FROZEN EMBRYOS, ICE-AGE ETHICS & COLD COMFORT: A CASE STUDY IN THE ETHICS OF REPRODUCTIVE TECHNOLOGIES

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I. Introduction

At the beginning of this decade, a civil court case in the United States (Davis v. Davis, 1989 & 1990) raised some interesting questions about the moral underpinnings of judgments on issues resulting from the application of new reproductive technologies, specifically in vitro fertilization. In this monograph I shall examine from a moral point of view some of the issues, themselves both moral and legal, raised in this case. The moral issues concern the possibility of a complicated set of rights conflicts between a prospective mother, a prospective father and a prospective child. While the initial judgment handed down seems reasonable, questions can be raised about the reasoning provided by the judge. In fact, the rationale, and possibly therefore the laws upon which it was based, manifest, in my view, a remarkably rigid and pre-historic set of moral values. Hence the first part of my title. The legal issues to be addressed arise out of a proposal by Anthony John Cuva (1991) for legislative change in the area of in vitro fertilization. While many of Cuva's presuppositions about the case seem right, I shall argue that his proposals are morally inconsistent, and as such provide little comfort to prospective parents contemplating the use of reproductive technologies. Hence the remainder of my title.

I should make it clear that in dealing with the moral issues I am not interested in the legal validity of the judgment under the relevant jurisdiction at the time the case was heard, nor in the question of whether it would be morally permissible for a judge to render a conscientious decision in conflict with the law. I am interested only in what a rational moral agent ought to believe about an appropriate resolution of the competing claims involved.

In examining the case, I shall be forced by my ignorance of certain of the relevant facts to make a number of idealizations, though I do not think this will lead me too far away from the important issues. I shall assume, for example, that there is no evidence that any children produced by the in vitro fertilization method would in this case be likely to have less than normal, healthy lives - no such evidence was adduced in any of the proceedings I shall discuss.

The philosophical approach to be taken neither that of testing nor deploying an ethical theory in relation to the example provided by the case. While it seems plausible to suppose that ethical intuitions are usually based on principles in my case, I suppose, those pertaining to natural rights - I align myself with such writers as William Gass (1957) in believing that principled intuition will always be a more reliable guide than ethical theory both to conduct and to judgment. I shall be concerned, then, to seek clarity on the issues involved in the case, and to provide a rationale, though not a theoretical one, for its resolution.

II. Frozen Embryos and Ice-Age Ethics: The Moral Issues

A. The Case

Mary Sue and Junior Davis, a married couple living in Maryville, Tennessee, were unable to have children of their own, without technological intervention, on account of Ms. Davis' having undergone a tubal ligation after a series of ectopic pregnancies. Together they sought medical help, and eventually a procedure was followed whereby ova were removed from her ovaries, fertilized in vitro with his sperm and frozen for future implantation into her uterus. The number of ova so treated was nine and an unsuccessful attempt at the simultaneous implantation of two embryos was made.

At this point the couple separated and then divorced, a development which it appears neither had foreseen at the start of the in vitro fertilization programme. Some time later, Ms. Davis determined to renew the attempt at becoming pregnant. Mr. Davis opposed this, and applied to the court for an order forbidding Ms. Davis from using any of the remaining frozen embryos for implantation. He argued that his right to choose not to become a father would be violated, and also claimed a right of property over the embryos. Ms. Davis argued in defence of her right to proceed with the implantation that the embryos were examples of potential human life, not of typical property, and that to the limited extent that they were rightly regarded as property, she should have the say in their disposition under the equitable distribution laws in force in Tennessee. She also entered a counter-claim that Mr. Davis be ordered to pay child support in the event that she bore a child.

The judge in the case ruled in favour of Ms. Davis, offering as his grounds the argument that the embryos were instances of human life, and so had a right to life. He awarded "custody" of the embryos to Ms. Davis. He reserved judgment on the child support issue, holding it in abeyance until such time as it should become relevant, namely if and when a child is born. In my view the ruling in favour of Ms. Davis is just, but the argument that the embryos have the right to life is repellent, for reasons which I shall explain in what follows.

The judgment handed down did not stand on appeal. The appellate court rejected the "right to life" rationale offered by the previous judge, as being inconsistent with Tennessee law governing such matters as abortion. This court recognized Mr. Davis' right not to become a father, and awarded control over the disposition of the embryos to Mr. and Ms. Davis jointly. It was able to do this, however, because of some important changes in the facts: by the time the case came to appeal, each party had remarried and neither wanted to have the frozen embryos implanted. The appellate court, therefore, did not examine the key issue in the previous hearing: whether the

rights of the prospective mother or the prospective father should predominate. It did reject the supposed rights of the frozen embryos.

B. A Conflict of Rights

The judgments reached in the case of the frozen embryos were of course relative to the laws of a certain jurisdiction. As I said before, it is not my concern to question whether either judgment was appropriate in that context. I wish to look only at the question of whether either of the judgments was correct from the moral point of view. I shall concentrate on the judgment made at the original trial, since it is the one which poses the clearest moral challenge. I propose first to treat the issue as a conflict of rights, namely those of Ms. Davis, Mr. Davis and the embryos, if these last have any relevant rights. I do not propose to examine the rights of any other persons, and I wish to begin by explaining why this step is appropriate.

The rights of "others" (i.e. those apart from couple and the embryos) might be thought to enter the picture in the following way. Some have argued against the practice of in vitro fertilization on the grounds that adopting, or in some other way looking after the welfare of, a needy child already born might be preferable to bringing a new child into the world (Poff 1987). Though the argument may not be expressed in terms of rights, I think it can be translated into those terms without loss of import. To the extent that the attempt to bear a child which is biologically one's own deflects one's attention from the welfare of other children, the rights of the latter to health, comfort, self-realization etc. are being ignored.

If I understand this argument, however, it seems to rule out not only in vitro fertilization but also the more common "natural" alternative. While this point of view may not be entirely unattractive - many, in fact , would find it compelling - it is hard to agree that it could impose an obligation on someone who wished to bring into the world a new child. Many would argue that the desire to foster biological children seems so much a natural part of human life as to make its relinquishing, if done on moral grounds, supererogatory. Against these, Poff (1987) suggests that, far from being natural, this desire is the result of inculturation at the hands and for the purposes of the patriarchy. Whatever the merits of that claim, it is not obvious that it entails that, once she has the desire, a woman (or indeed a man, if he has the desire) ought to act against it. It seems to be, that is to say, a desire whose fulfilment is morally permissible in most circumstances.

For the purposes of this paper, then, I wish to lay aside this set of considerations. They are importantly relevant to issues about health-care, education, communications etc. policy; they are much less so to the individual choices involved in this case. Something similar can be said about the rights of various other "others," for example the rights of the medical professionals involved to practice the techniques they have developed, the rights of relatives to share the joy of parenthood with the prospective mother, or to avoid the purported shame of being associated with such non-traditional approaches to parenthood. These rights have little or no weight, it seems to me, in deciding the moral issue in the particular case, though some of them might have to be taken into account in setting policy in this area.

In what follows, therefore, I shall give prominence to the rights (real or not) of Ms. Davis, Mr. Davis and the embryos. Since the focus of contention about the original judgment was its being founded on the notion of embryonic rights, I shall deal with these first.

