**FROZEN EMBRYOS — PERSONS OR PROPERTY?:**

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**INTRODUCTION**

Hard cases, it is said, make bad law.¹ They can also make revealing law. Hard cases identify the problems that have not been solved. They reveal ways the goals of the law conflict; they force us to articulate our assumptions and to examine our modes of discourse.

The case of *Davis v. Davis*² exemplifies the hardest of cases. In *Davis*, the Blount County Circuit Court of Tennessee was asked to determine whether frozen embryos were human beings or property with the potential to become human beings.³ In making this determination, the court undertook the task of determining when human life begins.⁴

The court declared that human life begins at the moment of conception and then ruled that frozen embryos are human beings.⁵ The court determined that, following her divorce from her husband, Junior Davis, Mary Sue Davis was entitled to temporary custody of the seven frozen human embryos.⁶ The court held that it was in the best interests of the frozen embryos to be in Mrs. Davis' custody for the purpose of future implantation.⁷

This Note focuses on the impact *Davis* will have on the legal status of an embryo which is created by *in vitro* fertilization⁸ (IVF) and frozen prior to implantation.⁹ The Note presents a brief examination of case law concerning the embryo’s legal status in the areas of criminal, tort, and inheritance law.¹⁰ This Note then analyzes the impact *Davis* would have if its holding were incorporated into these various

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¹. Northern Securities Co. v. United States, 193 U.S. 197, 400 (1903) (Holmes, J., dissenting).
². 15 Fam. L. Rep. (BNA) No. 46, at 2097 (Blount County Cir. Ct., Tenn., Sept. 26, 1989).
³. Id. at 2099.
⁴. Id.
⁵. Id. at 2103.
⁶. Id. at 2104.
⁷. Id.
⁸. Saltarelli, *Genesis Retold: Legal Issues Raised By The Cryopreservation of Preimplantation Human Embryos*, 35 SYRACUSE L. REV. 1021, 1023 (1985). IVF is a process in which a woman's egg is removed surgically, put in a petri dish, and inseminated with a man's sperm. It is then reimplanted in the woman's uterus within two to three days following fertilization. *Id.* The terms "in vitro," "IVF" and "in vitro fertilization" are used interchangeably in this Note.
⁹. See infra note 20 and accompanying text.
¹⁰. See infra notes 110-242 and accompanying text.
areas of the law. Finally, this Note concludes by suggesting that the legislature is better suited for resolving the issue of when human life begins than are the courts.

FACTS AND HOLDING

During nine years of marriage, Junior and Mary Sue Davis tried repeatedly to have children. After Mrs. Davis suffered five ectopic pregnancies, she underwent surgical treatment to have her fallopian tubes ligated. As a result, Mrs. Davis was incapable of natural conception.

Remaining committed to having a family, the Davises sought the advice of Dr. Irving Ray King who operated the Fertility Center of East Tennessee located in Knoxville, Tennessee. In the fall of 1985, Dr. King introduced the couple to the in vitro fertilization (IVF) program of the Fertility Center. From 1985 until December 1988, the Davises participated in the IVF program without the use of cryopreservation. After spending over $35,000 on six unsuccessful attempts to implant an embryo in Mrs. Davis’ uterus, the Davises decided to suspend their participation in the program. Instead, they sought to obtain a child through adoption. The adoption process also proved unsuccessful.

In the fall of 1988, the Davises learned of the new cryopreservation program sponsored by Dr. King’s Fertility Center. Under the

11. See infra notes 243-302 and accompanying text.
12. See infra notes 303-05 and accompanying text.
17. Id. at 2109. Dr. King and Dr. Charles A. Shivers who operated the Knoxville Fertility Center both testified at the Davis trial. Id.
18. Id. at 2098.
19. Id.
20. See infra notes 24-31 and accompanying text. Cryopreservation involves freezing and storing the newly fertilized eggs for reimplantation at a later date. Liquid nitrogen is generally utilized as the freezing agent. See Davis, 15 Fam. L. Rep. at 2098.
22. Id. at 2098.
23. Id. at 2108. Prior to her baby’s birth, a Kentucky woman offered the Davises her child for adoption. However, upon birth, the mother decided to keep the child. Id.
cryopreservation program, several ova\textsuperscript{26} may be aspirated\textsuperscript{27} and inseminated\textsuperscript{28} in the laboratory; and if the insemination process produces fertilized zygotes,\textsuperscript{29} the zygotes may be allowed to mature in the laboratory to a medically accepted point for the process of either implantation\textsuperscript{30} or cryopreservation for future implantation.\textsuperscript{31}

On December 8, 1988, Mrs. Davis had nine ova surgically aspirated.\textsuperscript{32} Shortly thereafter, the ova were fertilized with Mr. Davis' sperm, producing nine acceptable zygotes.\textsuperscript{33} The zygotes were permitted to mature under laboratory conditions, variously developing from the four-cell cleavage\textsuperscript{34} stage to the eight-cell cleavage stage, all of which were found to be of excellent quality by the doctors at the Fertility Center.\textsuperscript{35}

On December 10, 1988, two of the embryos\textsuperscript{36} were implanted in Mrs. Davis' uterus, but the implantation did not result in pregnancy.\textsuperscript{37} The remaining seven embryos were placed in cryogenic storage so that they could be implanted at a later date.\textsuperscript{38} While the

1079, 1082-86 (1986); Robertson, Decisional Authority Over Embryos and Control of IVF Technology, 28 JURIMETRICS OF L. SCI. & TECH. 285, 287-88 (1988).

26. STEDMAN'S MEDICAL DICTIONARY 1007, 1009 (24th ed. 1982). Ova is the plural of ovum which refers to the unfertilized reproductive cell produced by the ovary in the female. \textit{Id}.
27. Davis, 15 Fam. L. Rep. at 2098. Aspiration is the medical process "by which ova are surgically withdrawn from the ovary." \textit{Id}. For a detailed description of laparoscopy which is the surgical technique used to remove the ova from the woman's uterus, see Saltarelli, 36 SYRACUSE L. REV. at 1027.
28. Davis, 15 Fam. L. Rep. at 2098. The court stated that "[i]nsemination is the placing together of the sperm and an ovum." \textit{Id}.
29. See STEDMAN'S MEDICAL DICTIONARY 1590 (24th ed. 1982). Zygote refers to the "cell resulting from union of a sperm and an ovum." \textit{Id}.
30. Davis, 15 Fam. L. Rep. at 2098. The court stated that "[i]mplantation is the process whereby the physician deposits a zygote in the woman's uterus." \textit{Id}.
31. Note, 59 S. CAL. L. REV. at 1084. Because a woman may have to undergo several attempts at fertilization before a successful pregnancy is achieved, cryopreservation plays an important role in the IVF process because it eliminates the necessity of future laparoscopies. A woman can have a frozen fertilized egg subsequently reimplanted without the need to undergo IVF (i.e., extracting the egg and fertilizing it) each time she is reimplanted. \textit{Id}. See also Sillman, In Vitro Fertilization and Cryopreservation, 67 MICH. B.J. 601, 602 (1988).
32. Davis, 15 Fam. L. Rep. at 2098.
33. \textit{Id}.
34. STEDMAN'S MEDICAL DICTIONARY 287 (24th ed. 1982). Cleavage "refers to the series of cell divisions occurring in the ovum immediately following its fertilization." \textit{Id}.
35. Davis, 15 Fam. L. Rep. at 2098.
36. STEDMAN'S MEDICAL DICTIONARY 455 (24th ed. 1982). A human embryo is the product of conception from the moment of fertilization until approximately eight weeks into the gestational period. Thereafter, it is considered a fetus. \textit{Id}.
38. \textit{Id}. at 2110. Dr. Shivers testified that the seven embryos could be stored in a frozen state for approximately two years. \textit{Id}.
embryos remained in storage at the Fertility Center, the Davises' marriage disintegrated. On February 23, 1989, Mr. Davis filed for divorce. A custody battle over the seven cryopreserved embryos ensued.

