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Resolving Disputes Over Frozen Embryos: A New Proposal

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ABSTRACT *This paper proposes a principle for adjudicating conflicts between estranged couples over whether the frozen embryos they earlier created together ought to be gestated or destroyed. I argue that the fate of the embryos ought to be determined by the party who would be most harmed by having his or her preferences overruled. But I also claim that, when embryos are destroyed against the opposition of one of their co-creators, the individual at whose behest this was done owes compensation to his disappointed opposite number, in an amount that reflects the harm accruing to the latter as a result of the termination of the procreative project.*

1. Introduction

On many a liberal defence of abortion rights, until around the end of the second trimester, the developing foetus is not the kind of being that can be harmed, or wronged, by having its death brought about. For before this point the foetus is insentient, and as such can be ascribed neither interests nor rights — including, crucially, an interest in or right to continued life.¹ On the liberal view, moreover, the right to decide whether an insentient foetus will be aborted rests exclusively with the pregnant woman. For the foetus is located in her body, and the decision whether or not to abort it is therefore a decision about her medical treatment, which, as an autonomous agent, she is entitled to take alone.²

Now, if the liberal position on abortion rights is correct, one might nonetheless think that, in cases where an embryo is being maintained *ex utero*, the right to choose whether or not it will be destroyed need not necessarily be vested in the woman.³ And so, indeed, I argue here, with reference to cases in the mould of the following, much-discussed American legal dispute:

Davis v. Davis. Mary Sue and Junior Davis, a married couple, wished to have a child together. Because Mrs Davis had had her fallopian tubes severed, following a number of tubal pregnancies, the couple turned to *in vitro* fertilisation (IVF). They embarked upon seven unsuccessful rounds of IVF, during the last of which seven embryos, created using Mr Davis' sperm and Mrs Davis' eggs, were frozen ready for future uterine transfer. Before the embryos could be used, however, the Davises filed for divorce. Mr Davis requested a legal order preventing the fertility centre from releasing the embryos to his wife, whilst Mrs Davis argued that, as the mother of those embryos, she was entitled to attempt to bring them to birth.⁴

Litigants in cases like *Davis* cannot both have their preferences ratified: someone's ox must be gored. Whose?⁵ To be sure, it would be desirable if couples decided in advance

1 what ought to happen to their embryos in the event of their divorce, and signed legal
2 agreements ratifying those decisions. Yet the question what ought to be done in disputes
3 over frozen embryos becomes philosophically arresting precisely when we consider cases
4 where, as with *Davis* itself, no such agreement is in place. Accordingly, it is to these cases
5 that the attention of this paper is directed.

6 Cases such as *Davis* have already attracted some attention from bioethicists, who have
7 submitted various proposals for an equitable resolution, based on consideration of the
8 opposing parties' interests. I also endorse an interests-based approach, arguing that the
9 fate of frozen embryos ought to be determined by the party who would be most harmed
10 by having his or her preferences overruled. But I depart from existing solutions insofar
11 as the latter uniformly adopt a winner-takes-all strategy, under which the litigant whose
12 wishes do not hold sway is left with nothing. These proposals have unacceptably, in my
13 view, failed to consider what forms of redress might be owed to the losing party. It is my
14 claim that, when embryos are destroyed against the opposition of one of their
15 co-creators, the individual at whose behest this was done owes compensation to his
16 disappointed opposite number, in an amount that reflects the harm accruing to the latter
17 as a result of the termination of the procreative project.

18 Before I begin, four clarifying remarks are in order. First, it is a crucial background
19 premise of this paper that, as the liberal view on abortion maintains, the embryos
20 themselves have no interests. We need not consider them for their own sake, then, since
21 properly speaking they have no sake — or welfare — of their own.

22 Second, I hereinafter always assume that the party opposing gestation of the embryos
23 is male, and the party wishing to bring them to birth is female. There are three reasons
24 for this: (a) it makes for clearer exposition; (b) it accords with the empirical reality of
25 cases like *Davis*; (c), as we shall see, fertility treatment is considerably more demanding
26 on women, and this fact may be relevant to a fair resolution. To be sure, the party wishing
27 to bring the embryos to term could be the male (in which case he will require a surrogate
28 mother). The conflict adjudication method recommended should, *mutatis mutandis*, be
29 equally applicable when the roles are reversed in this way.⁶ I say more on this at the end
30 of Section 4.

31 Third, I assume that neither party is a wrongdoer, who may have forfeited his or her
32 right to decide what will happen to the embryos. Thus, for example, I assume that neither
33 party forced or deceived the other into becoming a gamete donor, and that the relation-
34 ship between the disputants was not a violent or abusive one.

35 Fourth and finally, I assume that there are no child-regarding reasons for the state to
36 refuse to release the embryos for gestation. To that end, I assume that the party seeking
37 implantation would make a fit parent, and that the embryos do not contain the genes for
38 any harmful diseases or disabilities.⁷ These last qualifications ensure that the disputes at
39 issue must be settled with reference to the competing interests of the couple alone.⁸

40 41 **2. Assessing the Unwilling Party's Interest in Preventing Embryo Transfer**

42 Bioethicists who have previously addressed conflicts over frozen embryos have tended to
43 assume that, if a child were brought to birth without the concurrent consent of both
44 progenitors, the unwilling party would not be morally or legally required to play any role
45 in its upbringing. Since I lack the space to evaluate competing theories of parental

1 responsibility, I accept this assumption throughout, whilst noting that it may not, in fact,
2 be justified. For it may be that bare genetic relatedness grounds (at least some) parental
3 obligations.⁹ On the assumption, however, that no rearing duties will be imposed upon
4 a man in the shoes of Junior Davis if he is unsuccessful in blocking the transfer of
5 embryos to his ex-partner, we must then ask what other grounds for objecting to that
6 transfer he might be able to muster.

