egg donor could not claim a constitutional right to have the embryo destroyed or discarded.[18]

Another commentator states that

> Under Roe, a woman's right to an abortion can be viewed as solely her right to bodily autonomy, or the right to

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[17] Courts have likewise held. See e.g., Group Health Assoc. v. Blumenthal, 453 A.2d 1198, 1206 (Mo. Ct. App. 1983). For collections of such cases, see Kader, The Law of Tortious Prenatal Death Since Roe v. Wade, 45 Mo. L. Rev. 629 (1980); Parness, Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life, 22 Harv. J. on Legis. 97, 110-19 (1985).

[18] Saltarelli, Genesis Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos, 36 Syracuse L. Rev. 1021, 1039-40 (1985) (cit. omit.).

> remove the fetus from her body, but not as the right to destroy the fetus or embryo. Once the fetus is no longer attached to the woman, her interests could be considered negligible, and the state then would be free to assert its interest in protecting the embryo.

Wurmbrand, Frozen Embryos: Moral, Social, and Legal Implications, 59 S. Cal. L. Rev. 1079, 1097 (1986). This analysis is equally applicable to Mr. Davis; as a sperm donor, his rights would be no more substantial than those of the egg donor. The Court clearly articulated that it was the pregnancy itself and the attendant burdens on the woman that supported including abortion within the zone of constitutionally protected liberty.

In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court further clarified that the unilateral right to obtain an abortion was within the sole province of the woman. Danforth involved a Missouri statute that, among other things, required a married woman to obtain the consent of her spouse before receiving an abortion. The Court found this provision unconstitutional as it accorded to the husband a veto-power over the woman's abortion decision that the state itself could not exercise. In explaining why it is the woman's will that prevails when spouses disagree over whether to obtain an abortion, the Court emphasized that the abortional right was based in the pregnancy itself: "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." Id. at 71.

Leaping from Carey -- wherein the Court stated that a right to use contraceptives resided in the "individual" vis-a-vis the

married couple -- Mr. Davis points to Danforth as vesting in the "individual" the unilateral right to destroy the embryos "irrespective of the spouse's vehement opposition and interest in becoming a parent." Davis App. Brief at 17. Mr. Davis attempts to liken himself to the woman in Danforth who seeks an abortion over a spouse's objection. The comparison, however, is inapt. As the Court clearly articulated, the reason for the woman having the right to abort notwithstanding her husband's opposition, was that if she were denied an abortion, she would be subject to the burdens of pregnancy. No such correlative burden of pregnancy exists for men. Accordingly, Danforth provides Mr. Davis with no support for his assertion that he should be allowed to frustrate Ms. Stowe's intent that the embryos be implanted.

Moreover, the right Mr. Davis seeks -- the right to destroy IVF created embryos -- is different in kind from that accorded in the abortion decisions -- a personal privacy right to be free from pregnancy. In upholding state law requirements that a second physician be present to care for a fetus born alive after an abortion, the Court has made clear that the right protected under Roe is freedom from the burdens of pregnancy and not the right to a dead fetus or embryo. See Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, 485 n.8 (1983) (upholding requirement that a second physician be present during post-viability abortions to provide additional protection for the life of the fetus, so long as there is a medical emergency exception to ensure that attention to fetus is not at additional risk to mother's health); Danforth,

428 U.S. at 83-84.

> In IVF, as opposed to abortion, the woman's body is not involved until the embryo is implanted. Therefore, a major consideration of the Court in deciding the abortion cases is inapplicable to the IVF controversy. Further, in the context of abortion, the Court has arguably implied that the right not to bear children does not necessarily include the right to destroy the fetus, since the Court has upheld statutes requiring the physician performing the abortion to strive to save the aborted fetus. . . In the abortion context, therefore, it can be argued that the Court has never allowed a woman to destroy the fetus whenever she decided she did not want to have children. The Court has simply protected the woman's privacy interests in her body, and in doing so, has found it necessary to allow the fetus to be destroyed in certain cases. Since the woman's body is not involved in IVF, it can be argued that there is no right to destroy the embryo.[19]

Mr. Davis seeks to effect this unilateral veto of Ms. Stowe's desire to implant the embryos for three reasons. Each of his claims can be readily resolved by this Court. First, he claims that he is "vehemently against fathering a child who will not realize a complete bond with both parents in a two-parent household." Davis App. Br. at 5. However, a parent's interest that children receive the benefit of a healthy and intact family setting hardly warrants a right to destroy any children that may be born into a different family setting. Moreover, this argument ignores the express intent of Ms. Stowe that she be permitted to donate the embryos "for the benefit of another childless couple." Stowe S. Ct. Brief at 8 (emphasis added). Accordingly, Mr. Davis'

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[19] Schaefer, In Vitro Fertilization, Frozen Embryos, and the Right to Privacy -- Are Mandatory Donation Laws Constitutional?, 22 Pac. L.J. 87, 107 (1990) (cit. omit.) (emphasis added). Schaefer ultimately concludes, however, that general privacy notions support a right to demand embryo destruction.

concerns that the children born from these embryos would not experience the benefit of an intact household is without merit.