In the divorce proceeding, Mr. Davis claimed that the seven frozen embryos "did not constitute life." He took the position that the embryos "constituted property jointly owned by the parties." Mrs. Davis, on the other hand, claimed that the seven frozen embryos were "the beginning of life...." She likened the embryos to children and requested the court to award her custody for purposes of implantation.

The central issue before Judge W. Dale Young of the Blount County Circuit Court of Tennessee was the "disposition of the seven cryogenically preserved embryos...." In resolving this issue, the court considered the difficult questions of whether frozen embryos were a form of property or a form of life, whether laws governing property should have applied, or whether frozen embryos should have been protected by state child custody statutes.

The court began its analysis by considering the parties' intentions when they entered into the IVF and cryopreservation programs. The court found that the Davises participated in the IVF process with the common intent of "produc[ing] a human being to be known as their child." The court further noted that there was no evidence in the record to suggest that the Davises discussed or had any inclination of changing their intent. Consequently, the court observed that the determination of whether the Davises "accomplished their intent... is to be made by the answer to the most poignant question in the case: When does human life begin?"

To determine when human life begins, the court heard the testi-
mony of four expert witnesses, including Dr. King who directed the Davises' IVF and cryopreservation programs. The expert witnesses were asked to offer their opinions on two fundamental questions. First, the experts testified as to whether the seven frozen embryos were "human," and second, whether the seven frozen embryos were in "being."

All four expert witnesses, Dr. King, Dr. Charles Alex Shivers, Professor John A. Robertson, and Dr. Jerome Lejeune, agreed that "the seven cryopreserved embryos [were] human." However, three of the expert witnesses offered opinions that the seven frozen embryos were not in being, while one expert offered an opinion that they were in being.

King, Shivers, and Robertson each testified that the seven frozen "entities" at issue were not in being. These three experts relied on guidelines published by the Ethics Committee of the American Fertility Society (AFS) in asserting that the frozen "entities" at issue

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52. Davis, 15 Fam. L. Rep. at 2099. See infra notes 53, 58-60 and accompanying text.

53. Davis, 15 Fam. L. Rep. at 2099. Dr. King is a medical doctor who has been involved in the subspecialty of gynecology, infertility/reproductive endocrinology for twelve years. He established the Fertility Center of East Tennessee, in Knoxville, Tennessee, in 1984 and has since worked extensively with IVF and cryopreservation. Id. at 2109.

54. Id. at 2099.

55. Id. A human has or manifests the form, nature, or qualities characteristic of mankind. AMERICAN HERITAGE DICTIONARY 640 (1981).

56. Id. Being is a state of existence. It is a condition of particular existence. AMERICAN HERITAGE DICTIONARY 120 (1981).

57. See supra note 53 and accompanying text.

58. Davis, 15 Fam. L. Rep. at 2109-10. Dr. Shivers, currently the Head of the University of Tennessee Department of Zoology, Knoxville, Tennessee, has been involved in the field of embryology since 1958 and has assisted Dr. King with in vitro fertilization since 1984. Id.

59. Id. at 2108-09. Mr. Robertson is a law professor at the University of Texas at Austin, Texas. He has served as a member of the American Fertility Society's Ethics Committee since 1985 and has published numerous articles on the subject of ethical considerations of the human preembryo. Id.

60. Id. at 2111. Dr. Lejeune is a world renowned Professor of Fundamental Genetics. He received the memorial Allen Award Medal, the world's highest award for work in the field of genetics, for discovering the genetic cause of Down's Syndrome. Id.

61. Davis, 15 Fam. L. Rep. at 2099 (citing WEBSTER'S NEW COLLEGIATE DICTIONARY 552 (2nd ed. 1981)).

62. See id. at 2107 (providing a summary of the experts' testimony). See infra note 63 and accompanying text.

63. Id. at 2099.

64. Id. at 2099. The Ethics Committee of the American Fertility Society (AFS) has been publishing guidelines on the subject of ethical considerations regarding
were "preembryos and not embryos." The experts noted that this distinction is significant because a "preembryo" is at a stage in development in which it simply possesses the potential for life and, as such, is not in being. The experts noted that the AFS Ethics Committee defines the word preembryo as "a product of gametic union from fertilization to the appearance of the embryonic axis. The preembryonic stage is considered to last until 14 days after fertilization." When discussing the legal status of the preembryo, the AFS Committee stated that "the human preembryo is not a person but is entitled to respect because it has the potential to become a person. This view limits the circumstances in which a preembryo may be discarded or used in research. . . ."68

Based on the foregoing AFS Committee guidelines, these three experts concluded that the frozen entities at issue were preembryos, and thus were not in being. Therefore, according to these experts, the seven frozen entities were not entitled to the same protection and rights as human beings.70

The court rejected this testimony and ruled that the experts' use of the term preembryo created a false distinction between stages of human cellular development. Instead, the court accepted the testimony of Dr. Jerome Lejeune, who testified that there was no such word as preembryo. According to Dr. Lejeune,

[t]here is no need for a subclass of the embryo to be called a preembryo, because there is nothing before the embryo; before an embryo there is only a sperm and an egg; when the egg is fertilized by the sperm the entity becomes a zygote; and when the zygote divides it is an embryo.72

On the basis of Dr. Lejeune's testimony, the court found that the seven cryopreserved entities were human and in being and, there-
fore, were human beings. The court noted that the difference in opinion among the expert witnesses as to whether the seven frozen embryos were in being and, therefore, were human beings stemmed from a disagreement in the area of cell differentiation. Dr. Shivers testified that the cells of human preembryos are comprised of undifferentiated cells, therefore, it is impossible to distinguish them at the zygote stage. According to Professor Robertson, because there is no way to distinguish the cells, "[i]t is uncertain whether a human preembryo is a uniquely identifiable individual." Consequently, Shivers and Robertson concluded that human preembryos were not in being and, therefore, were not human beings.

Dr. Lejeune sharply disagreed with the position of Shivers and Robertson. Lejeune testified that the science of molecular genetics can reliably prove that the cells of human embryos are especially differentiated. According to Lejeune, DNA profiling proves that:

[A] man is a man; that upon fertilization, the entire constitution of the man is clearly, unequivocally spelled-out, including arms, legs, nervous systems and the like; that upon inspection via DNA manipulation, one can see the life codes for each of these otherwise unobservable elements of the unique individual.

Based on Lejeune's analysis of DNA profiling, the court concluded that the seven frozen embryos were unique individuals and were therefore human beings.