7 Let me first draw attention to one potential objection that is clearly deficient. On this
8 view, we each have property rights in our gametes, or intellectual property rights in the
9 genetic information contained therein. In virtue of the fact that he has such rights, the
10 objection avers, the father is entitled to decide what will happen to embryos created from
11 his gametes. Yet, if the father has such rights, presumably his partner does as well. Thus,
12 insofar as the embryos were created using both partners' gametes, an appeal to property
13 rights in genetic material supports neither party over the other.¹⁰

14 I can think of only one other objection that the father might deploy to forestall embryo
15 transfer, and this is also the objection on which philosophical attention has focused. The
16 objection avers that, should the embryos be awarded to the woman, and a pregnancy
17 successfully completed, the man would face the psychological burden of knowing that,
18 somewhere in the world, there exists a child who is his genetic progeny, and who was
19 created against his will. In his evidence to the courts, Junior Davis emphasised just how
20 deeply he believed he would be affected by that knowledge, and his submissions have
21 informed subsequent philosophical discussion.¹¹ There has, however, been little consen-
22 sus reached as to whether the putative burden is real, and, if so, how much importance
23 should be attached to it. Before unveiling my own analysis, let us review those in the
24 existing literature.

25 First, siding by-and-large with the unwilling male, John A. Robertson argues:

26 Even if no rearing duties or even contact result . . . the unconsenting partner
27 may learn that biologic offspring exist, with the powerful attendant reverbera-
28 tions which can ignite. The psychological burdens of unwanted parenthood are
29 significant and should be given appropriate weight in deciding individual
30 disputes.¹²

31 Two paragraphs further down, he continues:

32 The party who wishes to avoid offspring is irreversibly harmed if embryo
33 transfer and birth occur, for the burdens of unwanted parenthood cannot then
34 be avoided. On the other hand, frustrating the ability of the willing partner to
35 reproduce with these embryos will — in most instances — not prevent that
36 partner from reproducing at a later time with other embryos. As long as the
37 party wishing to reproduce could without undue burden create other embryos,
38 the desire to avoid biologic offspring should take priority over the desire to
39 reproduce with the embryos in question.¹³

40 On Robertson's view, then, the psychological harms occasioned by non-consensual
41 biological parenthood are both serious and irreversible. Conversely, if she has other
42 opportunities for procreation (for example, she is still capable of producing eggs), the
43 woman is only temporarily frustrated in her ambition to have a child by being denied
44 the embryos. Robertson's proposal vests control in the non-consenting party whenever
45 the opposing litigant is able to have biologic offspring by other means. However, in cases

1 where *both* parties stand to be irreversibly affected should their preferences be overridden
2 (i.e. in cases where the woman lacks future opportunities for having genetic offspring),
3 the woman's interest in having a child should, Robertson contends, be considered on an
4 equal footing with the man's interest in avoiding biological parenthood.

5 Bonnie Steinbock argues that Robertson underestimates the physical and emotional
6 burdens that the woman may already have undergone to create the embryos under
7 dispute, and that she may be led to undergo again if those embryos are denied to her.¹⁴
8 These burdens include the pain and discomfort of hormonal treatment to induce
9 superovulation, and of the egg collection process itself.¹⁵ Where a woman has partici-
10 pated in successive rounds of treatment, the trauma and disappointment prompted by
11 previous failed attempts at achieving conception are also relevant, she adds. Steinbock
12 does not dispute that unwanted biological fatherhood might indeed occasion psycho-
13 logical harm. She contends, however, that due consideration of the taxing nature of IVF
14 treatment to the woman may nonetheless tip the balance in the latter's favour in some
15 cases. For instance, with regards *Davis*, she argues that, since she had already undergone
16 six unsuccessful embryo transfers, to expect Mrs Davis to 'undergo yet another treat-
17 ment cycle in order to have a chance at pregnancy would be unduly burdensome and
18 unfair'.¹⁶

19 Adopting an altogether more hostile stance towards fathers who, like Junior Davis,
20 claim that their lives would be blighted by the existence of unwanted genetic progeny,
21 Christine Overall writes:

22 The burdens here are not the burdens that would result if children were born
23 whom Junior Davis came to know, and from whom he was then forcibly
24 separated. Junior Davis is not complaining of the potential pain of separation
25 from his children; he is complaining of the potential pain of being biologically
26 related to children whom, if he so chooses, he need never know or even see. So
27 the situation here is not in any way analogous to that of a woman who gestates
28 a foetus, subsequently surrenders or is forced to surrender the infant for
29 adoption, and then regrets having done so.¹⁷

30 Dismissing, in this way, the putative psychological burdens to unwilling fathers, and
31 emphasising, as does Steinbock, the arduousness of further IVF treatment to the mother,
32 Overall contends that the wishes of men should *never* carry the day in disputes over
33 frozen embryos. As she says, somewhat pithily:

34 Men who want to control their sperm should be careful where they put it, and
35 should pause to think before they provide their sperm for insemination or for in
36 vitro fertilization — even with women who are their partners.¹⁸

37 If it is correct that the basis of the male's claim over the embryos is his interest in
38 avoiding the psychological burdens attendant on unwanted biological parenthood, then,
39 as Robertson, Steinbock and Overall appear at least to agree, an equitable resolution of
40 his dispute with his ex-partner requires that we answer two questions. First, how keenly
41 felt is the alleged trauma to him? Second, how much weight should we ascribe to his
42 feelings as against the interests of the woman, who may be devastated by the failure of
43 her ambition to bear a child, may already have undergone considerable sacrifices in
44 pursuit of that ambition, and may be led to accept further such sacrifices in the future
45 if the embryos are destroyed?

