Journal of Gender, Social Policy & the Law

Volume 21 | Issue 1 Article 2

2012

Life Begins at Ejaculation: Legislating Sperm as the Potential to Create Life and the Effects on Contracts for Artificial Insemination

Harvey L. Fiser

Paula K. Garrett

LIFE BEGINS AT EJACULATION: LEGISLATING SPERM AS THE POTENTIAL TO CREATE LIFE AND THE EFFECTS ON CONTRACTS FOR ARTIFICIAL INSEMINATION

HARVEY L. FISER, J.D., AND PAULA K. GARRETT, PH.D.*

I. INTRODUCTION

In numerous legal cases dealing with artificial insemination through sperm donation, courts have elevated sperm, a substance that alone cannot result in a child, to the status of a potential life.[1] Unlike rulings on the control or sale of blood, bone marrow, organs, or even faces, rulings on sperm have often privileged sperm as a substance that is something more than a body part or product. Courts and commentators that make this distinction refer to sperm's "potential to produce life"[2]—in effect, elevating

* Harvey L. Fiser, J.D., Associate Professor of Business Law, Millsaps College, Jackson, Mississippi & Paula K. Garrett, Ph.D. Vice President for Academic Affairs and Dean of the College, Warren-Wilson College, Asheville, North Carolina.

1. *See infra* Part V.

2. *See, e.g.*, *In re* Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 316 (Ct. App. 2008).

it to a status that ultimately treats sperm as equal to a life. More than half the states in the United States have no legislation to direct judges in cases dealing with sperm used in artificial insemination.[3] Without legislative guidance, judges have allowed personal and religious values to influence their rulings. These judicial rulings may negate the right to contract, placing men willing to donate sperm for artificial insemination at risk of enforced financial support of numerous children, and placing women—whether single or part of a lesbian couple—at risk of losing parenting rights by granting custody rights to sperm donors.[4] Clearly, such rulings introduce unintended consequences into cases involving sperm donation.[5] The unpredictability of judicial interpretation in cases involving artificial insemination is particularly magnified in situations involving single women or lesbian couples; these women lack other legal protections, and they may face additional prejudice in child custody matters arising from artificial insemination procedures using donated sperm.[6] Furthermore, in light of recent state referenda attempting to legislatively set the point at which life begins,[7] such rulings could lead to serious limitations on the use of donated sperm for anyone other than married, infertile, heterosexual couples for which a donor "stands in" for the husband.[8]

Without clear policies regulating contracting for sperm, legal cases have been decided by reference to sperm's status as potential creator of life,

---

3. Harvey L. Fiser & Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of "Best Interest of the Child" and the Right to Contract for Lesbian Potential Parents*, 15 CARDOZO J.L. & GENDER 1, 10, n.38 (2008).

4. Although it is beyond the scope of this Article, the subject of laws regarding the donation of eggs deserves further analysis, particularly in comparison to the subject of laws regarding sperm donation. This Article is focused on the legal treatment of sperm and the implications for unmarried women, particularly lesbian women, and, thus, does not examine this comparison.

5. For a complete discussion of the potential consequences of legal actions regarding artificial insemination in states with and without legislation protecting the donor and recipients, see Fiser & Garrett, *supra* note 3, at 11-19.

6. For a complete discussion of the potential of legal consequences that have an uncertain effect on lesbian contracts for artificial insemination procedures, see *id.* at 19-20.

7. *See* Erick Eckholm, *Push for "Personhood" Amendment Represents New Tack in Abortion Fight*, N.Y. TIMES (Oct. 25, 2011), http://www.nytimes.com/2011/10/26//politics/personhood-amendments-would-ban-nearly-all-abortions.html (discussing Mississippi's referendum); *see also infra* Part VI.C.

8. The Uniform Parentage Act is written, both in its original and in its revised version, in the context of heterosexual infertility. *See, e.g.*, UNIF. PARENTAGE ACT § 702 cmt. (2000) (amended 2002) (discussing parentage with a presumption of heterosexual marriage). Its application in other contexts is therefore unclear. *See also* Fiser & Garrett, *supra* note 3, at 10 (acknowledging the failure of many states to protect the family rights of non-heterosexual couples and similar limitations on artificial insemination).

ultimately resulting in courts treating sperm as if it were the child itself.[9] However, treating sperm as life or potential life in the legal context requires an erroneous conceptual leap in both property law and science. By elevating sperm to a "higher" status of property law, courts have, in legal effect, established that life begins at ejaculation.