Second, Mr. Davis fears the imposition of financial liability in the form of child support for any children born as a result of the successful implantation of the embryos. Davis App. Br. at 22. This argument appears to assume that Ms. Stowe would have the embryos implanted in herself and as the genetic father of the embryos, he could be forced to bear financial responsibility for the children. This concern may be addressed in one of two ways. In the first instance, under Tennessee law, the couple to whom the embryos were donated would be their legal parents and all financial responsibility for their care would be exclusively theirs. Tennessee has already addressed this situation in the context of artificial insemination with the sperm cells of a donor (AID). Tenn. Code Ann. § 53-446 (Supp. 1982) (if the husband of a woman undergoing AID consents to the procedure, the resulting offspring is the legal child of the couple). The situation here is also similar to adoption proceedings in which the adoptive parents are considered the legal parents of a legally adopted child.[20] Tenn. Code. Ann. § 36-1-126. In addition, this court has the authority to direct the trial court on remand to enter an order absolving Mr. Davis of any financial responsibility for any children born from the embryos. "Courts resolving such disputes in favor of

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[20] The Australian State of Victoria has passed legislation to clarify that a child born through IVF be considered the legal offspring of the social parents. Status of the Child (Amendment) Act of 1984.

reproduction should use their equity power to relieve the unconsenting party of any financial or rearing obligations, to the extent that that is consistent with the offspring's welfare." Robertson, In the Beginning: The Legal Status of Early Embryos, 76 Va. L. Rev. 437, 481 n.110 (1990).

Finally, Mr. Davis claims that he would be "psychologically punished...throughout his life" if the embryos were to be born. Davis App. Br. at 22. This concern pales in significance when compared to the interest in human life embodied in the embryos and Ms. Stowe's constitutionally protected interest in seeing the embryos implanted. The state has a "compelling interest" in the human life represented by the embryos. Webster, 109 S. Ct. at 3057; Ohio v. Akron Center for Reproductive Health, 110 S. Ct. at 2983. While Tennessee may not have the authority to prevent the parties from mutually deciding to destroy the embryos,[21] the state may legitimately determine that Mr. Davis' claims of psychological burden are insufficient to warrant his destruction of the embryos.[22]

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[21] This does not concede that the legislature lacks the authority to enact such a statute. See, Wurmbrand, Frozen Embryos: Moral, Social, and Legal Implications, 59 S. Cal. L. Rev. 1079, 1097 1986).

[22] Moreover, "courts usually do not like to confer fundamental right status on psychological burdens alone." Schaefer, In Vitro Fertilization, Frozen Embryos and the Right to Privacy -- Are Mandatory Donation Laws Constitutional?, 22 Pac. L.J. 87, 106 n.157 (1990). "The mere possibility that a biologically related child exists might cause some donors discomfort, yet this cannot be considered sufficient enough harm to outweigh the state's interest in protecting and preserving an embryos's development. This is analogous to the live aborted fetus. As Robertson argues, the burden of unwanted, unknown lineal descendants may be found insufficient to qualify for fundamental rights status." Wurmbrand, Frozen Embryos: Moral, Social, and Legal Implications, 59 S. Cal.

Contrary to Mr. Davis' assertions, Danforth fails to support a unilateral right in a male to override the woman's interest in completing a consensually initiated procreative process. While claiming that he seeks only the straightforward application of well-established constitutional principles, he instead argues for a non-existent paternal right to frustrate a woman's constitutionally protected decision to, if she chooses, bear a child. The Supreme Court unequivocally rejected such a right in Danforth. Innovative medical technologies, such as the IVF utilized to create the human embryos at dispute in this case, do not alter the nature of the rights protected in the Supreme Court's abortion decisions, which grounded the abortion "liberty" in the woman's right to decide whether her body should be subject to a pregnancy.

2. Roe v. Wade Does Not Preclude a Finding That Life Begins at Conception Outside The Context of Abortion Regulation.

Mr. Davis misinterprets the Supreme Court's statement in Roe v. Wade that the state could not "override the rights of the pregnant woman" to obtain an abortion "by adopting one theory of [when] life [begins]". 410 U.S. at 162. This limitation applies only within the narrow context of state attempts to limit abortion access through criminal statutes; it does not proscribe the adoption of such a policy for other purposes or in other contexts. As demonstrated above, this case does not involve an instance in

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L. Rev. 1079, 1097 (1986).

which the state is seeking to limit a woman's access to abortion; accordingly, the dicta of Roe and Akron is without force.[23]

The trial court's finding that "human life begins at conception," Slip Op. at 2, is not a component of a state attempt to regulate abortion. Instead, it was a finding of fact by a trial court that served to extend legal protection to extracorporeal embryos created through IVF. Moreover, Mr. Davis does not dispute the accuracy of the court's determination that life begins at conception. ("This appeal presents issues that are exclusively ones of law, based on a factual record that is unusual for its lack of disputed facts." Davis App. Br. at 8.)

As the trial court's finding that "human life begins at conception" is not offered by the state as a justification for regulating abortion, the dicta of Roe and Akron is inapplicable. Indeed, there is no conflict whatsoever between the abortion decisions' permitting abortion until viability and the trial court's finding that embryos created through IVF, existing in vitro, are human life.

C. A Paternal Right to Prevent the Implantation of Human Embryos Created with Maternal and Paternal Consent Cannot be Considered Fundamental.

Mr. Davis asserts that he has a constitutionally protected right to demand the destruction of embryos he and Ms. Stowe

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[23] Indeed, in Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), the Court upheld the preamble to an abortion that stated that "Life begins at conception." The Court found that the preamble had no substantive applicaiton to the state's abortion regulation statute and was therefore valid. Id. at 3049-50.

consensually created through IVF. The Court of Appeals agreed, finding that federal substantive due process protects Mr. Davis' right to avoid parenthood prior to the occurrence of a pregnancy. Slip Op. at 6. When measured against established standards required for substantive due process rights under the Fourteenth Amendment, Mr. Davis' asserted right is found wanting.