1 Let us take the first question first (I pursue the second in Section 3). Clearly, many
2 individuals who aspire to parenthood ascribe profound importance to genetic related-
3 ness. Indeed the cases under consideration only arise because couples are prepared to
4 pay a high premium to create a child using their own gametes, rather than avail
5 themselves of adoption or fostering facilities. One might think that it would be a peculiar
6 asymmetry if the need to have a biologically-related child were felt so keenly as to drive
7 many individuals and couples to the great lengths we know they do go to in order to
8 conceive, yet unwanted genetic parenthood were not experienced as a significant or
9 momentous event in a person's life at all. This lends *pro tanto* plausibility to the claim that
10 unwanted biological parenthood can indeed be traumatic.

11 In pursuing this matter further, it will help to consult our intuitions about cases in
12 which an individual's gametes are misappropriated, and used to create a child without
13 even an initial consent. I take it that very few would wish to uphold a principle requiring
14 of us that we donate our gametes to those who need them to have a child, or allowing
15 them to be confiscated against our wishes.¹⁹ Moreover, our reluctance to endorse such
16 a principle seems not to depend upon the fact that gamete confiscation might involve an
17 unacceptable invasion of bodily integrity. To be sure, as I have already noted, egg retrieval
18 is an uncomfortable process. However, and at the risk of stating the obvious, providing
19 sperm is by no means an unpleasant way for a man to spend a few minutes. And in any
20 case, the intuitive distaste for non-voluntary donation seems to hold equally in cases
21 where one's gametes have already left one's body — for example, where they are lying in
22 a laboratory, awaiting genetic diagnosis. Our right to decide whether or not our gametes
23 will be made available to others is implied, rather, by the more general claim that we are
24 not obligated to provide others with whatever they happen to need to fulfil their specific
25 conceptions of the good. That my conception of the good involves devouring great works
26 of fiction does not entitle me to the use of your private library. And symmetrically, that
27 your conception of the good involves parenthood does not entitle you to the use of my
28 gametes.

29 There are good reasons to suppose that non-consensual gamete use might lead to
30 considerable harm. Consider:

31 *Non-voluntary Sperm Donor.* A man and his partner are having difficulty con-
32 ceiving a child. They approach a fertility clinic, to which the man gives a sample
33 of his semen, so that his sperm count and sperm motility can be assessed.
34 Owing to a bureaucratic blunder, his sample is in fact used to fertilise a female
35 patient's egg *in vitro*. Nine months later, this woman gives birth to a child, at
36 which point the mistake is discovered, and the parents are informed of what has
37 happened.

38 Suppose the female patient in this example had no preferences as to the donor source,
39 so that we can gloss over how this mishap affects her. Turning to the man, I believe many
40 people will agree that it would be entirely reasonable for him to complain that he suffers
41 significant harm, of a psychological nature, as a result of the clinic's negligence.

42 At least three reasons can be adduced in support of this intuition.²⁰ First, the man may
43 be distressed at the thought that his offspring will one day find him and seek to establish
44 a relationship with him, and at the potentially straining effects that this might have on his
45 existing attachments to his partner and any other children he may have. This fear will be
46 well founded if the law allows children born via donor insemination to trace their

1 biological parents.²¹ And there are, indeed, good grounds for allowing children to do just
2 that, having not so much to do with the interests those children have in knowing their
3 medical history (since there are ways of making this available that preserve donor
4 anonymity), but rather their interests in discovering and coming to terms with their
5 identity and origins.²²

6 Second, insofar as many individuals believe that having a child with one's partner
7 establishes a deeply significant connection with the latter — a connection, indeed, that
8 endures in spite of contingencies such as separation, divorce and death — this man might
9 feel that he has had imposed upon him not only a relationship with an unwanted child,
10 but also with that child's mother.

11 Third, notwithstanding that the man, so we are assuming, need not, if he so chooses,
12 involve himself in the child's life in any way, he may find himself deeply concerned about
13 the latter's welfare, precisely in virtue of the fact that she is his genetic progeny. Whether
14 or not genetic relatedness grounds parental duties, it is certainly true that many people
15 do sincerely believe this to be the case. They believe, in other words, that blood ties are
16 ethical relationships.²³ Given the prevalence of such beliefs, one might plausibly think,
17 we risk inflicting deep trauma on a person if we impose upon him, without his consent,
18 the following unpalatable choice: to wit, involving himself in the upbringing of a child
19 whom he never wanted, or abstaining from doing so at the cost of experiencing deep
20 feelings of guilt at having abandoned that child.

21 The foregoing points suggest strongly that Robertson and Steinbock are correct to
22 emphasise the psychological burdens of unwanted genetic parenthood. To be sure, there
23 are likely be considerable variations between the reactions of different individuals: while
24 some men's experiences may match the pattern described, anecdotal evidence suggests
25 that others will father children whom they do not see, and to whose upbringing they do
26 not contribute, and not be much bothered by it. Seemingly, however, unwanted parent-
27 hood carries with it at least the *potential* for significant psychological harm. Presumably,
28 it will be up to judges to decide, on a case-by-case basis, what is the likelihood that this
29 potential will be actualised, having reflected on the circumstances, beliefs, and repre-
30 sentations of the man in question. Assume that this potential would be actualised in a
31 particular case. We must decide how much weight to attach to this male's interest in
32 avoiding psychological harm, and how much to attach to the female's countervailing
33 interests. To this question, I now turn.