Before deciding who was to have custody of the embryos, the court addressed some additional arguments made in support of the

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74. Id. at 2101.
75. Id. Differentiate is to perceive or show the difference in or between something. AMERICAN HERITAGE DICTIONARY 368 (1981).
76. Davis, 15 FAM. L. REP. at 2100.
77. Id. at 2108.
78. Id. at 2102.
79. Id. at 2101.
80. Id. at 2102. The court stated that molecular genetics is "'that branch of genetics concerned with the chemical structure, functions, and replications of the molecules—deoxyribonucleic acid (DNA) ribonucleic acid (RNA)—involved in the transmission of hereditary information.'" Id. (quoting DICTIONARY OF MEDICAL TERMS FOR THE NONMEDICAL PERSON (2d ed. 1989)).
81. Id.
82. Id. at 2102. DNA profiling is the complicated scientific process of manipulating and reading the DNA molecule. Through the DNA profile, the "genetic fingerprint" of a human chromosome can be identified and differentiated. Id.
83. Id.
84. Id. at 2103.
position that embryos were not human beings.\textsuperscript{85} The first argument addressed by the court was that a human embryo may never recognize its biological potential.\textsuperscript{86} According to this argument, until the embryo recognizes its potential, it is not considered a human being.\textsuperscript{87} The court refuted this argument by noting that "[a] newborn baby may never realize its biological potential, but no one disputes the fact that the newborn baby is a human being."\textsuperscript{88}

The second argument addressed by the court was the self-sustaining argument that supports the position that embryos are not human beings.\textsuperscript{89} This argument asserts that an embryo, only several hours old and with few cells in development, is not a human being because it is not able to sustain itself.\textsuperscript{90} Again, the court pointed out that under such reasoning a newborn baby also lacks the necessary criterion to qualify as a human being because it cannot sustain itself without the assistance of others.\textsuperscript{91}

The court also addressed the proposal that the seven frozen embryos should be allowed to "die a passive death."\textsuperscript{92} The court noted that this position bolsters the argument that the seven frozen embryos are human beings; in order for the seven frozen entities to die, they must first be alive.\textsuperscript{93}

Finally, the court addressed Mr. Davis' assertion that the embryos constituted jointly owned property.\textsuperscript{94} In rejecting this proposition, the court cited Tennessee Senator Albert Gore, then Congressman Gore, who had testified in a hearing.\textsuperscript{95} Senator Gore had stated that, "'I disagree that there's just a sliding scale of continuum with property at one point along the spectrum and human beings at another. I think there's a sharp distinction between something that is property and something that is not property... .'"\textsuperscript{96} The court concluded by stating, that whatever name one called the seven frozen entities, they were human beings and not

\textsuperscript{85} Id. at 2102.

\textsuperscript{86} Id. This argument was originally posited by the AFS Ethics Committee.

\textsuperscript{87} Id.

\textsuperscript{88} Id.

\textsuperscript{89} Id.

\textsuperscript{90} Id. The court addressed this issue although it was not raised at trial by any of the experts.

\textsuperscript{91} Id.

\textsuperscript{92} Id. The court never mentioned which party, if either, proposed to allow the seven frozen embryos to "die a passive death." Id.

\textsuperscript{93} Id. This argument was first offered by Mrs. Davis.

\textsuperscript{94} Id.


\textsuperscript{96} Id. at 2103 (quoting Brief for Defendant at 2097).
Having determined that human life begins at conception, the court turned to the issue of what legal status an embryo has in a divorce case. The court began its inquiry by addressing Tennessee's wrongful death and abortion statutes. The court examined these statutes to determine whether Tennessee had established a public policy declaring the rights of a human embryo, in vitro. The court's examination revealed that not only had Tennessee not established a public policy, but neither had any state in the union. Therefore, the court was without legislative guidance in determining the legal status of an embryo.

In the absence of such guidance, the court declared that there was no public policy consideration to prevent the continuing development of the common law. Consequently, the court concluded that "the age old common law doctrine of parens patriae controls these children, is [sic] vitro, as it has always supervised and controlled children of a marriage at live birth..." The court went on to explain that the parens patriae doctrine is commonly expressed as the "best interests of the child" doctrine.

Under the authority of the common-law doctrine of parens patriae, the court ruled that it was in the best interest of the embryos that "they be made available for implantation to assure their opportunity for live birth; implantation is their sole and only hope for survival." In conclusion, the court stated that it was in the best interest of the embryos that Mrs. Davis be given the opportunity to bring them to term by means of implantation. Therefore, the court resolved the disposition of the seven frozen embryos by granting temporary custody to Mrs. Davis.

98. Id.
99. TENN. CODE ANN. § 20-5-106 (1980) (providing that in a wrongful death action, an unborn child has legal status only if the child was viable at the time of injury).
100. TENN. CODE ANN. § 39-15-201 (Supp. 1989) (providing that an unborn child has legal status only if the child was viable at the time of injury).
101. Id. See also TENN. CODE ANN. § 20-5-106 (1980).
103. See supra notes 99-102 and accompanying text.
105. Id. See infra note 106 and accompanying text.
106. Davis, 15 Fam. L. Rep. at 2103 n.56. Parens patriae literally means "parent of the country" and refers traditionally to the role of the state as guardian of those under legal disability. Id.
107. Id., at 2104.
108. Id.
109. Id.
BACKGROUND

Some legal and medical commentators argue that an embryo is property. An American Fertility Society ethical statement specifically provides that "concepti are the property of the donors." Conversely, commissions like the Warnock Committee in the United Kingdom specifically recommended that "legislation be enacted to ensure there is no right of ownership in a human embryo."  

THE FROZEN EMBRYO AS "PROPERTY"

The Federal District Court for the Southern District of New York, in Del Zio v. Columbia Presbyterian Medical Center, held that the in vitro fertilization (IVF) embryo was not the property of the couple who provided the sperm and egg. In 1973, the Del Zios were one of the first reported couples in the United States to attempt IVF. In accordance with IVF procedure, the Del Zios' physician removed an egg from Mrs. Del Zio, fertilized it with Mr. Del Zio's sperm, and stored the mixture in an incubator.

While the culture was housed in the incubator, Dr. Raymond Vande Wiele, the chairperson of the pediatrics department of Columbia Presbyterian Medical Center, learned about the attempted IVF. Because he believed the IVF process was both unethical and immoral, Vande Wiele removed the culture from the incubator and destroyed it without notice to the physician or the couple. As a result of the embryo destruction, the Del Zios filed suit against Vande Wiele.

114. Id. (citing Del Zio v. Presbyterian Hospital, 74 Civ. 3588 (S.D.N.Y. Apr. 12, 1978) (unreported)).
115. Id. (citing Del Zio v. Presbyterian Hospital, 74 Civ. 3588 (S.D.N.Y. Apr. 12, 1978) (unreported)).
116. Sweeny & Goldsmith, Test Tube Babies: Medical and Legal Considerations, 2 J. LEGAL MED. 1, 6 (1980) (citing Del Zio v. Columbia Presbyterian Medical Center, No. 74-3558 (S.D.N.Y. Nov. 14, 1978) (unreported)).
117. Id. at 5 (citing Del Zio v. Columbia Presbyterian Medical Center, No. 74-3558 (S.D.N.Y. Nov. 14, 1978) (unreported)).
118. Id. at 6 (citing Del Zio v. Columbia Presbyterian Medical Center, No. 74-3558 (S.D.N.Y. Nov. 14, 1978) (unreported)). Vande Wiele felt that research should have been undertaken with primates before subjecting a human to the procedure. Id.
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Wiele and Columbia Presbyterian claiming unlawful destruction of their property and infliction of emotional distress.\textsuperscript{119} After a five-week trial and thirteen hours of jury deliberation, the jury returned a verdict rejecting the property claim but awarding the Del Zios damages for emotional distress.\textsuperscript{120} Therefore, according to the Del Zio court, the property approach was not a satisfactory framework within which to analyze the legal status of the embryo.\textsuperscript{121}