C. Embryonic Rights

As must be clear from the foregoing, I wish to deny that the frozen embryos in this case had any relevant rights, including the right to be allowed to develop into grown human beings. This is not the place to enter into, or even summarise, the entire issue of the so-called rights of the unborn, nor to investigate the thorny problematic of the legitimacy of abortion and related practices. These are difficult issues, but enough has been said elsewhere in support of the general position I adopt (Thomson 1971, Tooley 1984). I shall be content to make a few observations which I feel motivate adopting the same position in the case at hand. Here I shall be appealing to the ordinary intuitions which appear to prevail in related cases.

My main point is that the intuitions we have about the practices of in vitro fertilization are inconsistent with the embryos' possession of the right to life. This is not a simple (and fallacious) appeal to practice or to popular belief, but a reasoned position built on the comparison of cases, as I shall argue.

Consider first the actual method of implantation contemplated in the case at hand. Because of the high failure rate and the time-lag between implantation and determination of success or failure, the procedure was for two or three embryos to be implanted at once. Compared to one-at-a-time implantation, multiple implantation increases the chances of a woman's bearing a child in a single gestational period. However, it also lowers the chances of any particular embryo developing into a child, because the attachment of one embryo to the uterus wall inhibits the ensuing attachment of the others. If the frozen embryos had had a right to life, it would have been shared equally by each of them (given, at least, the absence of any knowledge about any differences in their future prospects for a happy life). It would appear, then, that the acknowledgement of that right would necessitate the one-at-a-time procedure for implantation, for otherwise some lives would have been sacrificed purely for the convenience of the would-be mother.

By-and-large, our ordinary intuitions support the multiple implantation technique. It could of course be argued that this is because the prospective mother's right to avoid inconvenience is more important to us than the right of the embryos to life. This would be to treat the case as a simple conflict of maternal versus embryonic rights. I shall return to this possibility in a moment.

Before that, let us examine a second issue. Suppose that upon implantation of the next embryo or embryos, Ms. Davis had become pregnant and thus had no further need of the embryos still remaining frozen. (We shall suppose that all along her desire had been to bear a single child, barring the unforeseen and slim possibility of twins or triplets.) What ought to have become of them? If they had a right to life, then steps should have been taken, it would seem, to guarantee them the fulfilment of that right. Potential mothers would have had to have been found for them. Cuva (1991) isolates the same consequence of the "right to life" view in his legal analysis of the case, and finds it inconsistent with the principles governing prevailing law in Tennessee. This

indicates that this body of law is in accordance with what I consider to be the correct moral intuitions.

The same recourse of finding potential mothers is available, of course, as a way of avoiding multiple implantation in favour of the one-at-a-time method. It also arises in the consideration of a less recent case in Australia, where both prospective parents died before the implantation of a number of embryos (raising the poignant issue of whether the frozen embryos should be regarded as their heirs or as part of the inheritance!). In none of these cases, however, do our intuitions indicate that it would be appropriate to cater to the alleged right to life of the embryos by enlisting surrogate mothers. Why is this so? In all three cases, it could be argued that a woman's right to autonomy might always override the obligation to volunteer for this duty, but while I believe this to be true if there is such an obligation, I do not find it plausible as an attempt to preserve the embryonic right to life.

In relation to the Davis v. Davis case, it makes no practical difference whether we release the prospective mother, and perhaps other women, from an obligation to bear the remaining embryos on the grounds either (1) that the embryos have no right to life or (2) that they do have such a right, but it is outweighed by the woman's (or women's) right to autonomy over her (or their) lives. It does, however, make an important theoretical difference. It seems to me an important metaethical principle that if an entity (perhaps I should say "animal") has a right of a certain kind, there must at least be some possible circumstance in which that right would outweigh other moral considerations (including other rights held by other entities (animals) involved in the situation) relevant to the evaluation of alternative courses of action available in the situation. A right which is always of least importance is not a right at all. Yet this principle would have to be false if embryos had a right to life. I can think of no possible circumstance, and I do not believe this is merely failure of imagination, in which it would be morally correct to place the alleged rights of embryos above those of other entities, nor in which it would be correct to ignore other moral considerations in deference to those alleged rights.

My rejection of embryonic rights in this case must not be understood as denying certain sorts of moral obligations towards embryos. I wish to allow that one can have an obligation not to behave in such a way that the consequences of one's action are likely to include suffering after birth on the part of one not yet born. This obligation might extend so far as to require preventing the birth of a human being which is in the embryonic stage at the time under consideration. What I deny is the obligation to bring a human being from embryonic to post-natal existence. (My intuitions on this point correspond to those of Bennett (1978).)

Whether this familiar asymmetry of obligations towards embryos can be justified in terms of considerations about embryonic rights remains a moot point. Can we deny the embryo the positive right to become a human being while at the same time allotting it the negative right not to become, for example, a miserable, because limbless, human being? Some would find this asymmetry uncomfortable.

Equally uncomfortable are some of the alternative ways of constructing a rights-based justification for obligations towards those who are not yet born. If a child is born limbless, as many were through the prescription of the drug thalidomide, can we justify the reasonable

position that s/he has a claim against, for example, the companies which developed the drug by saying that s/he has a right not to have been born? Such tensed rights, if I may so call them, are questionable, I suppose, because they appear to require actions which are no longer possible.

I am inclined to think that what has happened here is that we have reached the limits of the applicability of the concept of rights. As a result, we are unsure how to proceed in the attribution of rights. Because many forms of moral consideration are expressible without reference to rights, perhaps it would be better to avoid talk of rights altogether in this context, and stick to more flexible notions such as those of obligation or benevolent action.

However that issue is to be decided, I am confident that the balance of moral considerations in the case of the frozen embryos does not involve regarding the development of the embryos themselves as an object of moral concern. If the case is one of conflict of rights, the embryos have no rights relevant to its resolution; if not, there remain no moral reasons for acting in such a way as to guarantee their developing into persons.

I can give no deeper justification of this position than my belief that the frozen embryos are not persons, nor any other kind of entity which is deserving of moral concern, except in so far as requires looking out for their welfare in the future state of personhood, if they attain that state, or, at least in some form of conscious existence if they fail to achieve full personhood. At the stage of development relevant to our case, they have neither sensations nor desires, neither reason nor self-awareness. They are collections of (I believe) eight human cells, which under certain conditions may develop into persons, but this potential personhood is not itself, in my view, a ground of the appropriateness of moral concern.

I cannot hope in this context to do justice to the philosophical debate about these issues, but I shall mention one important point derived by Mary Warren (1978) from R.M. Hare (1975). The point made by Hare and quoted with approval by Warren is that it seems to make no conceptual difference, to the question of what is a potential person, whether we consider the pair of male and female gametes before conception or the fertilized ovum after conception. Each is a potential person in the sense that given the right conditions (admittedly different in each case) each will develop into a person. The slight difference in the requisite conditions does not seem to justify any difference in moral status. If, then, there is an obligation, even of a prima facie kind, to secure the development of embryos, there is a like obligation to secure their conception - indeed, the conception of as many as is morally feasible. However, it seems to me (if not to Hare?) ludicrous to suppose that there is even a prima facie moral obligation of the latter kind. Accordingly, there is no obligation to secure the development of the frozen embryos.