In Bowers v. Hardwick, 478 U.S. 186 (1986), the Court was invited to extend constitutional protection to homosexual sodomy. The Court first examined whether the right to participate in homosexual sodomy resembled rights previously given substantive due process protection. Plaintiff-challengers to the Georgia sodomy statute argued that the collective force of Griswold, Eisenstadt, Roe, and Stanley v. Georgia, 394 U.S. 557 (1969), required an invalidation of the statute. The Court however, looked at the earlier privacy cases and found that while they protected child rearing and education (Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923)); family relationships (Prince v. Massachusetts, 321 U.S. 158 (1944)); procreation (Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)); marriage (Loving v. Virginia, 388 U.S. 1 (1967)); contraception (Griswold, Eisenstadt); and abortion (Roe), "none of the rights announced in these cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy asserted in this case." 478 U.S. at 190-91.

The Court reiterated two tests an asserted right must meet to be considered fundamental and thus protected under the Due Process

Clause. The first category includes those "fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" Id. at 191-91 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Second, such rights must be "'deeply rooted in this Nation's history and tradition.'" 478 U.S. at 192 (quoting Palko, 302 U.S. at 503 (Powell, J.)). The Court concluded that "[i]t is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy." 478 U.S. at 192.

Technology does not obscure the right that Mr. Davis asserts in this case -- the paternal right to destroy consensually conceived human embryos. This interest is not "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." Nor can Mr. Davis seriously argue that the right he asserts before this Court is "deeply rooted in this Nation's history and tradition."[24]

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[24] The Supreme Court recently applied this test in the context of family relationships -- an area in which privacy rights are readily understood. Michael H. v. Gerald D., 109 S.Ct. 2333 (1989). The Court rejected the claims of an adulterous natural father seeking to maintain a relationship with a child. The Court found that even though a relationship between a child and his natural father is normally one that the law protects vigorously, an adulterous father enjoys no such right. The Court's decision reluctance in Bowers and Michael H. to articulate new constitutional rights should guide this Court's decision. While the Court has articulated the right to use contraceptives and for women to obtain abortions, the Court has never articulated a paternal right to destroy one's offspring. Mr. Davis' claim to have a fundamental right to destroy embryos created through the mutual consent of he and his ex-wife is hardly the type of right that "society has traditionally protected." See also, Schaefer, In Vitro Fertilization, Frozen Embryos, and the Right to Privacy -

The "harms" envisioned by Mr. Davis -- a parent's potential financial liability for a child he willingly conceived and the psychological burden of "having a child out there" if the embryos were to be born -- are hardly ones to which the law has shown solicitude. For Mr. Davis to argue that the novel right he urges on this Court is fundamental is, "at best, facetious." Id. at 194.

IV. TENNESSEE LAW DOES NOT SUPPORT A PATERNAL RIGHT TO PREVENT THE IMPLANTATION OF HUMAN EMBRYOS CREATED WITH MATERNAL AND PATERNAL CONSENT.

No Tennessee statute, constitutional section, or precedent can reasonably be interpreted to support the right Mr. Davis asserts before this Court. None of these has ever articulated a paternal right to unilaterally destroy consensually created embryos. Most notably, this Court has never held that the Tennessee Constitution provides an independent basis for recognizing abortion rights any broader than those granted under Roe v. Wade and its progeny. Accordingly, the Court of Appeals erred in creating a new and novel male right to destroy consensually conceived offspring.

The Court of Appeals ignored the lack of authority to create such a right in Tennessee law and looked to dissimilar areas of the law where the embryo and fetus are not extended substantial protection. The Court of Appeals concluded erroneously that because these other legal areas do not compel protection of human

- Are Mandatory Donation Laws Constitutional?, 22 Pac. L.J. 87, 117-18 (1990).

embryos created through IVF, they preclude such protection. By creating a new constitutional right, and reversing the trial court's attempt to resolve this dispute in a manner consistent with common law principles, the Court of Appeals erred.

A. The Tennessee Constitution Does Not Support the Father's Asserted Right.

No Tennessee decision interprets the Tennessee Constitution to protect a paternal right to destroy consensually created embryos. As discussed above, Mr. Davis' argument assumes that the woman's right to be free from pregnancy, as announced in Roe, creates in him a privacy right to demand the destruction of consensually created embryos. The Court of Appeals' decision accepts this assumption. In addition to the logical incongruity of this argument, it presupposes a fundamental abortion right in the Tennessee Constitution independent from that created on the federal level by Roe v. Wade. Neither this Court, nor any lower Tennessee court, has articulated such a right. For the Court of Appeals to in this case to announce an even more expansive right was a raw exercise in judicial policymaking.

State interpretations of abortion laws in Tennessee are limited. However, none of them indicates that the Tennessee Constitution, independent from the federal constitution, protects such a right.[25] In Planned Parenthood of Nashville v. Alexander, No. 79-843-II (Tenn. Ch. App. 1979), a state court was asked to

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[25] The abortion statutes are most relevant to this inquiry as it is a post-conceptive "right to avoid parenthood" that Mr. Davis asserts.

temporarily enjoin certain sections of an abortion statute requiring that a woman be provided certain information concerning the nature of the fetus and the procedure before she could consent to an abortion; the statute also imposed a waiting period before the abortion could be performed. Tenn. Code Ann. § 39-302 (1979). In enjoining the statute, the court relied exclusively on federal authority to find the law unconstitutionally vague. The Court also found that the absence of a scienter requirement put physicians at risk of criminal charges for performing abortions which they thought were permissible under the statute. Slip Op. at 4-5. The Court did not refer to any Tennessee Constitutional sections as protecting abortion; neither does the Court's opinion support such an inference.