35 **3. Assessing the Willing Party's Interest in Achieving Embryo Transfer**

36 I noted above that most people intuitively believe that the confiscation of gametes is
37 impermissible. We already endorse, then, strict limits on the extent to which others can
38 claim our help in overcoming childlessness. This finding alone, however, does not get us
39 all that far, for the disputes under consideration are unlike cases of gamete confiscation,
40 in two respects.²⁴ First, where one's gametes are confiscated, no embryo as yet exists,
41 whilst in disputes like *Davis*, an embryo has already been created, and the non-
42 consenting party is (merely?) being asked to accept its preservation and gestation.
43 Second, in the disputes at issue, the party petitioning for destruction of the embryos was
44 not always averse to becoming a parent: rather, he initially participated willingly in the
45 procreative enterprise, and subsequently changed his mind.

1 We can, then, uncouple cases in which an individual is asked to accept the gestation
2 of an embryo that now exists, but that he never wanted in the first place, from cases in
3 which he did once want it, but has had a change of heart. Let us examine first whether
4 it is permissible to impose upon someone the preservation of an embryo created without
5 his consent. Consider:

6 *The Contested Embryo.* The details are as in *Non-voluntary Sperm Donor*, except
7 that the clinic discovers its mistake, and informs the man and woman in
8 question, before the embryo is transferred to the latter's uterus. The man
9 demands the embryo's destruction; the woman demands that it be released to
10 her for implantation.

11 If the disputed embryo is implanted, the man in the foregoing example stands to be
12 harmed in the same way as the *Non-voluntary Sperm Donor*. What arguments might the
13 woman advance to support her opposing claim? She cannot argue that she needs the
14 embryo to implement her conception of the good, since, as we have seen, it is in general
15 false that we have a right to whatever we require to further these conceptions. Can she
16 argue (as Steinbock and Overall suggest that women in more familiar disputes like *Davis*
17 should do) that, unless she is awarded the embryo, she will have to undergo further
18 demanding fertility treatment? Overall claims, in relation to *Davis*, that:

19 . . . *the argument* [in favour of awarding the embryos to the woman] *should be*
20 *future-oriented*. What the *Davis* case shows is that the justification for assigning
21 decisional authority over embryos to the woman in cases of dispute is to reduce
22 the likelihood that the woman will have to undertake the burdens of IVF in the
23 future. Giving the embryos to the woman for implantation means that she may
24 be able to avoid being subjected to further massive amounts of hormones and
25 the removal of more ova.²⁵

26 I agree with Overall that our analysis of the woman's interest in the survival of her
27 embryos should, at least in part, be informed by what will happen to her in future if they
28 are destroyed. But it would be implausible to claim, as Overall comes close to doing, that
29 the sole reason to award the embryos to the woman is to lessen the chances of her
30 undergoing further rounds of fertility treatment.²⁶ For if the woman has an interest in the
31 survival of her embryos only insofar as she has an interest in avoiding this future
32 treatment, then, by implication, when a woman cannot produce any more eggs, and so
33 would not benefit from further treatment, she has no significant stake in whether her last
34 embryos are destroyed. Yet intuitively we believe that she would have a compelling
35 interest in the survival of these final embryos.

36 Someone might press against Overall the further claim that, since a woman is not
37 compelled to undergo additional treatment if she is denied access to a particular batch
38 of embryos, she cannot say that she requires them to escape the harms associated with
39 additional treatment. Now, it is true that a woman can choose to discontinue treatment,
40 and this point does indeed undermine the claim that a woman's stake in the survival of
41 her embryos can be explicated entirely with reference to her interest in not undergoing
42 repeated cycles of IVF. It does *not* show, however, that future-oriented considerations are
43 wholly irrelevant to that explication. For, as we have seen, permanent childlessness is
44 deeply painful for many individuals. Accordingly, a woman who chooses not to undergo
45 further treatment, having been denied access to some particular embryos, does not

1 necessarily escape future harm. Rather, she may merely avoid one form of harm (another
2 demanding cycle of IVF) in order to incur another (the emotional pain attendant on
3 childlessness).

4 The strength of a woman's interest in the survival of her embryos, then, depends at least
5 in part on what the future holds for her if they are destroyed. But imagine that the following
6 is true of the woman in *The Contested Embryo*. First, she already has biological children,
7 and will not be unduly distraught if denied the opportunity to have a further child. Second,
8 she will not seek further treatment if the embryo is destroyed. Perhaps she had hoped for
9 another child for purposes of family balancing, but would be content without one. If these
10 are the facts, the woman will not be harmed in the future if control over the embryo is
11 vested in the man. Does it follow that the destruction of the embryo does not harm her at
12 all? I do not believe that it does (which is not to say, yet, that she should be awarded the
13 embryo). If we are to offer a satisfactory explanation of what this woman has riding on the
14 fate of the embryo, we must also look to the costs she has already incurred.