I am aware that there are strands of utilitarianism which would take issue with my sense of the ludicrous here (see, for example, Sikora 1978). Consideration of those views, however, raises more complex issues, and so must be saved for another place. Here I shall merely conclude that the frozen embryos in the case at hand are not fit objects of any moral concern for their development. Alternatively, returning to the construal of the case as a conflict of rights, they do not have the right to have their development secured. They may have rights not to be allowed to develop into miserable persons, but since we are not in possession of any facts about their probable lives if they do become persons, we cannot make any judgment based on those rights.

Therefore, no rights of the embryos play any role in the resolution of the problem. If the judgment in favour of Ms. Davis was correct, it is not because of embryonic rights.

D. The Property Question

If, as I argued in the preceding section, the embryos had no right to be brought to personal existence, it might appear to follow that they are rightly regarded as property, as was urged in the case by the prospective father, and allowed in a limited sense by the prospective mother. The dilemma on which this conclusion is based may, however, be too quick; so too may be the further conclusion that Mr. Davis should have been granted his wishes in regards to the disposition of the embryos. I shall examine the former conclusion first.

It seems to me intuitively questionable to regard the embryos as property, but I do not think it possible to support this view in a way which makes it indubitable. I shall however consider various objections to the view that embryos are property, or are rightly regarded as property, in order to get closer to the matters upon which this question hinges.

I cannot support any objections to this view which arise from the claim that the embryos are examples of persons, for I believe this claim to be false. Whether their status as potential human beings justifies a prohibition on our regarding them as property is a more difficult question. We are dealing with a case at the very borderlines of the concepts of property and of a human being, and it is perhaps not to be expected that there will be a clearcut answer.

One of the major difficulties in examining this question is the paucity of unquestionably relevant comparison cases. Let us consider a range of examples of entities from which it seems plausibly correct to withhold the status of "property." This range includes the following categories:

1) human beings
2) human body-parts and body-products
3) items of no value (e.g. the cobwebs in the garden shed).

My reason for thinking it at least arguably wrong to classify items in this (incomplete) list of categories as property is that to varying degrees they are not the proper objects of the sorts of transactions to which property is normally subject. These transactions include:

1) assertion and acknowledgement of ownership rights
2) voluntary exchange of ownership
3) (judicial) confiscation
4) (judicially) forced transfer of ownership.

This list is not intended to be comprehensive, but it gives us some idea, I think, of the sociomoral surroundings in which the concept of property functions. I shall draw upon it below when examining the propriety of regarding the embryos as property.

To return to the central question, I remind the reader that I have denied that the embryos qualify under the first category of non-properties. Furthermore, it would be very difficult, in the case at

hand, to put them in the third category, since both parties to the lawsuit, at least, found possession of the embryos to be of great instrumental value. Would it make sense to deny that they constitute property because they fall into the second category? Answering this question involves inquiring into the types of transactions justly entered into by items in this category.

It is not entirely clear that objects in this class fail automatically to constitute property. They can, for example, be bought and sold (though this is relatively unusual): a case would be where someone sells some of her/his bone-marrow to a leukaemia patient, or a lung to a transplant patient. The temptation to deny them the status of property is based upon the inappropriateness of treating them in many of the other ways property is normally treated. It is hard to imagine, for example, a case in which it would be right for the state to confiscate them, or to award ownership of them to another, say in recompense for a debt owed. There seems to be no room for conflicting claims to ownership: their connection with the person of whose body they constitute, or in some cases have constituted, a part seems too close for that.

It may be that my reluctance to regard body-parts as property is founded on a confusion, however. Similar prohibitions against confiscation exist when the objects concerned are food items, or the clothes off a person's back, yet these are property in a noncontroversial sense. I therefore conclude inconclusively: without further investigation which I am unwilling to undertake at present, we cannot say that body-parts are wrongly regarded as property.

This is one reason why we cannot use the analogy with body parts to conclude that frozen embryos are not to be regarded as property. A second is that there is an important difference between the embryos and other body-parts - namely that the embryos are constituted of material from the bodies of two persons. This difference is threatening to the analogy, since it seems to allow for conflicting claims to the embryos which would be absent in the case of a simple body-part.

The only way I can see to make progress on the difficult question of whether frozen embryos can rightly be regarded as property is to compare them with embryos in utero. While this comparison runs the risk of being, for argumentative purposes, too close, so that varying intuitions about the two cases will always automatically coincide, I think it is worth consideration. For it is very difficult to suppose that an embryo in utero would rightly be regarded as property in any way at all. Such an embryo is not the proper object of any of the transactions which constitute the surroundings of the concept of property; nor, therefore, are the frozen embryos, whose distinction from those in utero is primarily geographical, and hence morally irrelevant.

This position is, however, in danger of becoming question begging. The value-laden character of the term "proper" in the last-but-one assertion indicates that claim is not based on a value-neutral analysis of the concept of property, nor of the possibility of the embryos having such a status. Whether it is right to regard embryos as property is not a purely factual matter, but partly a question of how, morally, they ought to be treated. As the existence of the present lawsuit shows, it has become controversial whether or not embryos are proper objects of proprietary transactions. Other legal cases, in which for example prospective fathers have attempted to force or prevent abortions, add to the aura of controversy. However strong our moral intuitions in this

area, we cannot pretend that they are based upon a morally neutral analysis of the concept of property, for there is no such thing.

As a result we are not in a position to press any conclusion from this consideration of the property question. The moral issues bound up in the question of whether the embryos are rightly regarded as property must be approached head on if an answer to the conceptual property question itself is to be attained. And this answer will be consequent upon, not antecedent to, the moral answers. It is much as in the case of abortion - the conceptual question of whether or not the foetus is a person is not one which can be decided in advance of the answer to the moral question of whether abortion is justified, for the conceptual question is one of whether we ought to extend the concept of a person, and hence the moral protection that concept affords, to include foetuses, or to refuse this extension.

Since there is no clearcut way of refuting the prospective father's property claim by denying that the embryos are rightly regarded as property, let us accept this way of viewing them for the sake of argument. Mr. Davis' claim can still be refuted, for it would not follow from it being right to regard the embryos as property that he would have had an automatic say in their disposition. Presumably, in the absence of any agreement as to the disposition of this part of the couple's property, the first candidate for a correct procedure would have been to divide them numerically (not after the fashion threatened by King Solomon!) between the two parties. While it may be appropriate to reject this procedure, such a rejection would not produce a result in favour of Mr. Davis' wishes.

A number of possible reasons for such a rejection deserve our attention. First there is Mr. Davis' claim (as reported by Cuva (1991)) that the embryos are joint property whose disposition requires the consent of both parties if such disposition results in unwanted parenthood. The basis of this claim was that the damage to his rights would have been irreparable if he had become a parent against his wishes, whereas if Ms. Davis had been prevented from becoming a parent, she would have had other opportunities to pursue that estate. The assessment of this argument depends upon the balance of rights between the two parties to the lawsuit, and will be postponed until that balance is examined more closely (see Section II.G).