This Article reviews the religious contexts that lead to the judicial treatment of sperm as life, and the scientific contexts demonstrating the misunderstanding of biology informing such beliefs. This Article then reviews the current state of the law regarding donation of sperm for artificial insemination and clarifies the mistakes courts and commentators make when they elevate sperm from a freely transferable commodity to a category of property that has the potential for life—or *is* life. To accomplish this, this Article compares cases involving sperm with cases involving the donation of other bodily fluids, useable organs, and tissues. Finally, this Article demonstrates the potential for absurd consequences that flow from the current faulty reasoning employed by courts in cases dealing with sperm in states lacking legislation protecting the donor, ultimately arguing that clarification is needed in laws regarding sperm donation—particularly the categorization of sperm as property for which contract law applies.

II. RELIGIOUS AND HISTORICAL CONTEXT OF SPERM

Although much of current law is based on Judeo-Christian mores, current law related to sperm and familial relationships is often based on an inconsistent application of Judeo-Christian biblical texts.[10] Admittedly, an assertion that American jurisprudence is based on Judeo-Christian law conjures objections, based largely on an understanding of the First Amendment to the Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[11] However, a debate has long waged over the understanding of the First Congress's meaning. Throughout history, many have argued that

9. *See infra* Part V (reviewing cases that analyzed the status of donated sperm).

10. *See* Roederick C. White, Sr., *How the Wheels Come Off: The Inevitable Crash of Irreconcilable Jurisprudence: Laws Based on Orthodox Judeo-Christian Theology in a Pluralistic Society*, 37 S.U. L. REV. 127, 136-46 (2009) (reviewing how early American laws were based on Judeo-Christian theology); Sarah E. Kay, Note, *Redefining Parenthood: Removing Nostalgia from Third-Party Child Custody and Visitation Decision in Florida*, 39 STETSON L. REV. 317, 321-26 (2009) (explaining the gradual departure from the broad Judeo-Christian definition of the family unit to the narrower nuclear family unit that is now recognized in contemporary society); Alessia Bell, *Public and Private Child:* Troxel v. Granville *and the Constitutional Rights of Family Members*, 36 HARV. C.R.-C.L. L. REV. 225, 246-52 (2001) (analyzing Judeo-Christian evolution of American law relating to familial relationships).

11. U.S. CONST. amend I.

American law should uphold Judeo-Christian principles and, in fact, some courts have overtly used references to religious morality in their decisions.[12] In fact, Supreme Court justices have cited Judeo-Christian tradition and morality as decisive, particularly in cases regarding homosexuality:

> Only eighteen years ago, Chief Justice Burger invoked the "Judeo-Christian tradition" to explain his opinion in Bowers v. Harwick, the case that upheld Georgia's anti-sodomy law. "Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards," he wrote. . . . There is a long history of such deference on the Court. Thus, Chief Justice Marshall, writing early in the nineteenth century remarked that "The American population is entirely Christian, as, with us, Christianity and religion are identified. It would be strange, indeed, if with such a people, our institutions did not presuppose Christianity, and did not often refer to it, and exhibit relations to it."[13]

Others on the Court have been more careful to avoid the use of religious language and references to the moral majority, but have continued to rely on the Christian moral majority to influence decisions.[14] These and other examples demonstrate that, despite the intention of separation of church and state and the frequent absence of overt references to Judeo-Christian beliefs, many and various judicial rulings are based on interpretations of Judeo-Christian texts. Such influence is found, then, in judicial rulings regarding sperm.