15 I claim that, whatever may befall her in the future, the destruction of embryos harms a
16 woman by making it the case that her prior investment in the procreative project has been
17 wasted. Thus, our analysis of the strength of a woman's interest in the survival of her
18 embryos cannot be purely future-oriented: it must in part be backward-looking also. Now,
19 when a person expends her time, effort and resources in order to secure some good, G, and
20 she does in fact obtain G, we do not say that the losses she incurred in pursuit of G were
21 harms to her — they were, rather, the price she paid to get something she wanted. But
22 when an individual invests in a project that, as a result of some intervening cause, does not
23 terminate in the acquisition of G, that intervening cause is properly understood as
24 harmful, insofar as it makes it the case that the investments made as a means to G are now
25 wasted. The destruction of embryos is harmful to a woman in just this way. When the
26 embryos are lost, the sacrifices she accepted to produce the eggs from which they were
27 made alter in significance — they are retroactively transformed into harms.

28 On the backward-looking analysis, only the burdens the woman encountered during
29 the treatment cycle that produced the disputed embryos ought to be considered when
30 assessing the extent to which their destruction harms her. However, it would be incorrect
31 to say that the earlier history of the woman's involvement in fertility treatment is
32 irrelevant, since the extent to which any single treatment cycle taxes her will depend to
33 some extent on how many such cycles she has undergone. Consider, for example, a
34 woman who has already undergone many rounds of treatment over a number of years,
35 all of them unsuccessful. She has endured significant disruption to her life, undergone
36 repeated egg collection procedures, and suffered the bitter disappointment of hearing,
37 time and again, that the embryos placed in her womb have failed to take. We can surmise
38 that this woman will, in virtue of her previous experiences, find any single further round
39 of treatment more (physically and emotionally) difficult than would a woman new to
40 IVF. Her total investment in this new cycle is greater for her having undergone previous
41 unsuccessful cycles — and so, accordingly, is the total harm done to her if that invest-
42 ment fails to bear fruit.

43 **4. Resolving Disputes Over Frozen Embryos**

44
45 I have argued that future harms *and* prior investments are relevant to determining the
46 importance of a woman's interest in the survival of her embryos. Let us now return to

1 whether the man in my *Contested Embryo* example has the right to demand that the
2 embryo be discarded. In light of the foregoing points, it appears that the answer cannot
3 automatically be 'yes'. For, as is now clear, we are not faced here with the choice of
4 imposing harm upon the man merely in order to benefit the woman, by transferring to
5 her something she wants to fulfil her conception of the good. If this were our choice,
6 then, to recapitulate, we would perforce decide in favour of the male. However, under the
7 analysis I have developed, we are in fact faced with a choice between two harms —
8 destroying the embryo will be harmful to the woman, implanting it will be harmful to the
9 man.

10 It seems crucial in *The Contested Embryo* that both parties are victims of the fertility
11 clinic's negligence: neither, in other words, has acted so as to undermine the force of his
12 or her claim.²⁷ For this reason it seems to me that the only principled way to resolve this
13 case is to decide in favour of the party who would otherwise be most seriously harmed
14 by seeing his or her wishes overruled. Who this person will be depends on the particular
15 facts about these individuals. If I am correct, then one's right to refuse to consent to the
16 use of one's gametes in the first instance does not entail a right to exercise control over
17 embryos created from those gametes without one's consent.

18 Note, however, that a complete resolution of *The Contested Embryo* requires more than
19 an assignment of control over the embryo to one or other of the parties. The losing party
20 is still harmed, albeit that the magnitude of this harm is not greater than the harm the
21 other party would have incurred. In resolving this dispute, I said that we face a choice
22 between harms. And the actor that forced that choice is here the negligent fertility clinic.
23 Accordingly, the clinic clearly owes compensation to the party whose preference is
24 overruled, for the harm it has caused. This fact about compensation is, as we shall
25 presently see, important for the resolution of *Davis* and its ilk.

26 To summarise, where an individual's gametes are non-consensually used to create an
27 embryo, that individual does not necessarily have the right to insist that it be destroyed,
28 if the other gamete source wishes to bring it to birth. Rather, he has that right only if he
29 would be more harmed were the embryo gestated than would the opposing party were
30 it destroyed. Let us now bring *Davis* back into view. As we saw above, there is a crucial
31 respect in which *Davis* and *The Contested Embryo* are unlike. Specifically, in the former
32 case, *in vitro* fertilisation occurred with the initial agreement of both gamete sources.
33 What is the significance of this fact?

34 I suggest that the man's initial involvement in the procreative enterprise is important
35 insofar as, when he subsequently objects to the use of the embryos, he cannot then claim
36 that, if he is successful in withholding them from his ex-partner, he will be a mere
37 bystander to the harm which accrues to her. Rather, he will become the cause of that
38 harm. In this respect, his situation is importantly dissimilar to that of the man in *The*
39 *Contested Embryo*. In the latter example, the fertility clinic is the cause of the harm to the
40 disappointed party. But in the present case, the woman entered into a joint procreative
41 project on the basis of an expectation that it would come to fruition in the form of
42 embryo implantation — an expectation engendered by her partner through his consen-
43 sual participation in the fertility treatment programme. Having contributed voluntarily
44 to the procreative project, and allowed his partner to invest in it on the understanding
45 that she would thereby succeed in fulfilling an important ambition of hers, the man
46 cannot now automatically demand that this project be abandoned, to her detriment. In
47 order to determine whether he may in fact do so, we must offer a general account of the

1 conditions under which an individual is entitled to revoke a prior commitment, and
2 thereby cause others to be harmed.