THE FROZEN EMBryo AS A "PERSON"

In the landmark decision of \textit{Roe v. Wade},\textsuperscript{122} the United States Supreme Court, addressing a woman’s right to an abortion, held that a fetus\textsuperscript{123} was not a “person” under the fourteenth amendment.\textsuperscript{124} As the Court noted, its decision to deny fetal personhood was consistent with the outcome reached in those cases in which the issue had been addressed\textsuperscript{125} and was in accord with the use of the term person elsewhere in the Constitution.\textsuperscript{126}

Although a fetus was not recognized as a person in a constitutional sense, the Court accorded it a different status upon the onset of viability.\textsuperscript{127} The Court held that in the third trimester of preg-

\textsuperscript{119} Id. at 8 (citing Del Zio v. Columbia Presbyterian Medical Center, No. 74-3558 (S.D.N.Y. Nov. 14, 1978) (unreported)).
\textsuperscript{120} Id. at 9-10 (citing Del Zio v. Columbia Presbyterian Medical Center, No. 74-3558 (S.D.N.Y. Nov. 14, 1978) (reported)).
\textsuperscript{121} See supra notes 113-20 and accompanying text.
\textsuperscript{122} 410 U.S. 113 (1973).
\textsuperscript{123} Id. Technically, the terms embryo and fetus refer to different gestational stages in the development of the unborn conceptus, the embryo being an earlier stage that lasts up to the eighth week. The law does not distinguish on this basis, however, and uses the term fetus to refer to all stages of development. Instead, the law differentiates at the point of viability and live birth. Id. For simplicity, the term fetus in this section of the Note is used as defined by the law rather than the medical profession.
\textsuperscript{124} Id. at 158. The fourteenth amendment states that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, §1. See generally Parness, \textit{Social Commentary: Values and Legal Personhood}, 83 W. VA. L. REV. 487 (1981).
\textsuperscript{125} Roe, 410 U.S. at 158. See, e.g., McGarney v. Magee-Womens Hospital, 340 F. Supp. 751 (W.D. Pa. 1972) (holding that a fetus is not a “person” or “citizen” within the meaning of the fourteenth amendment); Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1971) (holding that an unborn but viable fetus is not a “human being” within the meaning of the California homicide statute); State v. Dickinson, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971) (ruling that a viable unborn fetus is not a person within the meaning of Ohio’s vehicle homicide statute).
\textsuperscript{126} Roe, 410 U.S. at 157. The Court stated that, “in nearly all these instances, the use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application.” Id.
\textsuperscript{127} Id. at 163. The Court argued that a viable fetus was entitled to protection because it “presumably has the capability of meaningful life outside the mother’s womb.” The Court failed to define the term “meaningful,” but apparently it was intended to
nancy the state developed a compelling interest in protecting the "potentiality of human life." The Court noted that the state's interest became compelling when the fetus attained viability, defined as the time when the fetus was "potentially able to live outside the mother's womb, albeit with artificial aid." The court reasoned that as the state accrued its compelling interest, it could prohibit abortion entirely, except when the mother's life was in danger. Therefore, just as the Del Zio court rejected treating the embryo as property, the Roe Court ruled that treating the embryo as a person was an equally unsatisfactory framework within which to analyze the embryo's legal status. Because the embryo is neither person nor property, its legal status differs depending upon whether the embryo is being discussed in connection with criminal, tort, or inheritance law.

CRIMINAL LAW AS APPLIED TO EMBRYOS

For purposes of criminal law, the fetus generally has not been recognized as being a person or a human being. The issue of the fetus' status has been considered in both abortion situations and in situations in which an assault on a pregnant woman results in the death of the fetus. The question in abortion and assault cases is whether murder has been committed.

In early American cases, causing the death of an embryo or fetus was not an indictable offense unless the victim was a "quick" fetus which was born alive and which survived and breathed for even a short period of time. A fetus that had not quickened was not a protectable object under the criminal common law.

Under common law, if a quickened fetus was aborted and survived only momentarily, the one performing the abortion was guilty

describe a fetus that could survive outside the uterus and which, in practical effect, might be considered born. Id. The frozen embryo, viewed in isolation, cannot be compared to the viable fetus which was, according to the Court's calculations, at least six months old. Id. at 160.

128. Id. at 164-65.
129. Id. at 160.
130. Id. at 164-65.
131. See supra notes 113-21 and accompanying text.
132. Roe, 410 U.S. at 158.
133. See infra notes 134-242 and accompanying text.
134. See infra notes 137-42 and accompanying text.
135. See infra notes 143-69 and accompanying text.
136. See infra notes 143-69 and accompanying text.
137. BLACK'S LAW DICTIONARY 1122 (5th ed. 1979). Quickening is the first fetal motion the mother feels, occurring usually during the middle of the pregnancy. Id.
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of murder. However, if the quickened fetus was killed while in utero, the offense was only a misdemeanor. Therefore, at common law, abortion was murder only if the fetus was quickened, born alive, lived for a brief time, and then died.

The importance of the common-law requirements was shown as recently as 1976 by the Massachusetts Supreme Court in Commonwealth v. Edelin. In Edelin, the defendant, Dr. Kenneth Edelin, was charged with manslaughter for not saving the life of a fetus after he performed an abortion by hysterotomy on a seventeen year old, unmarried woman. Although unsuccessful, the prosecution attempted to prove that the aborted fetus had been born alive by showing that it had breathed after the placenta had been separated from the uterine wall. Similarly, in State v. Wintrop, a doctor was accused of the murder of a child while attending its birth. The Supreme Court of Iowa held that live birth required independent circulation and respiration and that the possibility of independence was not enough to convict the doctor of murder.

It is not clear precisely when in the embryo's fetal development it will be the human being or person mentioned in the appropriate murder statute. It is not clear whether the concept of viability found in the Roe decision or the concept of quickening is the determining factor.

In Keeler v. Superior Court, Mr. Keeler repeatedly kneed his estranged pregnant wife in the stomach. The fetus was later ex-

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140. Id.
141. Id.
142. Id. at 420.
143. 371 Mass. 497, 359 N.E.2d 4 (1976) (reversing a conviction of manslaughter on grounds of inadequate proof that the aborted fetus was capable of being saved).
145. AMERICAN HERITAGE DICTIONARY 1001 (1981). Placenta is defined as a membranous organ which develops in a female during pregnancy. The placenta lines the uterine wall and envelopes the fetus which is attached by an umbilical cord. Id.
147. 43 Iowa 519 (1876).
148. Id.
149. Id. at 521. It is significant to note that the United States Supreme Court has stated that a “physician’s or other person’s criminal failure to protect a liveborn infant surely will be subject to prosecution.” Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 83-84 (1976) (holding that a written consent requirement for abortions is permissible even though it is not required for other medical procedures).
150. See infra notes 151-53 and accompanying text.
151. See supra notes 127-32 and accompanying text.
152. See supra notes 137-39 and accompanying text.
153. See supra notes 127-32 and 137-39 and accompanying text.
155. Id. at 623, 470 P.2d at 618, 87 Cal. Rptr. at 482.
amined and found dead in utero due to its injuries. In Keeler, the California Supreme Court held that an unborn fetus was not a human being within the meaning of the California homicide statute.