In the Hebrew Scriptures, man's seed is consistently treated as life.[15] Such "seed" is treated literally as seed; if planted in fertile ground it will grow. In fact, Hebrew Scriptures never mention the egg.[16] Current laws based on this limited view of human biology are based on a primitive understanding of reproduction. Furthermore, the treatment of "seed" in the

---

12. *See generally* Derek H. Davis, *The Enduring Legacy of Roger Williams: Consulting America's First Separationist on Today's Pressing Church-State Controversies*, 41 J. CHURCH & ST. 201 (1999); Edwin S. Gaustad, *Thomas Jefferson, Religious Freedom, and the Supreme Court*, 67 CHURCH HIST. 682 (1998); David Machacek & Adrienne Fulco, *The Courts and Public Discourse: The Case of Gay Marriage*, 46 J. CHURCH & ST. 767 (2004).

13. Machacek & Fulco, *supra* note 12, at 769 (citations omitted).

14. *See id.* at sec. I.A (discussing the shift of the U.S. Supreme Court in its discussion of Judeo-Christian traditions in ruling on cases to a more secular use of the term moral judgment).

15. For further analysis of "seed" equal to sperm, see Gene Robinson, *A Public Lecture: Why Religion Matters in the Civil Rights Debate for Gays and Lesbians*, 32 NOVA L. REV. 573 (2008).

16. *See* OXFORD ENGLISH DICTIONARY, online ed., s.v. "Ovum" (explaining that the word "egg" is derived from the Latin "ovum" and was used first in reference to female reproduction in the early 18th century); *see also* PHYLLIS TRIBLE, GOD AND THE RHETORIC OF SEXUALITY 34-35 (1978) (reviewing all Hebrew references to the female womb).

Hebrew Scriptures is significant because of its context. The scriptural references to seed come from texts depicting events after Noah's flood, when there was an imperative to repopulate after the destruction of most of humanity. Thus, further scriptural references to seed insist that it must not be wasted, referring back to the original Genesis passage. The scriptural passage most often used to claim the importance of seed is Genesis 38:6-10, in which Judah's son, Onan, spilled his seed and was, therefore, killed by God.[17] This single reference has informed most Judeo-Christian interpretation of the appropriate treatment of sperm, including rules about masturbation, and may, therefore, be seen as influencing current law regarding sperm donation, which requires masturbation.[18] It is important to note, too, that this condemnation of Onan's masturbation was in the context of the post-diluvian need to repopulate.[19] Given widely-accepted understandings of human reproduction that require both egg and sperm and given that laws need not protect sperm in order to repopulate an already overpopulated world, contemporary jurisprudential allegiance to the precedent created by the Hebrew Scriptures is illogical.

III. SPERM, EGG, GAMETES, AND ZYGOTES: SCIENTIFIC CONTEXT OF SPERM AND POST-FERTILIZED DEVELOPMENT

Laws regarding sperm must reflect contemporary biological understanding. More specifically, sperm must be differentiated from other genetic materials such as embryos, preimplantation embryos (or pre-embryos), and zygotes. While there is significant disagreement as to the definitions of embryos, the United States National Institutes of Health (NIH) has attempted to clarify the issue. According to the NIH, an embryo is defined as "the developing organism from the time of fertilization until the end of the eighth week of gestation, when it becomes known as a fetus."[20] A pre-embryo is "the very early, free-floating embryo, from the time the egg is fertilized until implantation in the mother's womb is complete, about 12 to 14 days after fertilization."[21] A zygote is "the single-celled, fertilized egg."[22] These various forms of fertilized eggs are the

17. *Genesis* 38:6-10.

18. MARK D. JORDAN, THE ETHICS OF SEX 95-96 (2002).

19. *See* MICHAEL COOGAN, GOD AND SEX: WHAT THE BIBLE REALLY SAYS 110-13 (2010) (explaining the origin of the Christian belief that life begins at ejaculation because God put Onan to death immediately after Onan began ejaculating before intercourse to avoid impregnating his sexual partner).

20. NAT'L INSTS. OF HEALTH, REPORT OF THE HUMAN EMBRYO RESEARCH PANEL, VOL. 1, at D-4 (1994), *available at* http://bioethics.georgetown.edu/pcbe/reports/_commissions/human_embryo_vol_1.pdf.

21. *Id.* at D-7.