A 1989 Attorney General Opinion Letter considering the constitutionality of certain regulations applying to abortion clinics but not other ambulatory surgical treatment centers found the regulations to be invalid under federal law. Op. Tenn. Att'y Gen. No. 89-123. In summary, the Attorney General stated that "It is the opinion of this office that the additional requirements imposed by Chapter 466 on ASTCs that perform abortions unconstitutionally infringes on a woman's right of privacy as founded in the Fourteenth Amendment." Id. at 1 (emphasis added). In his extensive opinion letter which surveyed the status of federal abortion law, the extent to which Webster modified Roe, and the level of scrutiny properly employed in reviewing the regulations, the Attorney General had ample opportunity to identify

any and all bases for questioning the law's validity. However, at no point did the Attorney General refer to any state law based abortion right.

B. Tennessee Law Does Not Preclude State Protection of the Unborn Prior to the Point of Fetal Viability.

In concluding that Tennessee law permits no protection for the unborn until they are "viable", the Court of Appeals misread Tennessee law and failed to appreciate the differences between this context and those governed by the discrete provisions of Tennessee law the court examined. In addition, the court's quotation from William Blackstone in reference to the common law roots of Tennessee's legal treatment of the unborn leaves open the possibility for a court to further develop the common law in light of medical technological advances.

The Court of Appeals found that under Tennessee law, the viability standard had been treated as legally significant in three areas. First, the court looked at the Tennessee wrongful death law. Second, the court observed that abortions were legal until viability. Third, the court observed that it was a crime to cause the death of a viable fetus through an assault on the mother.

1. Fetal Wrongful Death.

In 1980, the Tennessee legislature extended the coverage of the Wrongful Death Act to include viable unborn children within the definition of "persons" protected by the act. Tenn. Code Ann. §20-5-106 (1980). Therefore, a viable fetus who is stillborn as a result of the negligence of another may recover under the act.

This statute overruled earlier decisions which, misinterpreting Roe v. Wade, had denied the cause of action for a stillborn child of any gestational age. Hanby v. McDaniel, 559 S.W.2d 774, 777-78 (Tenn. 1977); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958).

The Court of Appeals wrongly inferred that pre-viable fetuses were thus precluded from maintaining wrongful death actions. This ignores the common law "born alive rule" which accords to unborn children of any gestational age may maintain a valid wrongful death cause of action if they are born alive and later die from prenatal injuries. Thus, while the legislature expanded the Wrongful Death Act by extending it to stillborn viable children, the born alive rule permits a cause of action to the pre-viable fetus or embryo, if born alive. Thus, contrary to the Court of Appeals' belief, it is only the parents of pre-viable stillborn children who are without a right of recovery in Tennessee.

2. Fetal Homicide.

As with the law of fetal wrongful death, the legislature recently rejected the born alive rule in its application to the homicide of a viable unborn child. Tenn. Code Ann. § 39-13-107 (1990 Supp.); Tenn. Code Ann. § 39-13-214 (1990 Supp.). This reverses earlier decisions that required a live birth of the child for the imposition of homicide charges. State v. Evans, 745 S.W.2d 880 (Tenn.Ct.Cr.App. 1987); Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923).

In the decisions rejecting a fetal homicide charge for a

viable stillborn child, Tennessee courts have recognized their inability to create crimes in a code state such as Tennessee. See e.g., State v. Evans, 745 S.W.2d at 883-84. However, the requirement that penal statutes be strictly construed is inapplicable here. It does not follow from Tennessee's choosing not to treat persons who cause the death of a pre-viable fetus as murderers that Tennessee sees the purposeful destruction of pre-viable human life as a right. The criminal law is a blunt instrument carrying the harshest penalties the law is able to levy upon those whom society considers a serious threat to public welfare; a refusal to criminalize an activity is not to be considered approval.

3. Abortion Statutes.

Tennessee's abortion statute also obviously includes Roe's trimester framework establishing viability as the point at which the state's interest in fetal life may outweigh the woman's physical privacy right in terminating a pregnancy. Tennessee's current abortion law can only be understood as an exception to the broad public policy protective of human life. In Roe v. Wade, the Court forced the trimester framework on the states, holding that until the fetus is viable, the state interest in protecting fetal life is subordinated to the woman's physical privacy rights in freeing herself of a pregnancy. Roe thus invalidated Tennessee's earlier law which prohibited abortion unless necessary "to preserve the life of the mother." Tenn. Code. Ann. §§ 39-301, 39-302 (1956). Such opposition to abortion had a long history in Tennessee law.

In 1883, Tennessee adopted legislation against abortion, which punished all abortions alike, whether they were performed before or after quickening. Act of March 26, 1883, ch. CXL, 1883; ch. CXL, 1883 Tenn. Acts 188-89. The law also provided for a higher range of punishment if it were proved that the abortion caused the death of the unborn child. Id. When the legislature repealed its pre-Roe laws and enacted laws designed to comply with Roe, it stated that "it is not the legislative intent to authorize or condone the practice of abortion." 1973 Tenn. Pub. Acts ch. 235, § 6.