In reaction against the Keeler decision, the California homicide statute was amended and now protects the fetus by creating a new category of murder victim rather than by redefining human being to include a fetus. According to the amended statute, "[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought." Illinois also passed legislation in reaction to a case which excluded a fetus from being a murder victim. In People v. Greer, the Illinois Supreme Court reversed the conviction of Alan Greer in the murder of Baby Girl Moss, an eight and one-half month-old fetus. The dissent pointed out that the relevant homicide statute defined murder as the unlawful killing of an individual. The dissent then stated that Baby Girl Moss was clearly viable at the time of the injury and death. In reaction to the Greer decision, the Illinois legislature established the crime of feticide.

The states that have amended their homicide laws to protect the fetus differ in whether they redefine human being to include fetus or list the fetus as a separate type of being. In Utah, "[a] person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, . . . causes the death of another human being, including an unborn child." The Utah language includes an unborn child as a human being. In contrast, the California law in-
cludes two distinct categories, human being and fetus.\textsuperscript{169}

For purposes of criminal law, the common law did not treat the unborn fetus as a person to whom the law of homicide applied.\textsuperscript{170} Early common-law decisions gave significance to the concept of quickening,\textsuperscript{171} but the post-\textit{Roe} decisions have given significance to the viability of the fetus.\textsuperscript{172}

\textbf{TORT LAW AS APPLIED TO EMBRYOS}

Three general types of tort claims may be distinguished on the basis of the harm to the unborn which results from the tortious action.\textsuperscript{173} First, survival and wrongful death actions may exist when the harm resulting from a tort is that the fetus is born dead.\textsuperscript{174} Second, a wrongful life action may exist when the resulting harm is that the fetus is born, healthy or unhealthy.\textsuperscript{175} Finally, a standard or traditional common-law action may exist when the child, though born, is injured or unhealthy.\textsuperscript{176} Although each of the three claims has its own legal doctrine and accompanying case law, this Note discusses only standard common-law tort actions.\textsuperscript{177}

Standard common-law prenatal tort actions fall into two general categories.\textsuperscript{178} The first category is the child's right to sue third party tortfeasors for negligently inflicted prenatal injuries.\textsuperscript{179} The second is the child's right to maintain an action against its parents for negligent conduct.\textsuperscript{180}

\textit{Standard Prenatal Tort Actions Against Third Parties}

In 1884, the Massachusetts Supreme Court rendered the first American opinion on the question of tort liability for prenatal injury.\textsuperscript{181} In \textit{Dietrich v. Inhabitants of Northampton},\textsuperscript{182} a wrongful death action, the court held that a fetus had no human existence separate from its mother and, therefore, could not recover for wrongful

\begin{footnotesize}
\begin{enumerate}
\item See supra notes 158-59 and accompanying text.
\item See supra notes 134-69 and accompanying text.
\item See supra notes 137-39 accompanying text.
\item See supra notes 127-32 and accompanying text.
\item See infra notes 174-76 and accompanying text.
\item Comment, 13 J. Fam. L. 99 (1973).
\item Andrews, 32 LOY. L. REV. at 385-86.
\item See infra notes 178-211 and accompanying text.
\item See infra notes 179-80 and accompanying text.
\item See infra notes 181-200 and accompanying text.
\item See infra notes 201-11 and accompanying text.
\item Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).
\item 138 Mass. 14 (1884).
\end{enumerate}
\end{footnotesize}
The decision not to permit recovery of damages for injury suffered by a child en ventre sa mere influenced the law for the next sixty years. It was not until 1946, in Bonbrest v. Kotz, that the Federal District Court for the District of Columbia held that injuries to a viable child were compensable in a tort action brought after the child's birth. The court pointed out that a viable fetus could live apart from its mother and that, as such, the argument that the fetus had no independent existence was inapplicable. The court also noted that it was inconsistent and illogical to hold that the unborn child was part of its mother under negligence law but a separate person under the law of criminal and property law.

Within twenty years of Bonbrest, a majority of state courts allowed a subsequently born child a cause of action for a wrongful injury which occurred en ventre sa mere. By 1972, the Dietrich doctrine of disallowing a child's cause of action for prenatal injury inflicted by third parties was extinct — every jurisdiction now permits suits by the subsequently born child against third parties for prenatal injury.

Although the right of a child born alive to recover against third parties for prenatal injuries is universally recognized, many courts allow a right of action only when the injuries occurred after viability. This viability requirement has come under heavy criticism. Critics argue that the viability concept is an indeterminate concept which depends upon the development of a specific fetus and there is

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183. Id. at 17. The case involved a four to five month pregnant woman who slipped on the defendant's highway and, consequently, went into premature labor and gave birth to an infant who died after fifteen minutes. Id. at 14-15.

184. BLACK'S LAW DICTIONARY 479 (5th ed. 1979). En ventre sa mere literally means "in its mother's womb." Id.


187. Id. at 140.

188. Id.

189. Id.

190. PROSSER AND KEETON, supra note 175, at § 55, at 368.

191. Huskey v. Smith, 289 Ala. 52, 54, 265 So. 2d 596, 596 (1972). The court stated that "Alabama will join every other jurisdiction in recognizing such a cause of action [for prenatal injuries]." Id.

192. Andrews, 32 LOY. L. REV. at 381. See, e.g., Mone v. Greyhound Lines, Inc., 3313 N.E.2d 916 (Mass. 1974) (ruling that a "viable" eight and one-half-month old fetus was a "person" for purposes of wrongful death statute); Libbee v. Permanente Clinic, 288 Or. 258, 518 P.2d 636 (1974) (holding that a "viable" unborn child is a "person" for purposes of Article 1, § 10 of the Constitution of Oregon); Evans v. Olson, 550 P.2d 924 (Okla. 1976) (holding that a "viable" unborn child who is negligently injured prior to birth and who subsequently survives birth has common law action for such injury).

no way to determine if a fetus is viable unless it is immediately born. Consequently, these critics insist that recovery for prenatal injuries should not be limited by the point of viability. Some courts follow this reasoning and ignore the viability requirement to allow recovery even if the fetal injury occurred in the early weeks of pregnancy.

The first case to reject viability as a requirement for recovery for prenatal injury was *Kelly v. Gregory*. In *Kelly*, the Appellate Division of the New York Supreme Court held that separability, the concept which led courts to acknowledge a right of action for prenatal injuries, began at conception and not at viability. The court pointed out that it was unreasonable to hinge recovery on the fact that the child could survive separately at viability because no case required that miscarriage coincide with the injury. After *Kelly*, a growing minority of jurisdictions allowed recovery to a child born alive who was injured at any time after conception.