3 In this regard, note that it is not ordinarily permissible to inflict harm in the first
4 instance, and make amends *ex poste*. Rather, one ought not to inflict the harm. Clearly,
5 however, a moral principle requiring of individuals that they never default on their
6 voluntary undertakings would be implausibly demanding. We are, under some circum-
7 stances, entitled to break promises and commitments. Now, I take for granted the
8 principle, well known from contract law, that we cannot be mandated by a court to
9 provide specific performance in cases where we have undertaken to carry out some
10 continuing service. Consider, for instance, an opera singer, who is contracted to perform
11 at a particular theatre every night for a month. If she defaults, she cannot be forced back
12 to the theatre to complete her run. Instead, she must compensate the theatre owner for
13 his lost revenues. But the cases under discussion are unlike that of the opera singer
14 inasmuch as (so we are assuming) the man will not be required to play a rearing role in
15 the life of a child creating using the disputed embryos. Accordingly, he cannot demand
16 that his ex-partner abandon the procreative project on grounds that, if the embryos are
17 successfully gestated, he would have to take responsibility for that child, at undue cost to
18 his autonomy. For having provided his sperm, no further effort is required on his part.
19 We must determine, then, under what conditions we may scupper a project that our
20 former partner can finish alone, and which requires no further commitment from us.

21 I submit that we may do so only if the completion of the project would be more
22 harmful to us than its failure would be to the person who wants to continue it. Moreover,
23 having terminated the project, we must compensate the individual whose interests we
24 thereby set back. Accordingly, a person who prefers that the embryos he jointly created
25 with his partner not be implanted has a right that they be destroyed only if, were they
26 gestated, the harm to him would be greater in magnitude than that suffered by his
27 partner were they denied to her.²⁸ (Recall that, in determining the extent to which the
28 woman would be harmed, both the backward-looking and forward-looking consider-
29 ations distinguished in Section 3 are relevant.) However, having exercised that right, he
30 owes compensation to his partner to redress the harm she incurs. Finally, if both parties
31 stand to be harmed equally should their preferences be overruled, then, owing to the fact
32 that the woman stands to be harmed through no choice of her own, but rather by the
33 choice of her ex-partner, her preference should carry the day.²⁹

34 Let me enter a number of clarificatory remarks regarding the proposal just set out.
35 Note first that it requires assessment, on a case-by-case basis, both of the relative
36 magnitude of the harms that will be imposed upon the disputants should they not get
37 their way, and, in some cases, of the level of compensation those harms warrant. Arriving
38 at these judgements is likely in many cases to be a difficult, sensitive matter.³⁰ Yet, if my
39 arguments above were correct, fairness to the involved parties nonetheless requires that
40 they be made. And, indeed, we already ask the courts to adjudicate many similarly
41 difficult, sensitive cases — especially in the spheres of divorce and family law.

42 Note second that the unwilling party's duty to compensate does not imply that he has
43 committed a wrongful act in withdrawing his consent to the implantation of the
44 embryos: to the contrary, on the present proposal, he is entitled to do so, if he would
45 otherwise incur the greater harm.³¹

46 Third, the compensation requirement should not be taken to imply that the harms
47 experienced by the disappointed party can be completely alleviated, without remainder,

1 by money. Indeed, we can predict that many women awarded compensation will still
2 prefer to forgo the money, and have the embryos returned to them instead. I do not here
3 take a stance on when, if ever, cash compensation perfectly remedies a disadvantage.³²
4 Instead, I claim that, even if, in the cases under discussion, money is not a perfect
5 remedy, it is the best the woman can expect under the circumstances.

6 Fourth, holding the unwilling party under a duty to provide compensation is not the
7 same as holding him under a duty to provide his procreative partner with the resources
8 she requires to mount a renewed attempt to have a child. It is true, of course, that the
9 compensation she receives might be high enough to enable her to undergo further
10 rounds of fertility treatment. However, because the unwilling party's duty is to ensure
11 that she is compensated only for the harm his withdrawal of consent imposes upon her,
12 securing her future access to treatment is not required.

13 Fifth and finally, although I have focused on cases wherein the party seeking embryo
14 implantation is female, and the party opposed is male, I cannot think of any reason why
15 my proposed resolution would not be equally applicable were these roles reversed. It is
16 clearly not only men who might experience psychological trauma should they become
17 biological parents against their wishes. Furthermore, whilst providing sperm is not, as I
18 have noted, ordinarily arduous, there may be exceptions to this. And even if they do not
19 endure significant *physical* costs from their participation in fertility treatment, men might
20 make other sacrifices in furtherance of the procreative project (for instance financial
21 sacrifices), such that they would be harmed if their embryos were destroyed when they
22 were willing (with a surrogate mother) to bring them to birth. Insofar as these harms
23 equally warrant compensation, my proposal can, then, be applied without hitch where
24 the preferences of the male and female litigants are the converse of those found in *Davis*.

25 26 **5. Conclusion**

27 I have argued that, when couples disagree over what should be done with their jointly-
28 created embryos, a necessary step towards an equitable resolution is to uncover who
29 would be most harmed by having his or her wishes overruled. However, in many cases,
30 it will not be sufficient merely to allow this person to decide what should happen to the
31 embryos. Rather, if the winning litigant is the individual who wants the embryos
32 destroyed, he must compensate the losses he thereby imposes upon his ex-partner.

33 Having made my case, let me return finally to the issue with which this paper began,
34 namely abortion. Does my proposal have implications for cases in which a couple are at
35 odds over whether their foetus will be terminated? Insofar as continuing a pregnancy
36 involves large sacrifices of bodily integrity, the liberal view of abortion rights cannot
37 contemplate allowing a man to demand that his partner carry a foetus to term. But does
38 he have a right to compensation if an abortion is performed against his objections? Not
39 necessarily, for several reasons.