Tennessee's incorporation of "viability" into its abortion law cannot be read as anything more than compliance with the Supreme Court's directive in Roe. That the state chose to exert its maximum protective power at the point of viability -- the earliest Roe allowed -- evidences the state's strong interest in protecting fetal life to the fullest lawful extent. The Court of Appeals' reliance on the viability standard incorporated in the Tennessee abortion statutes as evidence of Tennessee's refusal to protect pre-viable fetuses and embryos is less than forthright.
Moreover, it is the woman's physical privacy right to rid herself of a pregnancy free from state interference which supplies the rationale for Tennessee's abortion law. It is only deference to Roe that prevents the state from proscribing abortion prior to viability as it once did. The physical burdens pregnancy places on a woman cannot be claimed by Mr. Davis; it is these burdens incident to pregnancy that implicate the woman's protcted physical

privacy right. Therefore, the woman's right to choose abortion up to fetal viability is in no way analogous to Mr. Davis' asserted right. The Tennessee abortion statute offers no support to his argument; the recognition of such a right may not be inferred from the statute. In light of Tennessee's longstanding opposition to abortion prior to Roe, Mr. Davis' argument that the Tennessee Constitution protects a male abortion right is disingenuous.

C. The Common Law May Properly Be Applied to Protect Human Embryos Created through In Vitro Fertilization.

In looking to the roots of Tennessee's treatment of the unborn, the Court of Appeals quoted commentator William Blackstone: "'Life' begins in contemplation of the law as soon as an infant is able to stir in the mother's womb." Slip Op. at 5 (quoting I W. Blackstone, Commentaries on the Laws of England 125). Blackstone here refers to "quickening", the point at which a woman senses the movement of the fetus within her. Quickening usually occurs near sixteen to eighteen weeks gestation -- during the middle of the second trimester and long before the fetus is viable. Dorland's Illust. Med. Dict. 1105 (26th ed. 1985). According to Blackstone, the Father of the common law, the unborn were "life" in the eyes of the law long before viability.

The Court of Appeals' misinterpretation of Blackstone was compounded by its failure to appreciate the historical nature of the common law. Development of the common law has been

inextricably intertwined with advances in medical understanding.[26] Accordingly, the degree of protection provided at common law was limited by the state of medical understanding. However, at all times the common law protected the life and health of the unborn child to the fullest extent permitted by contemporary medical science.

It is only when the common law's treatment is viewed through the lens of modern medical science that it seems primitive and unprotective of the unborn child. Courts have often stumbled badly in evaluating the history of medical jurisprudence, viewing what were historically laws of evidence and procedure erroneously as substantive rules of law. Forsythe, The Born Alive Rule and Other Legal Anachronisms, 21 Val. U.L. Rev. 563 (1986).

At common law, medical jurisprudence involving pregnancy and the unborn child revolved around two basic concepts -- quickening and live birth. Id. at 567. Quickening is "the first recognizable movements of the fetus, appearing usually from the sixteenth to the eighteenth week of pregnancy." Thus, quickening does not occur

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[26] See J. Keown, Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982 26-47 (1988); Dellapenna, The History of Abortion: Technology, Morality and Law, 40 U. Pitt. L. Rev. 359 (1979); Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U.L. Rev. 563 (1987); Atkinson, Life, Birth and Live-Birth, 20 Law Q. Rev. 134 (1904).

See generally D.J. McCarthy, ed., Reese's Textbook of Medical Jurisprudence (8th ed. 1911); A. Taylor, Medical Jurisprudence (7th ed. 1861); J. Beck, Elements of Medical Jurisprudence (11th ed. 1860); J. Chitty, A Practical Treatise on Medical Jurisprudence (1st Am. ed. 1835).

until approximately the middle of the second trimester of pregnancy. "[A]t the time when medicine was in its infancy, it was considered that the foetus only received vitality when the mother experiences the sensations of its motion!" A. Taylor, Medical Jurisprudence 530 (7th ed. 1861).

Before the advent of modern medicine in the mid-nineteenth century, the law looked at quickening as significant for the detection of pregnancy. Between the sixteenth and nineteenth century, the mere detection of pregnancy was one of the most perplexing and debated subjects in medicine.[27] With the discovery of conception, physicians rejected quickening as heralding the beginning of human life.

> Only in the second quarter of the nineteenth century did biological research advance to the extent of understanding the actual mechanism of human reproduction and of what truly comprised the onset of gestational development. The nineteenth century saw a gradual but profoundly influential revolution in the scientific understanding of the beginning of individual mammalian life. Although sperm had been discovered in 1677, the mammalian egg was not identified until 1827. The cell was first recognized as the structural unit of organisms in 1839, and the egg and sperm were recognized as cells in the next two decades. These developments were brought to the attention of the American state legislatures and public by those professionals most familiar with their unfolding import -- physicians. It was the new research findings which persuaded doctors that the old "quickening" distinction embodied in the common and some

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[27] Entire chapters in medical texts were devoted to the detection or "signs" of pregnancy. See, e.g., W. Montgomery, An Exposition of the Signs of Symptoms of Pregnancy (2d London ed. 1857); V. Seaman, The Midwives Monitor and the Mothers Mirror (1800); F. Mauriceau, The Diseases of Women with Child 14 (H. Chamberlen trans. 8th ed. 1755); N. Culpeper, The Midwife 101 (1672).

statutory law was unscientific and indefensible.[28]

Wharton & Stille's wrote similarly in 1905:

> This symptom [quickening] was formerly given much weight, because at that time the child was supposed to receive its spiritual nature -- to become animate. Such ideas have now become entirely obsolete in the scientific world. The time of perfecting the child is at its conception. After then, in all ways, it is merely a question of growth and development.