22. *Id.* at D-8.

result of products from two people, male and female, thus implicating the rights of the two participating persons from whom the fertilized egg was created. In addition to addressing the rights of these two persons, once an egg is fertilized, there are religious, moral, and legal arguments over whether life has already begun.[23] Therefore, laws regarding fertilized eggs introduce these additional issues of protection, sometimes treating the fertilized egg relative to the rights of three individuals.[24]

In contrast, sperm is the product of one individual; thus, sperm alone is not life. While "[s]perm cells are living entities,"[25] "they are not living persons,"[26] because "[e]ach stage in the development of a sperm cell is marked by changes that enhance the sperm's ability to fertilize the egg and not changes to aid in its personal development."[27] Sperm cells lack the genetic material to become human life on their own.

> Each cell of the human body, including germ cells from which sex cells derive, has forty six chromosomes. . . . Germ cells have their original number of chromosomes cut in half to twenty three when they develop into sperm and egg so that when they fuse, the fertilized egg reestablishes the forty six chromosomes that is characteristic of normal human cells.[28]

Therefore sperm cells alone cannot grow into other types of cells or into living organisms.[29] Instead, these cells are used solely for fertilization of an egg for reproduction.[30] Thus, because of the scientific difference between sperm and fertilized materials, courts and legal scholars must both recognize and consider the significance of these differences when drafting opinions or legislation regulating the donation, sale, or other type of transfer of sperm. In cases involving a fertilized egg—as in the case of pregnancy resulting from unprotected sex, or in the case of eggs that have already been fertilized (such as embryos)—judges rightly consider both man and woman responsible for the fertilized egg (the union of sperm and

---

23. For further discussion of scientific and religious arguments regarding origins of life, see Elizabeth Spahn & Barbara Andrade, *Mis-Conceptions: The Moment of Conception in Religion, Science and Law*, 32 U.S.F. L. REV. 261 (1998).

24. Bridget M. Fusilier, *The Wisdom of Solomon: We Cannot Split the Pre-embryos*, 17 CARDOZO J.L. & GENDER 507, 509 (2011) (discussing the ambiguity regarding the legal status of the pre-embryo).

25. Ernest Waintraub, *Are Sperm Cells a Form of Property? A Biological Inquiry into the Legal Status of the Sperm Cell*, 11 QUINNIPIAC HEALTH L.J. 1, 10 (2007).

26. *Id.*

27. *Id.*

28. *Id.* at 9.

29. *See id.* at 10 (reviewing the development of sperm cells).

30. *See id.* (explaining that sperm cells only produce material specific to development).

egg).[31] However, in cases solely involving the transfer of sperm, science dictates that judges should consider sperm solely as a bodily substance instead of as life.

IV. THE LAW OF THE BODY (EXCLUDING SPERM)

There have been ethical and legal debates over the ability to sell or transfer body parts and fluids throughout history. According to the traditional English rule, bodies were not property to be owned or transferred.[32] However, more modern American courts eased these restrictions and limited rights to control the disposition of bodies began to emerge.[33] At first, American courts began to recognize a "quasi" property approach in which the next of kin could determine what should be done with the bodies of the deceased, but courts did not go so far as to allow unlimited rights to the transfer as "property."[34]

As technology advanced and live bodies became more "useful," the law was forced to adapt to these changes:

> [M]any body parts are now commonly treated as commodities appropriate for sale, with very little legal involvement. Blood, semen, hair, teeth, sweat, and urine are the simplest of these, but even pieces of skin and muscle from living persons have been sold without raising any controversy. Pituitary glands are even sold for use in research and medications. Sale of these body parts is discrete but common-place, appears to be legal, and has apparently been accepted by society.[35]

Obviously, this conception of semen or sperm considers both akin to other body parts or products. We might expect the same conception in the law, but, as our review indicates, this is not the case.

In addition to judicial regulation of body parts, legislation has also attempted to regulate the transfer of bodies as property. For example, the Uniform Anatomical Gift Act (UAGA)[36] and the National Organ

---

31. *See id.* at 8 (advocating for higher property rights for fertilized eggs because the union of sperm and egg has already occurred).

32. William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 704-05 (1995) (discussing the history of the English rule of property law and the trend toward the modern American perception of human bodies and products as property).

33. *See id.* at 707-09 (characterizing the modern American view of body property rights as a response to the growing need to dispose of cadavers).