40 First, insofar as many conceptions are unintentional, the man often cannot claim to be
41 harmed by reliance on the woman's initial agreement to embark on a procreative project
42 with him. Second, where conception *is* deliberate, it will at least sometimes be true that
43 the man lacks a personal stake in the project's outcome, such that he is not harmed by
44 its failure, and is not owed compensation (consider, for instance, a man who has sex with
45 a friend to help her to have a baby, but is personally indifferent as to whether the baby

1 is born). Third, in cases where the man does have a stake in the success of the project,
2 and would be non-negligibly harmed by his partner's having a termination, one would
3 still have to show that an award of compensation would not unduly compromise the
4 latter's weighty interest in bodily autonomy, by imposing a prohibitive cost on the choice
5 of an abortion.

6 Accordingly, it is not a good objection to my proposal that it entails that a woman must
7 compensate her partner if she aborts without his consent. Determining whether she has
8 a duty to compensate him requires further analysis, of a kind that must await another
9 occasion.³³

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14 NOTES

- 15 1 See especially B. Steinbock, *Life Before Birth* (Oxford: Oxford University Press, 1992); J. McMahan, *The*
16 *Ethics of Killing* (Oxford: Oxford University Press, 2002).
- 17 2 For the latter claim, see, e.g. E. Jackson, *Regulating Reproduction* (Oxford: Hart Publishing, 2001), p. 83.
- 18 3 An embryo becomes a foetus at eight weeks after conception. In the cases I shall discuss, the term
19 'pre-embryo' may be more appropriate. For some writers prefer not to describe the conceptus as an 'embryo'
20 until the appearance of the 'primitive streak' (the precursor of the nervous system), at around fourteen days
21 post-conception. See Steinbock op. cit., p. 215. It is for purely stylistic reasons that I herein refrain from
22 referring to frozen *pre*-embryos.
- 23 4 See *Davis v. Davis* 842 S.W. 2 d 588 (Tenn. 1992). In describing the features of the *Davis* case, I draw on
24 Steinbock op. cit., pp. 213–214. In a similar recent case, a British woman, Natallie Evans, fought to prevent
25 the destruction of a batch of embryos she had created prior to undergoing treatment for ovarian cancer, after
26 her ex-partner withdrew his consent to their use. Evans took her case as far as the Grand Chamber of the
27 European Court of Human Rights, but lost at every stage. For the Grand Chamber ruling, see *Evans v.*
28 *United Kingdom* (App 6339/05) 10 April 2007.
- 29 5 In *Davis*, the trial judge found for Mrs Davis, on grounds that the embryos had the legal status of children,
30 and interests dictating in favour of implantation in their mother's womb. This judgement was reversed on
31 appeal, where it was decided that Mr Davis could not have paternity imposed upon him. See Steinbock op.
32 cit., pp. 214–219.
- 33 6 Unless, that is, both commercial and altruistic surrogacy are morally objectionable, and ought to be
34 prohibited. Christine Overall, who regards surrogacy as deeply problematic, has argued that men should
35 never be awarded frozen embryos, partly on grounds that to do so would represent an official endorsement
36 of surrogacy. See C. Overall, 'Frozen embryos and "fathers' rights"' in J. C. Callahan (ed.) *Reproduction,*
37 *Ethics and the Law: Feminist Responses* (Bloomington, IN: Indiana University Press, 1995), pp. 192–193.
- 38 7 The literature on the ethics of procreation is divided on the question of when a child can coherently complain
39 of having been harmed by being caused to exist. On the dominant view, a child is harmed by existence only
40 if his life is so miserable that it is not worth living. Some writers, however, contend that a child can be harmed
41 by being caused to exist with a disease or disability that is in some respects disadvantageous, albeit
42 compatible with a life worth living overall. For an influential statement of the former view, see A. Buchanan,
43 D. Brock, N. Daniels and D. Wikler, *From Chance to Choice* (Cambridge: Cambridge University Press, 2000),
44 pp. 235 ff. For the latter view, see e.g. F. M. Kamm, 'Genes, justice and obligations to future people', *Social*
45 *Philosophy and Policy* 19,2 (2002): 360–88. I need not wade into this dispute here.
- 46 8 Someone might object that third parties in society, on whom the couple's procreative activities may impose
47 negative externalities, also have an interest in deciding what should happen to the embryos. I believe,
48 however, that the majority of liberals would agree that, even if third parties may refuse to contribute to the
49 upkeep of other people's children, on the luck egalitarian grounds that individuals must pay the cost of their
50 choices, they lack a right to interfere with the procreative enterprise in the first instance. For the claim that
51 justice cannot require us to subsidise other people's reproductive decisions, see E. Rakowski, *Equal Justice*
52 (Oxford: Clarendon Press, 1991), pp. 152–4.