**Prenatal Tort Actions Against Parents**

In recent years, an increasing number of state courts have abrogated, either partially or entirely, the parental-immunity doctrine. Given this growing recognition of parental liability for negligent injury to minor children and the universally recognized liability of third parties for prenatal injury, an action by the child against its

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194. Id.
195. Id.
196. E.g., Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971). In *Womack*, the Michigan Supreme Court did not mention viability in recognizing a cause of action for prenatal injuries. The child in *Womack* sustained her injuries before viability, during the fourth month of pregnancy. Id. at —, 187 N.W.2d at 219.
197. 282 A.D. 542, 125 N.Y.S.2d 696 (1953). This case arose when the plaintiff’s mother was struck by an automobile during her third month of pregnancy, causing injuries to her child. Id. at —, 125 N.Y.S.2d at 697.
198. Id. at —, 125 N.Y.S.2d at 697.
199. Id. at —, 125 N.Y.S.2d at 697.
200. See e.g., Simon v. Mullin, 34 Conn. Supp. 139, 380 A.2d 1353 (1977) (permitting recovery for prenatal injuries occurring at any point following conception regardless of the infants viability); Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961) (holding that an infant born alive but not viable was able to recover for prenatal injuries following an automobile collision).
201. See e.g., Gibson v. Gibson, 3 Cal. 2d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (father negligently instructed son to leave car to correct wheel position while automobile on highway); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972) (injuries sustained due to mother’s negligent driving); Wood v. Wood, 135 Vt. 119, 370 A.2d 191 (1977) (mother’s negligent use of firearms). The doctrine of parental immunity is simply that a child cannot sue his parent and a parent cannot sue his child in tort for personal injuries sustained arising out of a negligent or intentional act. Prosser and Keeton, supra note 175, at § 122, at 904.
parents for negligent prenatal injury appears very likely. 203

The possibility of the parents being liable for prenatal injuries was at issue in Grodin v. Grodin. 204 In Grodin, the Michigan Appellate Court upheld the right of a child allegedly injured prenatally to present testimony concerning the negligence of his mother in failing to seek proper prenatal care. 205 The Michigan Supreme court had determined that "a child could bring a negligence action against a tortfeasor for negligently inflicting prenatal injuries" 206 and that the doctrine of intrafamily tort immunity had been discarded. 207 Relying on these theories, the Grodin court reasoned that the mother of the injured child would bear liability for injurious, negligent conduct which interfered with the legal right of a child to a healthy life. 208 The court also stated that "[a] woman's decision to continue taking drugs during pregnancy is an exercise of her discretion. The focal question is whether the decision reached by a woman in a particular case was a 'reasonable exercise of parental discretion.' " 209

The Grodin decision recognized a woman's duty to her fetus. 210 The court ruled that a woman would be held to a standard of conduct similar to that of a third party, thereby requiring her to refrain from negligent conduct which resulted in injuries to a fetus who was subsequently born alive. 211

In summary, courts are increasingly willing to recognize the standing of the fetus to sue 212 and to abolish the parental-immunity doctrine. 213 Therefore, courts increasingly allow a child born alive to recover against its mother for prenatal injuries caused by her acts. 214

INHERITANCE LAW

At early English common law, there was no taking of property under a deed or will because the law required that something tangible, such as a handful of earth or a twig, be transferred to the new

203. Note, 14 COLUM. J.L. & SOC. PROBS. at 56.
205. Id. at —, 301 N.W.2d at 871.
206. Id. at —, 301 N.W.2d at 870 (citing Womack, 384 Mich. at 718, 187 N.W.2d at 218).
207. Id. at —, 301 N.W.2d at 870 (citing Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972)).
208. Id. at —, 301 N.W.2d at 870 (citing Smith v. Brennan, 31 N.J. 353, 364-65, 157 A.2d 497, 503 (1960)).
209. Id. at —, 301 N.W.2d at 870-71 (quoting Plumley, 388 Mich. at 8, 187 N.W.2d 169).
210. See supra notes 204-09 and accompanying text.
211. See supra notes 204-09 and accompanying text.
212. See supra notes 181-209 and accompanying text.
213. See supra note 201 and accompanying text.
owner of the property.\textsuperscript{215} Therefore, to transfer property both parties had to be present on the land.\textsuperscript{216} However, in the sixteenth century, the Statute of Uses\textsuperscript{217} and the Statute of Wills\textsuperscript{218} were passed to eliminate the necessity of physical presence at the conveyance sight.\textsuperscript{219} As a result of these changes, an embryo \textit{in utero} may be designated to take part of an estate.\textsuperscript{220} As long as the embryo is born alive, its rights to the property are held to have vested at the time of conception.\textsuperscript{221}

Granting inheritance rights to posthumously born children generally did not unduly burden estates because it was assumed at common law that a child would be born within ten lunar months (280 days) after conception.\textsuperscript{222} When more than 280 days passed between the alleged father's death and the birth of the child, it was assumed the child was not that of the deceased.\textsuperscript{223} This presumption was rebuttable by evidence of the deceased's paternity of the child.\textsuperscript{224}

The common-law approach has been codified in many states.\textsuperscript{225} In California, a child conceived before the death of the testator but born thereafter can inherit as if she had been born during the lifetime of the testator.\textsuperscript{226} The fetus is not vested with inheritance rights, however, until and unless it is born alive.\textsuperscript{227}

Whether a frozen embryo will be entitled to inherit if it is subsequently gestated and born will depend, in part, on the statutory provisions in a given state.\textsuperscript{228} In California, probate law provides that "[i]n the absence of a contrary provision in the will: . . . a person conceived before but born after the testator's death . . . takes if answer-
ing the class description.\textsuperscript{229} Under this provision, one who was frozen as an embryo may assert an inheritance claim years after the death of the testator.\textsuperscript{230} In contrast, the probate statute in Louisiana provides that "[c]hildren in the mother's womb are considered, in whatever relates to themselves, as if they were already born. . . ."\textsuperscript{231} Therefore, Louisiana probate law requires the embryo to be \textit{in utero} when the testator dies before the resulting child can inherit.\textsuperscript{232}

A question might be raised as to whether a "spare" frozen embryo itself should be treated as property to be distributed as part of the parents' estate.\textsuperscript{233} This issue arose in the state of Victoria, Australia, in the case of the "orphan embryos."\textsuperscript{234} In 1981, Mario and Elsa Rios, a California couple, were allowed to participate in the \textit{in vitro} fertilization program of Melbourne's Queen Victoria Medical Center.\textsuperscript{235} Because Mr. Rios was infertile, Mrs. Rios's eggs were fertilized with donor sperm.\textsuperscript{236} One fertilized embryo was subsequently implanted in Mrs. Rios on June 8, 1981, and the other two were frozen for future use.\textsuperscript{237} Mrs. Rios later miscarried and was not emotionally fit to participate in another immediate attempt at implantation.\textsuperscript{238} Mrs. Rios and her husband died in a plane crash before the remaining eggs could be implanted.\textsuperscript{239} Because the couple had not executed a will, their estates were distributed under the California intestacy laws without regard to the frozen embryos.\textsuperscript{240}

In summary, inheritance rights attach to the fetus at conception; however, live birth is essential.\textsuperscript{241} Absent live birth, the fetus has no inheritance rights.\textsuperscript{242}

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\textsuperscript{229} CAL. PROB. CODE § 6150 (West Supp. 1990).
\textsuperscript{230} Andrews, 32 LOY. L. REV. at 393.
\textsuperscript{231} L.A. CIV. CODE ANN. art. 29 (West 1952).
\textsuperscript{232} Andrews, 32 LOY. L. REV. at 393.
\textsuperscript{233} Dionne, Jr., \textit{A French Widow Sues Over Sperm}, N.Y. Times, July 2, 1984, at A7, col. 1. The article involved a French case in which a woman wanted to conceive a child with sperm her husband had frozen before his death. A lawyer for the sperm bank maintained that the sperm was an indivisible part of the husband, not subject to inheritance. \textit{Id}. The court ultimately ruled that the woman should be allowed to be inseminated with her husband's sperm. \textit{Widow Wins Right to Dead Mate's Sperm}, Chicago Sun-Times, Aug. 2, 1984, at 5. \textit{See also} Thies, \textit{A Look to the Future: Property Rights and the Posthumously Conceived Child}, 110 TRUSTS & ESTATES 922 (1971).
\textsuperscript{235} \textit{Id}.
\textsuperscript{236} \textit{Id}. at 28.
\textsuperscript{237} \textit{Id}.
\textsuperscript{238} \textit{Id}.
\textsuperscript{239} \textit{Id}.
\textsuperscript{240} \textit{Id} (citing CAL. PROB. CODE §§ 6401, 6402 (West 1985)).
\textsuperscript{241} \textit{See supra} notes 220-27 and accompanying text.
\textsuperscript{242} \textit{See supra} note 227 and accompanying text.
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ANALYSIS