A second possible reason for rejecting the equal division of the embryos is Ms. Davis' claim that her contribution to their creation was relatively so much greater than her former husband's, given the greater discomfort involved in the donation of ova as opposed to sperm. Ms. Davis urged this argument in the context of the equitable distribution laws prevailing in Tennessee, and in that context her argument may very well be successful, but it seems to me that the argument is weak in moral terms alone. The fault lies with the principle that property should be divided according to the relative contributions of the former joint owners. Suppose two people with the same job, say felling trees, working under the same conditions and paid at the same rate, marry and later divorce. The principle would seem to entail dividing their joint property in proportion to the muscular weakness of the partners, since the weaker partner wilh ave had to exert more effort to earn his/her share of the family income; but this conclusion seems absurd.

Even if this counter-example can be evaded by a more sophisticated expression of the principle, we should note (1) that the principle can only justify deviating from the equal division of the

embryos in favour of Ms. Davis, not of Mr. Davis, and (2) that the most that can be urged in favour of Ms. Davis' claim in this regard is that contribution is one factor that may be taken into consideration in deciding the equitable division of the joint property. This is because of the undeniable relevance of another factor, namely the potential use each party can make of the property to be divided.

This reason for rejecting the equal division of the embryos is much more compelling. The important issue is whether there is a relevant asymmetry in the capacities of each party to use, or to gain any benefit from, the property which is to be divided between them. Viewed from this perspective, it is clear that Ms. Davis could have made immediate use of the embryos in fulfilling her desire to bear a child, whereas Mr. Davis could not. However, it must be admitted that he had the potential of coming to a future position in which he could have made related use of the frozen embryos, for example by securing the help of a surrogate mother to bring them to personal existence. The fact that, in the case at hand, he had no such intention helps us resolve the case itself, but leaves open the hypothetical question, which for completeness we ought to answer.

I want to suggest that the immediacy of Ms. Davis' possible use of the embryos outweighs any claim that Mr. Davis might have over them. The case is parallel to the following: two spouses, A and B, are divorced and have agreed on the disposition of all their property except for a wheelchair which A, but not B, requires for mobility, but which was jointly bought. Let us suppose that it would not be economically or technically easy for A to acquire a replacement if s/he loses this wheelchair in the settlement. Justice would dictate, it seems to me, giving the wheelchair to A, despite any assertion by B that at some point in the future s/he might meet someone, or seek someone out, who would be able to use the wheelchair, and be glad of it, which might thus confer an indirect benefit upon B. Even if there were such a person waiting in the wings, I should be inclined to think A deserves to keep the wheelchair for her/his immediate use. This conviction is based upon a notion of personal property which I believe underwrites the claim that the history of one's use of an item, where that use is based upon a severe need, gives one a right to its continued use over and above the otherwise equivalent rights of a previously unconnected person.

The same conclusion applies in the case of the embryos, on the supposition that they can rightly be regarded as property. That is the answer to the hypothetical question I raised just now. Notice that if the relative discomforts involved in producing ova and sperm were for some reason reversed, the asymmetry of use would I think predominate over the discomfort/contribution factor, thus showing its relevance to be weak.

The issue of competition for implantation of the embryos did not arise in the specific case we are investigating, since Mr. Davis did not urge such a desire - he wanted them kept to prevent implantation. Thus in the case at hand, we have to consider not two competing claims to the same sort of use, but two claims to different sorts of use: control over the disposition of the embryos allows a chance of parenthood to one party, and prevents it for the other.

Whether there is a stronger claim of property on the part of Mr. Davis as opposed to Ms. Davis boils down to whether he had the right not to become a father, since from this point of view custody of the embryos is merely an instrument in the fulfilment of this claimed right. I shall

accordingly postpone discussion of the former until I come to examine the significance of the latter (see Section II.G).

It is worth noting that there are some respects in which Ms. Davis and Mr. Davis had symmetrical potential uses for the embryos, which would not therefore justify an asymmetry in their rights of property. Each, for example, could conceivably have sold the embryos to a third party. That these symmetries of use do not justify an asymmetry of rights does not however mean that they justify a symmetry of rights and hence equal division of the embryos between the parties. I believe that the asymmetries of use were so great as to overrule the levelling effect of the symmetries; this conclusion is based upon the kinds of human needs involved in wanting to become or not to become a parent, and will likewise be discussed later (see Section II.G).

A further reason for rejecting the equal division procedure is that it is at least arguable that the two parties had made an agreement, tacit or not, about the disposition of the embryos. I do not mean an agreement outside the facts that are mentioned in my description of the case, but merely the original understanding they had reached about engaging in the in vitro fertilization programme. For this procedure was carried out not for either of the purposes of selling the embryos for monetary gain or of allowing the former husband to keep some on hand until there is a candidate surrogate mother. Clearly the intention of both parties was that the former wife should bear a child through this procedure. This agreement, I suggest, confers first option in the division of this putative property to Ms. Davis, just as she should have first option, in choosing among the goods to be divided in their divorce settlement, on the car which was bought specifically for her use.

If, then, the matter is to be viewed under the heading of disposition of property, the most that Mr. Davis can morally claim is some form of compensation for this asymmetry in the division, for example a greater share in some other of their goods to be divided. The difficulties of estimating the value of such "property" are clear, but perhaps not insuperable objections to regarding it as property in the first place, for similar difficulties arise in ordinary cases of property where sentimental value and uniqueness play a role.

The conclusion to be drawn from these considerations is that if we are to maintain the view that the embryos are property, yet reject their numerical division between the parties, we should only do so in a way which assigns a prior claim to Ms. Davis, not to Mr. Davis. Thus even if this way of viewing the embryos is correct, it fails to support his case for preventing implantation. This conclusion waits, however, on the settlement of a number of outstanding issues which I have postponed until the next sections.

E. The Prospective Father's Rights

The unwilling prospective father in this case urged two claims about his rights. The first, treated above, was that he had a right of property over the embryos; the second was that he had rights stemming from his position as a potential father. The two claims overlapped to a certain extent, in that Mr. Davis based his argument for an essential say in the disposition of the embryos (viewed as property) on the harm he would suffer if he became a father against his will. I shall now turn under this heading to the issues surrounding the second claim.

The alleged right in question is of course the right not to become a father through Ms. Davis' pursuing of the implantation programme. In the legal context, we might agree with the appellate court that Mr. Davis has this prima facie right, although in this case it is outweighed by the conflicting rights of his former wife. The latter issue will be discussed later (see Section II.G); first I shall turn my attention to the question of whether there exists such a negative "father's" right. It will be convenient, in this discussion, to postpone looking at the question of whether Mr. Davis would have to have provided child support if a child had resulted from the procedure. For now I am concerned only with whether continuing implantation itself would have infringed upon Mr. Davis' alleged right not to become a father.

We might want to deny such a right after noting that Ms. Davis' future actions, except in so far as she has sued for child support, would have had little if any direct effect on Mr. Davis' future life. So far as the continuation of implantation alone goes, he would have been made unwillingly a biological father, but he was not being asked to participate in the upbringing of any child which might be born, nor in the traditional family relationships associated with raising children in contemporary industrialised society. He was not being asked to shoulder any of the responsibilities of fatherhood as these are traditionally conceived. How can he have had a right to avoid fatherhood if for him fatherhood would have had no direct consequences?