3 Wharton & Stille's, Medical Jurisprudence 7 (5th ed. 1905). Today, by contrast, quickening "provides only corroborative evidence of pregnancy and itself is of little diagnostic value." Pritchard, MacDonald & Gant, Williams Obstetrics 218 (17th ed. 1985).

With no other reliable evidence, however, the law continued to look at quickening to indicate the beginning of life in the womb. A 1872 New York court described the evidentiary function of the quickening doctrine:

> But until the period of quickening there is no evidence of life; and whatever may be said of the foetus, the law has fixed upon this period of gestation as the time when the child is endowed with life, and for the reason that the foetal movements are the first clearly marked and well defined evidences of life.

Evans v. People, 49 N.Y. 86, 90 (1872). Before quickening, therefore, it was virtually impossible to prove that the woman was pregnant or, consequently, that the child in utero was alive.

The second important rule of medical jurisprudence involving

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[28] The Human Life Bill: Hearings on S.158 Before the SubComm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong. 1st Sess. 474 (statement of Victor Rosenblum, Professor of Law and Political Science, Northwestern University, Chicago).

pregnancy at common law was the born alive rule. See generally, Forsythe, 21 Val. U.L. Rev. 563. "Live birth" is the objective clinical observation that a fetus, upon coming out of the womb, is alive.

> "Live birth" means the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of the pregnancy, which, after such expulsion or extraction, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.

Tenn. Code Ann. § 68-3-102(9) (1983) (emphasis added); see also Pritchard, MacDonald & Gant, Williams Obstetrics 2 (17th ed. 1985). As the Tennessee statute provides, live birth is not associated with any particular time of gestation.

The born alive rule was an important evidentiary rule for determining the cause of death of an infant which was expelled from the womb dead or which was born alive but died shortly thereafter.[29] The rule was predicated on the fact that -- even after the onset of quickening -- medical science could tell little about the life of the child in the womb until after birth. The rule was important because doctors and lawyers were called upon to address difficult questions such as: "Has the infant died before delivery" Has it died during delivery? Has it died at the moment of birth, in consequence of deformity of the mother, or congenital disease?" M. Ryan, A Manual on Medical Jurisprudence 137, 138 (1st Am. ed.

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[29] Cf. Morgan v. State, 148 Tenn. 417, 256 S.W. 433, 434 (1923) ("it has always been difficult to procure conviction in cases like these" because "[t]he necessary evidence is hard to obtain.").

1832). As recently as 1949, a New York court noted that where there is no "eye or ear witness...evidence of live birth precedent to speedy death is of a nature practically impossible to medical science." People v. Hayner, 300 N.Y. 171, 176, 90 N.E.2d 23, 25 (1949).

Although the law was hampered by the primitive state of medical science, it was believed, for important reasons, that the law governing the determination of life and death "ought to be certain." E. Coke, The Third Part of the Institutes of the Laws of England 53 (Garland Pub. Reprint 1979); J. Chitty, A Practical Treatise on Medical Jurisprudence at 415. Accordingly, the law created rules of evidence and procedure -- like the born alive rule and the quickening doctrine -- to accurately determine the cause of death of an unborn or newborn child.[30]

Extending legal protection to the unborn has a long history. Perhaps the earliest evidence of the law's solicitation for the unborn human life is found in the Roman civil law legal maxim: conceptus pro iam nato habetur, under which the fetus was to be

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[30] Viability was not legally relevant under the common law.

> English law does not act on the principle that a child, in order to become the subject of a charge of murder, should be now viable, i.e., with a capacity to live....The capability of a child continuing to live has never been put as a medical question in a case of alleged child murder; and it is pretty certain, that if a want of a capacity to live were actually proved, this would not render the party destroying it irresponsible for the offense.

A. Taylor, Medical Jurisprudence at 413.

treated like a born person whenever some benefit to the fetus was at stake. Thus, Paulus wrote: "A child in its mother's womb is cared for just as if it were in existence, whenever its own advantage is concerned; although it cannot be of any benefit to anyone else before it is born." 2 S.P. Scott, ed., Corpus Juris Civilis 228 (AMS Press ed. 1973).

This rule was adopted by the American common law:

> It has been the uniform and unvarying decision of all common-law courts in respect of estate matters for at least the past two hundred years that a child en ventre sa mere is "born" and "alive" for all purposes for his benefit.

In re Holthausen, 175 Misc. 1022, 1024, 26 N.Y.S.2d 140, 143 (1941). This general principle -- that the law should protect the unborn to the extent medical understanding permits has been developed in a number of different areas of law. In the past fifty years, courts have extended increasingly greater protection to the life and health of the unborn at all stages of gestation.

1. Property

Legal protection of the unborn appeared in property law long before prenatal legal rights were recognized in other areas of the law because the law of property was not limited by evidentiary hurdles imposed by primitive medical understanding. The law could preserve the property interests of the unborn child until the child was born, and these interests could logically and appropriately be subject to live birth for the simple and obvious reason that the child in the womb could not use or benefit from the property interests.

Two hundred year ago, Blackstone wrote:

> an infant...in the mother's womb...is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterward by such limitation, as if it were then actually born.