In Davis v. Davis, the Blount County Circuit Court of Tennesee equated frozen embryos to human beings. In the Davises divorce case, the court ruled that Mrs. Davis was entitled to temporary custody of seven frozen embryos for the purpose of implantation. By equating embryos to human beings, the Davis decision adopted the inheritance law notion that an embryo is a juridical person who presumably is entitled to the same respect, status, and rights as other persons.

This section explores some of the implications of the Davis holding; specifically, how the legal status of the embryo will be impacted by the establishment of the embryo as a juridical person. First, this section examines how the Davis decision, when juxtaposed with Roe v. Wade, could lead to absurd results. Next, this section considers some of the implications of the Davis decision if it were adopted in the areas of criminal, tort, and inheritance law. Finally, this section concludes by suggesting that the legislative branch is better suited to determine if life begins at conception and thus whether the embryo should be considered a human being.

Davis Juxtaposed With Roe

The United States Supreme Court’s 1973 decision in Roe undoubtedly was the most significant characterization of embryos with respect to personhood. Specifically, the Roe Court held that a fetus is not a person for purposes of the fourteenth amendment. From this premise, the Court went on to hold that a woman, in consultation with her physician, has a constitutionally guaranteed right to an abortion during the first trimester of pregnancy.

In Davis, on the other hand, the court characterized embryos as

243. 15 FAM. L. REP. (BNA) No. 46, at 2097 (Blount County Cir. Ct., Tenn., Sept. 26, 1989).
244. Id. at 2103.
245. Id. at 2104.
246. BLACK’S LAW DICTIONARY 785 (5th ed. 1979). Juridical relates to the administration of justice, or the office of the judge. It pertains to the law of jurisprudence. Id.
247. See supra notes 215-40 and accompanying text.
248. See infra notes 250-302 and accompanying text.
250. See infra notes 253-65 and accompanying text.
251. See infra notes 266-302 and accompanying text.
252. See infra notes 303-05 and accompanying text.
254. See supra notes 122-26 and accompanying text.
255. See supra notes 127-30 and accompanying text.
human beings, in essence creating juridical embryo children.\textsuperscript{256} Consequently, according to the \textit{Davis} court, it is reasonable to infer that frozen embryos are entitled to the respect, status, and rights afforded a human being, including the right not to be destroyed.\textsuperscript{257}

At first blush, \textit{Roe} and \textit{Davis} may not appear inconsistent; however, upon closer inspection, a significant difference surfaces.\textsuperscript{258} Under \textit{Roe}, a woman is permitted to abort an embryo that is inside her body during the first trimester of pregnancy.\textsuperscript{259} In contrast, presumably under \textit{Davis} no one is permitted to destroy an embryo in a petri dish because it is the equivalent of a child.\textsuperscript{260} Juxtaposed, the inconsistency of these two holdings becomes apparent.\textsuperscript{261} While in a petri dish, an embryo may not be destroyed, but once it is implanted in a woman's uterus, it may be aborted.\textsuperscript{262} The curious inconsistency of these two holdings could bring about absurd results.\textsuperscript{263} Conceivably, the woman who is not permitted to destroy the embryo in the petri dish under \textit{Davis} will simply have it implanted in her uterus. If the implantation is unsuccessful, she need not worry further. If, however, the implantation is successful, she may simply exercise her fourteenth amendment privacy right under \textit{Roe} to terminate her pregnancy by obtaining an abortion.\textsuperscript{264} This circumvention of the rule prohibiting the destruction of frozen embryos would pose unnecessary health risks and expense to many women.\textsuperscript{265}

\textbf{Implications in the Criminal Law Area}

In the criminal law setting, if embryos are established as juridical persons, there will be significant ramifications with regard to common-law homicide.\textsuperscript{266} Generally, at common law, the death of an embryo or fetus was not an indictable offense unless the victim was viable or born alive.\textsuperscript{267} If \textit{Davis} were extended to its logical conclusion, the reckless or negligent destruction of an embryo, whether one second or ten months after conception, would constitute criminal

\begin{itemize}
\item \textsuperscript{256} \textit{Davis}, 15 Fam. L. Rep. at 2103.
\item \textsuperscript{257} Id. See also U.S. CONST. amend xiv, § 1.
\item \textsuperscript{258} See infra notes 259-265 and accompanying text.
\item \textsuperscript{259} See supra notes 127-30 and accompanying text.
\item \textsuperscript{260} Davis, 15 Fam. L. Rep. at 2102-04.
\item \textsuperscript{261} See supra notes 259-60 and accompanying text.
\item \textsuperscript{262} See infra notes 264-65 and accompanying text.
\item \textsuperscript{263} See supra notes 127-30 and accompanying text.
\item \textsuperscript{264} See supra notes 127-30 and accompanying text.
\item \textsuperscript{265} See infra notes 267-76 and accompanying text.
\item \textsuperscript{266} See supra notes 137-39 and accompanying text.
\end{itemize}
Because an embryo would have the same legal status as any live, fully matured human being, it would receive the same legal protection as any other human being. This would truly be a radical departure from the traditional common-law rule with regard to fetal homicide.

Furthermore, if Davis is adopted in a criminal context, it would necessitate the enactment of laws against abortion. These acts would parallel traditional murder and manslaughter enactments because the embryo's life would be constitutionally protected.

In addition, the Davis formula of equating embryos to human beings would have profound implications for physicians in the criminal law context. The standard of care required of physicians attempting to provide adequate care to a two-cell, four-cell, or eight-cell embryo would be elusive. For example, under a state's child protection laws, a physician could be prosecuted for child abuse if the county attorney had probable cause to believe the physician should have provided different nutrients in the embryo's medium or should have stored the embryo at a different temperature. Moreover, the physician could be subject to criminal prosecution if the doctor discarded an embryo which was not properly maturing. Furthermore, physicians would be uncertain about the permissibility of the use of embryo freezing. If more than three of an IVF patient's eggs were successfully fertilized, a woman might not want them all implanted because of the risks to her and to potential offspring that

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268. See supra note 260 and accompanying text. It is interesting to note that Judge Young never answered the question of whether all seven embryos must be brought to term. For example, he never discussed what should take place if Mrs. Davis changed her mind about implantation, or if she succeeded in having one or two children as a result of implantation, whether the remaining embryos must be implanted in one or more other women to further their 'hope of survival.' The imposition of a requirement that all seven frozen embryos be implanted and brought to term would certainly raise the specter of criminal prosecution to parents engaged in IVF and cryopreservation. See Davis, 15 Fam. L. Rep. at 2097.