This question is based, unfortunately, on a false supposition. As Cuva (1991) points out, Tennessee law did not provide Mr. Davis with any haven from the financial and custodial obligations normally applying to fathers if a child is born, no matter to what extent Ms. Davis may not have wanted to urge them upon him. From the moral point of view, we can see this as a failing in the law, as I shall argue later (Section II.H), and although we must allow it some weight in deciding the moral question in the Davis v. Davis case, we can also say that morally it ought not to be a factor in the first place.

Furthermore, the question answers itself in so far as it leads us to examine the indirect consequences for the prospective father. Even if neither Tennessee law nor Ms. Davis was asking him to assume the responsibilities of fatherhood, Mr. Davis may have been psychologically incapable of casting off (the feeling that he had) such responsibilities. Furthermore, it is very difficult to argue that such a feeling is irrational, since such paternal concern is both biologically and socially beneficial in general terms; we might say it is only natural for him to have felt that way.

On this view, what Mr. Davis had the moral right to avoid was being placed against his will in a position where he took himself to have a number of responsibilities which he could not easily fulfil. It is, if you like, the cognitive dissonance of this position which he had a right to avoid. And while this might be not the most important consideration in the case, nor is it one of negligible weight. One has the prima facie right to avoid the psychological distress brought about by such a dislocation between one's self-image and one's real situation.

Having said that, I shall repeat again that I feel that this right is one which in the present conflict of rights is outweighed by Ms. Davis' right to bear a child. To this I now turn.

F. The Prospective Mother's Rights

The rights which to me seem to be the most prominent in this case are those of the prospective mother. In contradistinction to most contexts in which the issue of "the right to choose" is raised, namely those of contemplated abortion, the choice here is that of becoming, not avoiding becoming, a mother. This means that our analysis of this right must be a little more searching than in the case of abortion.

The most common way of phrasing the right to choose abortion is as the right "to control one's own body." This way of putting the matter in the case of abortion gives emphasis to the consequences for the mother of continuing a pregnancy to term. These include potential health threats as well as economic and other disadvantages which might ensue. Basing the right to choose on the right "to control one's own body" affirms that she has a right to avoid those consequences, although it stresses the health issues, it seems to me, more than the others. In the present case of a woman choosing to bear a child, those negative consequences are of course irrelevant. Instead, the right is the right to choose and to experience the positive consequences of motherhood. It is unclear whether these can be formulated clearly in terms of the right "to control one's own body," since it seems they are not primarily health-related.

Nevertheless, it seems equally clear that Ms. Davis possesses the right to bear a child. (At this stage we are speaking only of prima facie rights.) No doubt the intuitions behind the assertion of the right over one's own body do have some relevance to the case, but I should prefer to express the important right in a different fashion.

Parenthood, after all, is not merely a biological state--it is a sociocultural estate which can be desired for many reasons other than the merely biological. In these reasons we might include the pleasure of the company of children, the social respect granted to parents, admission to the "family" subcultures within our social structures (e.g. those surrounding "family swim" at the local pool, daycare centres etc.) and the desire to have the comforts of family support in one's old age. Alongside these sorts of reason are those involving concern for one's self image: it is easy to see how someone might think having a child is necessary for one's fulfilment as a human being, whether the desire for this fulfilment is taken to be a biological drive or a psychological preference.

We do not know, in relation to the specific case at hand, what were the precise motives of Ms. Davis, the woman seeking parenthood. To that extent we do not know where we should place emphasis in urging her rights. For the sake of argument, let us assume that, as is fairly common, her motivations included the whole spectrum I am here alluding to. My conclusions will then be of general application, although the particular case might need more detailed consideration.

I have noted above (Section II.B) that it has been argued that some of the desires for the social and biological position of parenthood (specifically motherhood) have been criticized as more the results of patriarchal inculturation than the urgings of human nature. I do not wish to pretend that they are immune from such criticism. We should therefore be open to arguments of this kind whose conclusions focused on the importance of fostering independence from the traditional "woman = mother" stereotype, on the provision of non-reproductive ways (e.g. adoption) of

fulfilling some of the sociocultural purposes of parenthood and so on. These are all questions of reproductive policy. It may even be possible to criticize the desires of the woman in our case on similar grounds, though I myself would resist that conclusion. What I think one clearly can't deny is the prima facie right of a woman to fulfil the desire to be a parent.

I shall now turn to a consideration of how that right interacts with the others involved in the case.

G. Resolution of the Rights Conflict

I have argued above that 1) the frozen embryos in this case have no rights relevant to its resolution, and 2) that while various parties other than the prospective mother and father may have rights relevant to the case, they are negligible in weight compared to those of the two principal agents. I have not examined the latter claim, nor the very plausible feminist analysis it opposes, in anything like the depth it deserves. My reason for wishing to leave that to another place is my heavy reliance on the intuition that the desire for parenthood is so natural for human beings that its renunciation in these circumstances would be supererogatory. While it may be morally questionable that women are brought to have the desires for biological parenthood, it is not immoral for a woman, finding herself, as it were, with those desires, to pursue them.

In my view, then, the resolution of this conflict of rights boils down to consideration of the conflicting claims of the prospective mother and father. This consideration has two aspects: 1) a discussion of the differential consequences of a decision in favour of either person, and 2) a discussion of the relevance or otherwise of the original agreement they made to engage in the in vitro fertilization programme. In relation to both aspects, I find that Ms. Davis' claims outweigh Mr. Davis'.

In terms of the consequences of deciding one way or the other, it seems to me that Ms. Davis had much more at stake than had Mr. Davis. If she had been refused the right to continue with the implantations, she would have been refused admission to the estate of parenthood, in all its biological, social and cultural dimensions. If he had been refused the right not to become a father, he would have had to deal with some felt responsibility towards a child, if one had been born, whom he would in all likelihood never have seen. Given the unfortunate nature of Tennessee law, he may also have had to deal with certain legal obligations, though these would have been only potentially applicable, for example should Ms. Davis die. All in all, the depth of distress it would be rational to feel would have been much greater for Ms. Davis, if she had been refused, than for Mr. Davis, if he had been refused. So purely on these grounds alone, we ought to find in her favour.

We ought to reach exactly the same conclusion in a case where a prospective father decides against parenthood during the term of a normal pregnancy - this would grant him no right to force termination of the pregnancy against the woman's wishes. We ought also to support the same conclusion in a case where the sexes of the parties are reversed - where the man desires to pursue parenthood through surrogacy, while the woman seeks to prevent the development of the embryos.

Mr. Davis argued in court that in the current situation a dispute between a prospective parent who desires implantation and one who does not should always be decided in favour of the latter. His grounds were that the harm suffered by the reluctant parent is irreparable if a child is born, whereas the harm suffered by the willing parent who is refused implantation can be made up in other ways, for example by pursuing parenthood with a different biological partner. I do not know if these grounds are factually true in the Davis case: whether Ms. Davis was capable, in terms of biological condition, of conceiving and bearing a child in the future through such alternative means. Even if it was possible, however, I cannot see that Mr. Davis' principle of irreparable harm has much weight given the imbalance in the relative amounts of harm involved. Alternatively, one might say that Ms. Davis has also suffered an irreparable harm, that of the inconvenience of having to pursue pregnancy through alternative means.