W. Blackstone, I Commentaries on the Laws of England 130 (U. Chicago Press paperback 1979).[31] The English common law has historically protected the property rights of child still in the womb. Trower v. Butts, 57 Eng.Rep. 72 (1823); Doe v. Clarke, 129 Eng.Rep. 617 (1795); Wallis v. Hodson, 26 Eng.Rep. 472 (1740); Beale v. Beale, 24 Eng.Rep. 373 (1713).

Tennessee recognizes and protects the property rights of the unborn.[32] The property interests of the unborn child are protected in many ways by the federal courts and by virtually all 50 states. These property rights vest while the child is in utero and are not dependent on live birth.

2. Prenatal Torts

The law of prenatal torts was obviously limited, early on, by

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[31] Of course, the fact that "infant" is not in its mother's womb does not change its human nature; in Blackstone's time, medical technology was such that a pre-viable infant could not survive except "in the mother's womb." This case involves technology that has allowed the offspring of human parents to be conceived and grow outside the womb. Their nature is still the same as though they were in utero.

[32] See e.g., Tenn. Dept. of Human Services v. Shelton, 671 S.W.2d 29 (Tenn. 1984); Rodgers v. Unborn Child or Children of Rodgers, 315 S.W.2d 521 (Tenn. 1958); Alcott v. Union Planters Nat'l Bank, 686 S.W.2d 79 (Tenn.App. 1984); Schneider v. Schneider, 260 S.W.2d 290 (Tenn.App. 1952); Stephens v. Stephens, 28 Tenn.App. 58, 185 S.W.2d 915 (Tenn.App. 1945).

evidentiary problems. However, virtually all American state courts now allow a cause of action for prenatal injury or prenatal torts; some American courts have recognized the cause of action regardless of the stage of gestation at which the injury occurs. The problems of proof that originally served to deny the cause of action have been rejected.

Originally, courts imposed a viability limitation on their own handiwork. But this viability limitation has been rejected by virtually all courts. Today, a cause of action can be stated for prenatal torts at any stage of pregnancy, without regard to viability.[33] Instead of denying the cause of action completely, the proof problems were left to the plaintiff in each case. This is the position Tennessee courts have adopted. Shousha v. Matthews Drivurself Service, Inc., 358 S.W.2d 471 (Tenn. 1962).

As a corollary to an action for prenatal injuries, some courts have extended a right to informed consent to the unborn, exercised by the mother. See e.g., Roberts v. Patel, 620 F.Supp. 323 (D.C. Ill. 1985); Informed Cnsent: An Unborn's Right, 48 Alb. L. Rev. 1102 (1984).

The broad scope of fetal protection under the common law highlights that the unborn have historically been accorded protectable interests in property, the right to sue for injuries

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[33] See Daley v. Meier, 33 Ill.App.2d 218, 178 N.E.2d 691 (1961)(injury to fetus of one month gestation); Kelly v. Gregory, 282 A.D. 542, 125 N.Y.S.2d 696 (1953); Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966).

sustained after -- or before -- conception, and others. It would be erroneous to believe that the medical technology involved in this case somehow renders null the common law's protective posture toward the unborn.

> The incompleteness of the embryo previous to quickening, is no objection to its vitality....[T]he foetus enjoys life long before the sensation of quickening is felt by the mother. Indeed, no other doctrine appears to be consonant with reason or physiology, but that which admits the embryo to possess vitality from the very moment of conception. If physiology and reason justify the position just laid down, we must consider those laws which treat with less severity the crime of producing abortion at an early period of gestation, as immoral and unjust.[34]

V. THE COURT OF APPEALS ERRONEOUSLY REJECTED THE CIRCUIT COURT'S FACTUAL FINDINGS AS TO THE NATURE OF THE EMBRYOS.

The Court of Appeals, sua sponte, rejected the trial court's finding of fact that the embryos are differentiated. Relying on the expert testimony presented at trial, the court found that "[f]rom fertilization, the cells of a human embryo are differentiated, unique and specialized to the highest degree of distinction." Tr. Ct. Slip Op. at 2. The Court of Appeals concluded, however, that "Genetically each cell is identical. Approximately three days after fertilization the cells begin to differentiate into an outer layer that will become the placenta and an inner layer that will become the embryo." Slip Op. at 2. The Court of Appeals failed to provide any basis for its diversion from

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[34] 1 T. Beck, Elements of Medical Jurisprudence 201-202 (Albany, 1823).

the testimony accepted by the trial court fact finder. In ignoring the clear factual findings of the trial court, the Court of Appeals overstepped the proper bounds of a reviewing court.

The Court of Appeals' lack of restraint in rejecting the trial court's finding is highlighted by Mr. Davis' concession that there are no factual issues in dispute before the court: "This appeal presents issues that are exclusively ones of law, based on a factual record that is unusual for its lack of disputed facts." Davis App. Br. at 8. The Court of Appeals had the obligation to defer to the reasonableness of the trial court's factual findings and if the trier of fact did not abuse its discretion, its factual findings are presumed to be correct unless overcome by a preponderance of the evidence.

In civil cases, the standard of review is clear:

> Unless otherwise required by statute, review of findings of facts by the Trial Court shall be de novo upon the record of the Trial Court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.

Tenn. R. App. Proc. Rule 13(b). Kelley v. Kelley, 679 S.W.2d 458 (Tenn. Ct. App. 1984), applied this standard to a divorce action.