- 1 9 For discussion of the view that genetic relatedness grounds parental responsibilities, see McMahan op cit.,
2 pp. 373–8.
- 3 10 Cf. S. Chan & M. Quigley, 'Frozen embryos, genetic information and reproductive rights', *Bioethics* 21,8
4 (2007): 439–448.
- 5 11 For details of Junior Davis' testimony, see, e.g. Overall op. cit., pp. 185 ff.
- 6 12 J. A. Robertson, 'Resolving disputes over frozen embryos', *Hastings Centre Report* 19,6 (1989): 8.
- 7 13 Ibid.
- 8 14 Steinbock op. cit., pp. 216–219.
- 9 15 Steinbock mentions the dangers associated with laparoscopy in particular. As an anonymous reviewer
10 pointed out to me, this method is now used only in exceptional circumstances. Instead, egg collection is
11 routinely done via a vaginal ultrasound probe. Yet, albeit that it is safer than laparoscopy, vaginal egg
12 collection is still an uncomfortable process, carries a risk of infection, and must sometimes be conducted
13 under general anaesthetic, which itself poses non-negligible risks to life and health.
- 14 16 Steinbock op. cit., p. 218.
- 15 17 Overall op. cit., p. 186.
- 16 18 Overall op. cit., p. 182.
- 17 19 John Harris is something of an exception in this regard, arguing that regulations prohibiting the non-
18 consensual use of *male* gametes are 'over-precious', in light of the tendency of some men to abandon their
19 sperm during sexual intercourse without concern as to the consequences. See J. Harris, 'Rights and
20 reproductive choice' in J. Harris and S. Holm (eds) *The Future of Human Reproduction* (Oxford: Clarendon
21 Press, 1998), p. 18. I criticise Harris' view by implication in this paragraph and the next five. In doing so,
22 I draw on arguments developed in C. Fabre, *Whose Body is it Anyway?* (Oxford: Oxford University Press,
23 2006), especially at p. 123.
- 24 20 The first and third of these are elaborations on points marshalled by Fabre against the confiscation of
25 gametes; see Fabre op. cit., p. 123.
- 26 21 In the UK, for instance, the Human Fertilisation and Embryology Act 2008 grants individuals the right to
27 trace their donor parents.
- 28 22 For an innovative recent treatment of the importance of knowing one's biological parents, see J. D. Velleman,
29 'Persons in prospect', *Philosophy and Public Affairs* 36,3 (2008): 255–265.
- 30 23 Voluntary gamete donors may be an exception here. For the anonymous donor agrees to provide his gametes
31 precisely on condition that he will play no part in the child's life, and presumably experiences no guilt at
32 having abandoned his offspring. That there are exceptions, however, does not impugn my claim that the cited
33 sentiments are widely held, and that, where they are held, imposed biological parenthood stands to occasion
34 psychological harm.
- 35 24 These factors are highlighted by Cécile Fabre as relevant to the resolution of a somewhat analogous dispute
36 between a couple, over whether their foetus ought to be transferred to an artificial uterus. See her 'Artificial
37 wombs and the permissibility of abortion', unpublished manuscript. The account of the significance of these
38 factors developed here differs from Fabre's.
- 39 25 Overall op. cit., p. 192 [emphasis in original].
- 40 26 I say that she 'comes close to' doing that because, earlier in the same page, she suggests that the case
41 for granting the embryos to the woman ought not to depend 'only' on the magnitude of her prior burdens.
42 This suggests that, in Overall's view, these burdens may be relevant *in part*.
- 43 27 I take it as read that if, for example, the woman had stolen the man's sperm, and used it to create an *in vitro*
44 embryo herself, she would have no right to gestate it.
- 45 28 Consider a scenario in which it seems clear that the harm to the male would be greater. Here, a woman has
46 previously created some embryos (perhaps using donor sperm). She then marries, and creates a second batch
47 with her new husband. The couple subsequently divorce. For trivial reasons, the woman slightly prefers to
48 use the embryos from her marriage if she can get them (for instance, because her children will then have a
49 tall father). Meanwhile, the man has deep conscientious objections to having a child out of wedlock. Here,
50 I think, the embryos should be destroyed. For whilst the father faces significant psychological burdens should
51 they be implanted, the woman, conversely, can pursue her goal of parenthood without even undergoing
52 further egg removal, by using the other embryos. However, the woman is still harmed by the embryos'
53 destruction, insofar as she made sacrifices to create them, and should be compensated.
- 54 29 An anonymous reviewer doubts that the judgement that the threatened harms are equal could ever be made.
55 This raises questions regarding how finely we can calibrate interpersonal comparisons of wellbeing that lie
56 outside the scope of this paper. Rather than address them, I record, for the sake of completeness, what my

14 *Jeremy Williams*

- 1 proposal implies for scenarios in which the harms are equal, just in case one should be deemed to have
2 arisen.
- 3 30 I am grateful to an anonymous reviewer for emphasising the need to acknowledge this fact.
- 4 31 What if he cannot pay? Presumably he may still demand the destruction of the embryos, and his debt to his
5 partner will remain in force until he can pay it. In this respect, my compensation requirement is analogous
6 to that imposed on persons who permissibly infringe the rights of others. Consider the case of the
7 mountaineer who must break the window of a log cabin, and crawl inside, to escape an oncoming avalanche.
8 It is permissible for him to break the window to avoid the harm even if he foreseeably cannot compensate
9 the cabin's owner. But his compensatory duty remains in force until eventually discharged.
- 10 32 For criticism of the assumption, often made by theorists of distributive justice, that all forms of disadvantage
11 can be fully alleviated by money, see J. Wolff & A. de-Shalit, *Disadvantage* (Oxford: Oxford University Press,
12 2003), pp. 24–31.
- 13 33 Earlier versions of this paper were presented at the University of Warwick's tenth annual Graduate Confer-
14 ence in Political Theory, and at a political theory doctoral workshop at the London School of Economics, in
15 February and June 2008 respectively. I am grateful to the participants for their feedback on those occasions,
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