The resolution of the rights conflict in favour of Ms. Davis is strengthened by looking at the issue of the prior agreement, in so far as we know any details about it, between the parties. If they had foreseen the possibility of divorce, and made some agreement as to the outcome in that case, the considerations about consequences might conceivably (or would presumably) be overswayed by that agreement. As far as we know, that is not the case. The matter came before the courts, and before our moral inspection, precisely because the possibility of divorce was not anticipated; the issue is what to do in the absence of such detail in the agreement. It is of course hardly surprising that the informal agreement they had was open-ended in this way.

Whatever the precise nature of that agreement, however, it seems undeniable that Ms. Davis was entitled to the expectation that she would be allowed to continue with her attempts to become pregnant. Although her former husband now wished to rescind the original agreement, his actions in accord with it had contributed to her having been placed in a position of being committed to the programme and of having this expectation. While it may be true that she was not at the moment in question literally pregnant, what she was rationally entitled to expect on the basis of the original agreement is the same as if she had been. Mr. Davis could not simply evade the consequences of his original commitment at his own whim.

I think this feature strengthens the analogy between the case at hand and one of normal pregnancy. It would be wrong to find in favour of Mr. Davis in the same way in which it would be wrong to allow a man to force a woman to abort their foetal biological child. The only thing lacking in our present case is the physical and psychological hardship of the procedure of undergoing an abortion (as compared to refraining from implantation), and while these may not be inconsiderable, they do not seem to me to be the main reasons in favour of allowing a woman to choose pregnancy. Those concern instead the woman's desire to live a certain kind of life.

This way of describing the reasons supporting Ms. Davis' choice stresses the fundamental character of the choice she had made. In some over-literal sense it could be said of Mr. Davis too that he had a desire to live a certain kind of life - namely one in which he would not find himself prey to anomalous paternal feelings - but to say this would be to mask an important insight. That we categorize kinds of lives in such a fashion that Ms. Davis' choice but not Mr. Davis' counts in an everyday sense as a choice of a kind of life signifies the extent to which we regard what she was being asked by him to renounce as much more fundamental to our concept of a fully human

life than what she was asking him to give up. I can think of no deeper justification for finding in her favour.

Having decided the moral question in favour of Ms. Davis' right to pursue the implantation programme, I now wish to reflect back briefly on the property question. My moral conclusions allow me to assert that if it is correct to regard the embryos as property, it is correct to regard them as her property. Not only an asymmetry in potential use, but also one in the depth of significance assigned to the kinds of use each party desires, leads us to rank her claim higher. This still leaves open, however, the conceptual question of whether the embryos are rightly regarded as property in the first place.

H. Child Support

The single area in which I should be inclined to find in favour of Mr. Davis is in whether he should have been required to pay child support. I think not, though this is a delicately balanced issue.

The argument from the previous section about the rational expectation of completion induced in Ms. Davis by Mr. Davis' original commitment to the programme has some weight in inclining me to think that that commitment extends as far as providing child support should a child now be born from renewed attempts at implantation. This would certainly be so if the case were one of normal pregnancy, even if during it the prospective parents had divorced, but I am inclined to think that at this point the analogy in fact breaks down.

The relevant difference is, I think, that in normal pregnancy the prospective father is partly responsible (causally, and therefore morally) not only for the expectations of the prospective mother but also for her biological condition, of being pregnant. In our case, Mr. Davis had the first moral responsibility but not the second, since Ms. Davis was not literally pregnant at the time of consideration. Admittedly, he was causally partly responsible for the situation in which she found herself, but the pregnancy was not a fait accompli. She still had the choice of whether to become pregnant or not, and if she had decided to do so, the required causal contribution of her actions to this end would have been proportionately much greater, in comparison to her former husband's, than in the case of normal pregnancy. The moral responsibility for any action which will make her literally pregnant would thus have been so much more hers as to be effectively hers alone. Hence, while Mr. Davis was morally committed to allowing her to fulfil her expectation of bearing a child, he was not required to shoulder the normal responsibility of biological fatherhood to provide child support.

This is the reason why current law on the subject, at least in Tennessee, should be changed. As we shall see in Part III below, the same conclusion is reached by Cuva (1991) in his article on the legal analysis of the case. Were such oversights in the law corrected, Mr. Davis' claim that he would suffer harm, or potential harm, through Ms. Davis' bearing a child which is biologically also his would be correspondingly weakened.

III. Cold Comfort in Legal Limbo: a response to Cuva's proposal for in vitro fertilization legislation

I. The Legislative Issues

Anthony John Cuva's (1991) penetrating and persuasive analysis of the major legal aspects of cases involving disagreements about the disposition of cryopreserved human embryos concludes with a proposal for legislation to govern some of the novel issues raised by such cases. While I am aware that conflicting analyses exist (Robertson 1989), I defer to Cuva's understanding of prevailing legislation, its powers and its failings, and recognise that his proposal is guided by considerations of legislative consistency and efficiency rather than those of morality. I wish to suggest, however, that from a moral point of view his proposal is less decisive than I think it ought to be. I therefore want to offer some considerations of a philosophical nature which challenge it.

Cuva offers five general characterisations of what he thinks the required legislation should do:

1) require an agreement before cryopreserving embryos;
2) determine the policy of the state as granting "utmost respect" to embryos;
3) prohibit the sale of frozen embryos;
4) limit the number of embryos that may be frozen;
5) relieve unwilling parents from parental responsibilities.

I find myself in agreement with the first and fifth proposal (and have argued for the latter above (Section II.H) - see also Robertson (1989)), but in disagreement about the remaining three. In the remainder of this monograph I shall try to explain why.

J. "Utmost Respect"

The case of Davis v. Davis is the one analyzed most thoroughly by Cuva. As we have seen, one of the issues that arose in the case was whether frozen embryos should rightly be regarded as property. If so, their disposition would be a question, more or less, of weighing competing claims to ownership and discovering what if any contracts, overt or implied, existed between the parties. If not, and this is how the original judge found, the state would have an interest in acting as an advocate for the embryos, under the doctrine of parens patriae, and would view the issue as one of custody, where the "best interests" of the embryos would have to be taken into consideration.

In his discussion of the case, and in the preamble to his proposal for legislation, Cuva rejects the idea that the embryos should be subject to parens patriae, indicating instead that their disposition should be determined by the donors. His first proposal is a way to accomplish this in the case of disagreement between or death of the donors, since a written agreement will exist indicating the action to be taken in these events. I agree with both this proposal and its rationale. Cuva's second proposal, however, seeks to establish a legal status for embryos which is (p.413)

> . . . one of utmost respect: considerably higher than mere human tissue but less than the rights of a fully developed person. This standard would permit donors who have had a successful implantation to thaw the remaining embryos so that they would not be implanted into another woman's uterus.

While I appreciate the jurisprudential motives for Cuva's attempt to find an intermediate status between personhood and "mere human tissue," I do not think such "utmost respect" is justified. (A similar position is supported on differing grounds by Annas 1989.) Although there is no legal status already existing into which embryos can clearly be slotted, that of "mere human tissue" seems the best candidate, at least in the present context.

Cuva points out a number of jurisdictions and advocate organizations which favour the "utmost respect" approach, but beyond that provides no real argument for the view. I do not think there is a way to avoid the apparent inconsistency of this approach with his belief that the donors should have ultimate say in what happens to frozen embryos: an entity which can be disposed of at will is being accorded no respect at all, it seems to me.