> This is a divorce action decided by a trial court without a jury. The Supreme Court of Tennessee, citing Evans v. Evans, 558 S.W.2d 851, 854 (Tenn. App. 1977), has ruled that in such cases, trial courts are vested with broad discretion in adjudicating the rights of the parties. Decisions based upon this discretion are entitled to great weight. Thus, in such cases, the role of this Court is to review the record of the trial court de novo with the presumption that the trier of fact acted correctly unless the evidence preponderates otherwise. [cit. omit.]

Id. at 459.

The trial court's finding that the embryos are differentiated from conception was based on credible expert testimony provided by Dr. Jerome Lejeune.[35] This finding is entitled to a presumption of correctness and can only be reversed on appeal if the evidence produced at trial preponderates against it. When considered against the substantial factual testimony of highly qualified experts, it cannot be said that the trial court's finding is unsupported by trial testimony. This testimony, however, was not included in the Abridged Transcript that was before the Court of Appeals. This testimony is crucial to this Court's de novo review of the record from which the trial court drew its factual findings and on which it decided the case. Accordingly, Dr. Lejeune's testimony is attached in its entirety as Appendix B. Unlike the testimony provided by the other experts at trial, Lejeune's testimony included information from the most recent genetic studies employing recently discovered DNA methylation and DNA probe tests which demonstrates with scientific certainty that the information which dictates cell differentiation is present in the first cell

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[35] Dr. Jerome Lejeune is Professor of Fundamental Genetics on the Faculty of Medicine at the University of Paris and a practitioner at l'Hospital des Enfants Malades in Paris. Dr. Lejeune discovered the genetic cause of Down's Syndrome, for which he was presented the Kennedy Prize and the Memorial Allan Award Medal, the highest award in the world for work in the field of genetics. Dr. Lejeune was the former professor of Human Genetics at the California Institute of Technology. He is a member of the American Academy of Arts and Science, the Royal Science of Medicine in London, the Royal Society of Science in Stockholm, the Science Academy in Italy, the Science Academy in Argentina, the Pontifical Academy of Science, the Institute of France of the Academie de Science Morale et Politique, and the Academy of Medicine in Paris.

created by gamete fusion.[36]

Dr. Lejeune relied upon the studies of Dr. Alec J. Jeffries, who developed a method for producing DNA fingerprints that "are completely specific to an individual (or to his or her identical twin) and can be applied directly to problems of human identification." Jeffries, Wilson, & Thein, Individual-Specific "Fingerprints of Human DNA, 316 Nature 76 (July 4, 1985). Lejeune testified that Jeffries' discoveries make it possible to demonstrate that differentiation takes place far earlier than was previously considered to be the case. Lejeune stated that as a result of this method of DNA manipulation, it is scientifically provable that a unique individual exists from the initial cell created at conception. The likelihood of the genetic "fingerprint" being found in another person is conservatively estimated at less than one in one billion.

While Professors Shivers and Robertson testified that they believed cellular differentiation occurred between ten and fourteen days after conception, at the appearance of the primitive streak, they were unable to state with certainty that differentiation did

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[36] App. B. at 39-42. Lejeune relied, in part, on the studies of Dr. Alec Jeffries who developed these methods of DNA manipulation. Jeffries' DNA manipulation tests allow for the defining of a genetic fingerprint for each individual. See, Jeffries, Wilson, Thein, Weatherall, & Ponder, DNA "Fingerprints" and Segregation Analysis of Multiple Markers in Human Pedigrees, 39 Am. J. Human Genetics 11 (1986); Jeffries, Wilson, & Thein, Individual-Specific "Fingerprints of Human DNA, 316 Nature 76 (July 4, 1985).

not occur at conception. Slip Op. 14-15.[37] Therefore, Lejeune's testimony that differentiation exists from conception forward was unrebutted. Id. at 15.

The collective force of Dr. Lejeune's detailed testimony was that human life begins at conception and that the embryos created through IVF were human life. Lejeune provided unequivocal, unrebutted testimony that the single cell created at conception is the most specialized human cell, as it contains all the genetic needed for a lifetime of human growth and development. In reaching his conclusions, Lejeune relied on recent scientific developments that conclusively demonstrated that genetic uniqueness is established at conception. The trial court found Dr. Lejeune's testimony persuasive and reached findings of fact based, in part, on it. The Court of Appeals failed to show that the evidence preponderated against these fact findings. The Court of Appeals' improper rejection of these findings of fact must accordingly be reversed.

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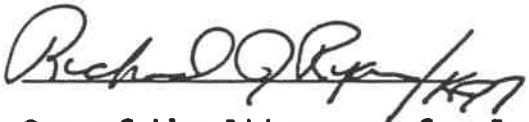
[37] While these experts and the Court of Appeals considered differentiation to be significant biologically and legally, it fails to support Mr. Davis' asserted right. Even under the Court of Appeals' definition, differentiation occurs prior to the onset of pregnancy. The creation of placenta cells precedes implantation, as the placenta is necessary for the embryo to successfully attach to the uterine lining. Thus, if Mr. Davis asserts the right to avoid parenthood where no pregnancy has yet occurred, it is irrelevant whether the embryos are differentiated.

VI. CONCLUSION

The Court of Appeals established a paternal right to destroy human embryos created through the consensual initiation of IVF, over the objection of the mother. When evaluated against the backdrop of federal privacy doctrine and the criteria for establishing a right under the Due Process Clause, Mr. Davis' claim fails. The Tennessee Constitution, Tennessee statutes, and Tennessee caselaw fail to provide any basis for the creation of such a right. Accordingly, the Court of Appeals should be reversed and the trial court decision affirmed.

Respectfully submitted,



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