269. See supra notes 256-57 and accompanying text.

270. See supra notes 137-39 and accompanying text.


272. Roe, 410 U.S. at 156-57. The Court stated that "[t]he appellee and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. . . . If this suggestion of personhood is established, the appellant's case, of course, collapses for the fetus' right to life would then be guaranteed specifically by the Amendment." Id.

273. See infra notes 274-83 and accompanying text.


275. Id.

276. Id.

277. Id.
multiple pregnancies and multiple births entail. The woman may wish to have some of the embryos frozen. Yet embryo freezing is experimental, and many embryos will not survive the freeze/thaw process. This result could lead to the physician's prosecution for harming embryos.

The possibility that a physician could have widespread liability with respect to the embryo in every action undertaken, or permitted to be undertaken, certainly will impede the availability of IVF. In all likelihood, the fear of criminal prosecution will prompt physicians in some states to abandon the IVF practice altogether. If physicians are deterred from offering IVF, then a couple's access to the technique will be restricted and their procreation desires frustrated.

IMPLICATIONS IN THE TORT LAW AREA

The equating of embryos to human beings would also have significant implications in the area of tort law. If embryos are deemed juridical persons, as they were in Davis, then they would have standing to sue regardless of whether they were injured prior to or after the point of viability. Thus, a child who is born alive would be able to recover for injuries the child sustained in vitro as a frozen embryo.

The ability of an in vitro embryo to recover for negligently inflicted injuries will substantially impact physicians and parents alike. Any physician who directs an IVF procedure will be directly responsible for the safekeeping of the in vitro embryo. This responsibility may deter physicians from offering IVF because they would have to exercise extreme due care in connection with their actions toward the in vitro embryo to avoid being held liable for

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282. See supra notes 273-81 and accompanying text.
284. Id.
285. See infra notes 286-94 and accompanying text.
286. Saltarelli, 35 SYRACUSE L. REV. at 1049.
287. Id.
288. See infra notes 289-94 and accompanying text.
negligence.\textsuperscript{290}

Even more significant is the impact the \textit{Davis} decision could have on common-law tort actions against parents.\textsuperscript{291} In jurisdictions where the parent-child immunity doctrine has been abrogated, under the \textit{Davis} decision embryos could sue their parents in tort for negligent prenatal injury.\textsuperscript{292} Parental discretion to smoke cigarettes, drink alcohol, take medication, engage in immoderate exercise or sexual intercourse, obtain employment in a fatally toxic work environment, or reside at high altitudes for a prolonged period might be limited.\textsuperscript{293} Because parents could be held civilly liable by their children if one of the above activities resulted in prenatal injury, some people may be discouraged from becoming parents.\textsuperscript{294}

\section*{Implications in the Inheritance Law Area}

Inheritance law presently recognizes inheritance rights in posthumously born children.\textsuperscript{295} Therefore, the impact of \textit{Davis}, which could extend inheritance rights to frozen embryos, at first appears to be minimal.\textsuperscript{296}

However, because the use of IVF and cryopreservation enable an embryo to be stored for some time, a child could have inheritance rights long after the child’s biological parents have died.\textsuperscript{297} Obviously, this could significantly forestall and disrupt the orderly and efficient settlement of estates.\textsuperscript{298}

\section*{Who Should Decide When Life Begins}

Apart from the merits of the court’s ruling in \textit{Davis}, one must ask whether the court was the proper forum for determining the issue of when human life begins.\textsuperscript{299} Traditionally, the United States judiciary has declined to grapple with the issue of when human life

\begin{itemize}
  \item \textsuperscript{290} \textit{Id.}
  \item \textsuperscript{291} See infra notes 292-94 and accompanying text.
  \item \textsuperscript{292} See supra notes 201-14 and accompanying text.
  \item \textsuperscript{293} Note, \textit{Parental Liability For Prenatal Injury}, 144 COLUM. J. OF L. & SOC. PROBS. 47, 73-75 (1978). Such maternal acts are said to be causes of prenatal injury. \textit{Id.}
  \item \textsuperscript{294} \textit{Id.}
  \item \textsuperscript{295} See supra notes 215-21 and accompanying text.
  \item \textsuperscript{296} See supra notes 221-32 and accompanying text.
  \item \textsuperscript{297} \textit{Davis}, 15 FAM. L. REP. at 2109-10. Dr. King and Dr. Shivers testified that at present the longest embryos can be stored and remain viable is two years. \textit{Id.} However, others suggest the embryo may be stored indefinitely. Sillman, 67 MICH. B.J. at 605.
  \item \textsuperscript{298} Thies, \textit{A Look To the Future: Property Rights and the Posthumously Conceived Child}, 110 TRUSTS & ESTATES 922 (1971) (addressing similar legal issues with respect to the child conceived posthumously with donor sperm).
  \item \textsuperscript{299} \textit{Roe}, 410 U.S. at 159.
\end{itemize}
In Roe, the Supreme Court stated that:

[we] need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.\(^{301}\)

Regardless of one's personal position on when human life begins, given the Supreme Court's refusal to decide the issue, the court's decision in Davis that human life begins at the moment of conception cannot be supported under traditional methods of legal reasoning.\(^{302}\)

**CONCLUSION**

There is an old legal adage which says that hard cases make bad law. The issue in Davis v. Davis\(^{303}\) certainly presented a hard case. Judge W. Dale Young of the Blount County Circuit Court of Tennessee was asked to determine what to do with seven frozen embryos which were created by the in vitro fertilization of Mary Sue Davis' ova with the sperm of her husband Junior Davis. The Davises filed for divorce and the court was required to determine who had rights to the seven frozen embryos.

The court's conclusion in Davis was that it was in the best interests of the seven frozen embryos to be in the temporary custody of Mrs. Davis for purposes of implantation.\(^{304}\) On the surface, the decision appears to be legally sound and supportable. However, the court's ruling was based on two legally unsupportable premises: first, that human life begins at the moment of conception; and second, that frozen embryos are human beings.\(^{305}\)

Despite the United States Supreme Court's admonition against a judicial determination of when human life begins, the court made that question the central issue in Davis. The court set out to do that which philosophers, theologians, and the nation's greatest legal minds have been unable to do.

By choosing to focus on the issue of when human life begins, the court necessarily entered the highly controversial debate on the status of prenatal life on which questions of an ethical, legal, moral, philosophical, scientific, and social nature continue to be raised. Ar-

\(^{300}\) Id.

\(^{301}\) Id.

\(^{302}\) R. DWORKIN, LAW'S EMPIRE 114-51 (1986).


\(^{304}\) Id. at 2104.

\(^{305}\) Id. at 2103.
guably, the legislative branch of government is far better equipped to
deal with this inquiry than is the executive or judicial branch. First,
the legislative branch offers a more responsive forum for advocacy by
those concerned. Second, the legislative branch is equipped to re-
spond to the various developments in the new reproductive biology.
The legislative branch is equipped to shape and direct a future course
of action which requires continual fine-tuning and close monitoring.
Therefore, if society must reach a consensus on when human life be-
gins, and indeed it must, it should be charted in the legislative assem-
blies in which the conscience and the understanding of each region of
the country may be codified and not on the case-by-case approach of-
fered by the judiciary.

In essence, the court in *Davis* established a juridical person by
equating frozen embryos to human beings. The court established a
legal status for the embryo which had no support in legal doctrine.
Therefore, from a positivistic viewpoint, the case was bad law and the
old legal adage that hard cases make bad law lives on.

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