Here I am interpreting "respect" so that to treat an entity with respect is both to treat it as having rights and to take its rights into consideration in deciding how one is to behave towards it. There are perhaps some senses in which embryos do have rights, for example the right not to be born into a thoroughly miserable existence, but there are strong reasons (Thomson 1971, Bennett 1978, Warren 1978, Tooley 1984) for thinking they do not have the right to be born simpliciter. They therefore have no rights relevant to their disposition in the cases under consideration, and it would seem that "respect" is an inappropriate attitude.

(To the extent that they do have rights, we can regard these as co-extensional with the respect which should be accorded to the person they will become if they become anyone at all. We can then explain why it might be considered wrong to damage an embryo in a way which would allow it to develop into a person with a painful disability - the problem is the effect on the person, not the effect on the embryo.)

But perhaps this is to take Cuva too literally. The sense of "respect" which he might be recommending might be closer to the sense in which, for example, we treat a person's remains with respect. The rights which are relevant here are not those of the person whose remains they are, but of the surviving friends and relatives and perhaps the public at large: the purpose of the respect is to avoid hurting their feelings. This may be the import of the quotation given by Cuva (p.394) from the Congressional Hearings (1987) into these matters:

> [W]e know intuitively that a human embryo is more valuable than a kidney and of much more symbolic importance regarding human life . . ..

The state, then, might have a responsibility to protect the public at large from being offended by its treating embryos as mere property.

On this construal of "respect," however, I should argue that the state has no responsibility to protect the public from its own tendency to be irrationally offended. Either the embryo has intrinsic worth, entitling it to respect on account of its own rights, or it does not. If it does not, the public should not be offended if it is treated in a way which accords with its lack of rights. If the public is so offended, it should be educated, not protected.

This vicarious sense of "respect," furthermore, provides no grounds for distinguishing between embryos and other examples of human tissue. For we do treat human tissue with this form of respect. In particular, we take it that the state has a role in ensuring that the person whose tissue it is not offended by the way the tissue is treated, and the state should have an exactly similar role in the case of embryos: the say over their disposition should reside, as Cuva correctly argues, in the donors of their biological components.

Admittedly, and as I pointed out in Section II.D, there is one respect in which embryos differ from other examples of human tissue and which is relevant to the settling of rights issues about their disposition. This is the fact that they are the products of two human bodies, not of one. This makes disposition a more complicated matter, morally, but only because it involves the rights of two human beings, the donors, whose rights may conflict - not because the embryos themselves have rights. If I may be forgiven a gruesome comparison, the case is parallel to one in which two survivors lose limbs in an explosion, but the pieces of tissue recovered cannot be separately identified: there may be a conflict of rights between them over the disposition of the remains, but the pieces of tissue themselves clearly have no rights.

I am afraid I cannot find a more charitable interpretation of the "utmost respect" view which would allow Cuva to hold both that embryos should be treated as having a status higher than that of human tissue and that their disposition is purely up to the biological donors. I have to admit that I am puzzled as to why, ultimately, he wishes to insist on the enhanced legal status, why he wishes to reconcile legislative presuppositions which seem to be inconsistent. A possible explanation arises from his consideration of the question of whether the courts have the right to decide when life begins. To this I now turn.

K. "When Does Life Begin?"

In his comments on the original trial court opinion (pp.403-405) Cuva appears to adopt the assumption of the court that the issue of when life begins is a scientific one. As detailed in Annas (1989), the court was impressed by the evidence of one "expert witness" who pointed out that, far from being a mass of "undifferentiated cells" an embryo is, at the genetic level, a clearly distinct individual, possessing a determinable DNA structure. It concluded on this basis, according to Cuva, that the embryo is an example of human life, not merely potential human life.

However, this argument contains a huge logical gap. Being "individual" in this sense, of having a chemical make-up distinguishable from those of others of the same kind, is hardly a prerequisite for life at all, never mind for fully human life. In this sense every first mutation of a virus, and arguably every rock if one includes in its make-up the precise admixture of impurities, is also an individual. Nor would the failure of such chemical uniqueness, in for example cloned but fully developed human beings, be sufficient for refusing them human status. Something has gone wrong here.

Presumably, the claim about the individuality and distinguishability of each embryo is aimed at the contention, sometimes urged in defence of the view I hold about embryos' lacking the right to be born, that they are nothing more than collections of undifferentiated cells. This contention is ambiguous: it might mean (1) that none of the cells that make up the embryo can be

distinguished, in terms of its intrinsic features, from any of the other cells, or (2) that the whole collection is indistinguishable from any other collection of such cells. The "expert testimony" in Davis v. Davis is aimed at the second interpretation, though it falls far short, it seems to me. It is more likely, however, that the contention was urged in the first sense, as a way of reminding us that an embryo lacks the structural complexity empirically necessary for embodying higher order characteristics, such as consciousness, normally taken as constitutive of human beings. Now this by itself is not sufficient to entail that embryos have no rights, but it is a useful antidote to some of the misrepresentations of the nature of embryos, as tiny humans full of yearning for existence, often visited upon us by non-philosophical participants in the debate about embryonic rights.

If I am right in this diagnosis, the court in Davis v. Davis was clearly in error in accepting the "expert testimony" as establishing that life begins at conception. Cuva's treatment of the issue indicates on the surface that he has been led in the same direction as the court, and perhaps that is why he adopts the "utmost respect" position which I have described as inconsistent with granting the final word to the donors.

In my view, "when life begins" is not primarily a scientific issue. In the sense of "life" which is relevant here, when life begins is a matter for decision based upon moral considerations, for it is the question of whether this undeniable life-form is to be accorded the status of a person. Whether we extend our existing concept of "person" to cover foetuses and embryos is a choice we must make, not a finding we will be driven to by the facts of the matter. As I have already noted, I think there are strong moral reasons for refusing to extend the concept as far as embryos. If there are any facts at all relevant to this decision, they are ones concerning such mental characteristics as conscious awareness, rationality and intelligence and the extent to which embryos lack these.

Cuva indicates that he might embrace an approach similar to mine when he considers the question of whether the courts should use viability as the dividing line between potential and actual life. Contrasting Roe v. Wade (1973) with Webster v. Reproductive Health Services (1989), both of which cases involved an issue of abortion, he reports that the jurisprudence is inconclusive as to "the point [during the development of the embryo/foetus] at which a state may have a compelling interest in protecting potential life" (p.391). Whereas in the first case the court found that the state did not have such an interest before the foetus is viable, with artificial aid, outside the uterus, the second seemed to imply that the interest might begin earlier in gestation. Both of the cases were decided on the assumption that what was required was a balance of the potential mother's rights against those (in my view non-existent) of the foetus before viability.

Cuva appears to be inclined to accept the presupposition, of the prevailing case law he describes, that "a state's compelling interest in protecting potential life increases with the viability of a fetus" (p.393). He suggests that because the survival rate for frozen embryos is so small, compared, for example, to that for second-to-third trimester foetuses, the interest of the state in protecting them is correspondingly small. On the surface, this seems a morally questionable view: if the embryos really do have the right to be born, then surely they should not lose that right in proportion to the chances of their failing through natural causes, any more than a person in extreme danger has less of a right to be protected than one in no danger at all.

Cuva may, however, have a more subtle point. What is at issue, on his view, is not the existence of the embryo's right, but its weight in relation to the conflicting rights of, in these cases, the potential mother. If what is at issue is this balance of rights, then one can accept a proportionality of weight to viability in estimating to what extent it would be appropriate to interfere with the conflicting rights of the potential mother. Likewise, the extent to which one would create hardship and risk for others in order to save someone in danger may be regarded as proportional to the chances of succeeding.

Of course, the position still affirms what I deny, that the embryo has any relevant rights. So whereas Cuva appears to regard the embryo's rights as negligible, I regard them as non existent. This generates no difference between us on the court judgment in Davis v. Davis, but it does result in a disagreement about Cuva's legislative proposals. For the reasons discussed above I reject his second proposal that the state should adopt a policy whereby embryos are accorded "utmost respect."

L. Selling Embryos

Given the general view I take about the status of embryos, it follows that it is unnecessary, on their account, to prohibit their sale. They do not require the enhanced status that such a prohibition would confer. There might however be reasons of an entirely different kind for discouraging this practice.

These reasons would involve the rights of the donors, not the alleged rights of the embryos. Thus it might be argued that a lucrative market in embryos might entice economically disadvantaged people into engaging in in vitro fertilization procedures at some duress to themselves purely for the sake of economic security. Similar arguments could be made against allowing the sale of organs or body products such as blood.

This is a difficult question, upon which I am not ready to make a definitive judgment. At the moment I cannot say I find the argument compelling, although I cannot say it is without weight. Suffice it to say that there can be no justification for prohibiting the sale of embryos which is based solely upon their alleged status as examples of human life. Thus for the moment I reject Cuva's third proposal.

M. Leftovers

Cuva raises a consideration similar to that of proportional viability in the justification of his fourth proposal, to limit the number of embryos which can be frozen. He argues that if the number of embryos frozen is such that the chances of survival are roughly the same as in normal conception, then not implanting leftover embryos is justified, or more easily justified. The presupposition here is that we have a duty to give each of the collection of frozen embryos at least as much chance as it would have had if it had been conceived in the normal way. Clearly on my view that embryos do not have the right to be born, this limitation cannot be supported. I think too that it is shaky on its own legs.

The problem is that at the point at which we have to make the decision what to do with such "leftover" embryos, the fate of the successful embryo has already been decided - it has been implanted; likewise, the fate of those remaining is still to be decided - it is in our hands. If they have, in some sense, the right to a certain chance of survival, they have that right as individuals, and they retain it in the situation where one of their colleagues has already "been lucky." If we know that the chances of saving sailors lost at sea is, say, 40%, we do not think it right to abandon the search once 40% of a crew have been saved - and certainly not when the rest are within easy reach.

Here we see further signs of the inconsistency of which I accused Cuva above. He appears to want to insist upon some form of right to be born, some form of inherent value, some form of enhanced status, for the embryo, yet to be free to support their disposal at the whim of the donors. I happily embrace the second position here, but I can only do that because I reject the first.
Once again, then, I reject the fourth proposal as unnecessary in terms of the alleged rights/value/status of the embryos. The further justification offered by Cuva for the fourth proposal, that implementing it will reduce the number of disputes, may indeed be true. I do not however find it compelling in this context. Given that increasing the number of embryos frozen increases the chances of the fulfilment of the prospective parent's or parents' desire to have a child, it would be wrong to limit the number frozen just because irrational disputes based upon the notion of embryonic rights might arise. The existence of such moral disputes might be seen as a very desirable feature of a community, for one thing, but in any case I am convinced that the benefit to prospective parents outweighs the negative aspects of their existence.

If what Cuva had in mind were not these sorts of irrational disputes, but the kinds of rights conflicts present in the Davis v. Davis case, the proposal to require formal agreement would seem to be a sufficient response, and this proposal I support. The fourth one is, once again, unnecessary.

N. Conclusion on the Legislative Issues

In summary, I believe Cuva has tried to tread a difficult road between two opposing moralities of in vitro fertilization, based upon two opposing conceptions of the status of embryos, frozen or otherwise. As a result there is an inconsistency in the justification for the proposals he makes for new legislation. Frozen embryos cannot at the same time be given "utmost respect" as entities intrinsically more valuable than human tissue and yet be discardable entirely at the whim of their donors. The proposals he makes would further enshrine the same sort of ambivalence in the law, and so would delay the resolution of this most pressing sociomoral issue. It is important therefore to jump off the fence on one side or the other. I have made it clear, though I have not provided the full justification here, which side I prefer.

IV. Further Issues

This interesting case has allowed us to explore our moral intuitions about the issues it raises and to propose a resolution of the rights conflict it brings up. I shall not repeat my position on these

issues. Instead I shall mention some of the areas which I think my consideration of the case opens for further investigation.

The first of these is the whole area of the feminist critique of the desire for biological parenthood. I have done my best to argue that it is of limited moral relevance to the specific case at hand, but I want to insist that it is of the utmost relevance to the examination of policy, and hence legislative, issues in this area. That admission might or might not undercut my insistence on its lack of relevance to the present case, but that point cannot be decided without further inquiry. Among many points of detailed agreement, the discussion of this paper shares with Cuva's exposition the assumption that the project of bearing a child through in vitro fertilization is in general a legitimate one. This assumption has been questioned, for example by Poff (1987), on the grounds that caring for the welfare of a child already born might be morally preferable to bringing into existence a new child. I believe this challenge has some weight, and I find it personally fairly compelling. At the same time, I believe that the desire for procreation is so much a part of what we conceive as a natural human life that its renunciation would have to be regarded as supererogatory. This is a difficult issue, however, and I cannot hope to do it justice here.

The second area for further investigation is that of the borderlines of the concept of property as it applies (or fails to apply) to living things. Adequate investigation of that issue would have to include reference to the cases of animals (of varying types), parts of animals and products of animals as well as of the related question of whether embryos and/or foetuses are members of any of these three classes.

The third is the issue of to what extent the informal, perhaps tacit, agreements made between people such as Ms. Davis and Mr. Davis have the moral status of binding commitments. While I believe my approach to this question in terms of the setting up of rational expectations is intuitively sound in the case in point, I should prefer to have provided a more systematic grounding for my intuitions.

A broader, more philosophical, fourth issue is the question of whether the vocabulary of rights can handle the kinds of moral question which arise in this area. I have indicated some limitations in reference to embryonic rights, but cannot pursue them further. Also of philosophical interest would be the consideration of utilitarian approaches to the case of the frozen embryos, as well as to other related cases; I have been conscious throughout that my intuitions are often not utilitarian, and I have not taken issue with possible utilitarian positions.

In closing, I should like to mention a feature of issues surrounding new reproductive technologies like in vitro fertilization which makes their investigation greatly attractive. That is their connection with the concepts of personhood. Not only do they raise the issue of the personal or otherwise status of pre-natal stages of human beings; they also raise issues about the importance or otherwise of the role of parenthood in defining what it is to be a fully-developed ("fulfilled"?) person. They deal with the concept of a person in its biological as well as sociomoral dimensions, and they bring to the forefront the relation between these two types of dimension. That, in conjunction with their role in dispelling the ice-age ethics with which many people approach them, is why it is important for philosophers to pursue them.

V. References

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