34. *See id.* at 710-11 (describing the evolution of the quasi-property approach with respect to the right of next of kin).

35. *Id.* at 712 (illustrating the modern practice of the sale of body organs). While this choice of quotation makes the sale of body parts and fluids seem simple, as noted in this Article, the treatment of sperm is actually not as clear cut.

36. *See generally* UNIF. ANATOMICAL GIFT ACT (2006) (amended 2009) (discussing the procedures for the making of anatomical gifts).

Transplantation Act (NOTA)[37] both govern the donation and transfer of body parts. While the UAGA allows for the donation of bodies and body parts for scientific study and transplantation, NOTA prevents the sale of organs for transplant in life or death.[38] However, NOTA only prohibits the sale of items that would be considered "human organ[s] . . . for use in human transplantation."[39] Such unregulated items could include organs for research or bodily fluids not considered organs.[40] Bone marrow, interestingly, is considered to be an organ under this act.[41] Therefore, it cannot be sold. In addition to these federal statutes, "[s]ome states have also stepped in and passed laws prohibiting trade in human organs . . . [although most] are limited . . . to the transfer of organs for transplantation."[42]

Blood, while somewhat regulated, is a more commercialized form of physical property.[43] As it is not covered by federal restrictions, blood—unlike organs and bone marrow—is donated, sometimes sold, and freely transferred. However, it is not clear whether blood is always property in the standard sense:

> [F]orty-seven states have declared that when the medical service industry uses or stores blood and other body-matter for medical purposes, this is not a transfer of goods, but the performance of a service. Some statutes plainly state that "human tissues, whole blood, plasma, blood products, or blood derivatives shall not be considered commodities subject to sale or barter." The effect is to allow the medical service industry to escape liability for breach of implied warranty of fitness in the contract when it supplies blood which is unfit for human use.[44]

However, at least one court, in dicta, deemed blood to be property: "[B]lood plasma, like a chicken's eggs, a sheep's wool, or like any salable part of the human body, is tangible property which in this case commanded

37. *See generally* National Organ Transplantation Act of 1984, Pub L. No. 98-507, 98 Stat. 2339 (describing the legal obligations of the organ procurement and transplantation network).

38. *See* Boulier, *supra* note 32, at 712-13 (comparing the regulation of the transfer of body parts between UAGA and the NOTA).

39. *See* National Organ Transplantation Act of 1984 § 301(a) (barring sale of human organs in interstate commerce).

40. *See* Boulier, *supra* note 32, at 713.

41. National Organ Transplantation Act of 1984 § 301(c)(1).

42. Boulier, *supra* note 32, at 713.

43. *See* Nicolette Young, Note, *Altruism or Commercialism? Evaluating the Federal Ban on Compensation for Bone Marrow Donors*, 84 S. CAL. L. REV. 1205, 1220-21 (2011).

44. Aaron Lichtman, Note, *Commercial Exploitation of DNA and the Tort of Conversion: A Physician May Not Destroy a Patient's Interest in Her Body Matter*, 34 N.Y.L. SCH. L. REV. 531, 543-44 (1989) (quoting S.C. CODE ANN. § 44-43-19 (1985)).

a selling price dependent on its value."[45] Furthermore, courts have treated blood as property by upholding claims under the Carmack Amendment for loss or damage to shipments of blood.[46] Clearly, courts have differed in their opinions regarding applicability of property and contract law to blood. But, regardless of whether courts treat blood as a product or service, it is freely transferable. In contrast, there are numerous cases that pose substantial obstacles for the free transfer of sperm as either a product or service, as discussed below.

V. THE COURTS AND SPERM

While sperm is a body fluid regularly regenerated like blood, bone marrow, and some organs, courts have often mischaracterized sperm as equal to fertilized eggs.[47] Courts have incorrectly linked sperm and fertilized eggs by drafting sperm-related rulings informed by analogies from cases involving embryos and by not identifying sperm more closely with other regenerative bodily fluids. In doing so, courts have incorrectly treated sperm as life—or as its potential—rather than as akin to other potentially life-giving parts of the body, such as blood, bone marrow, and other bodily substances. Such miscategorization confuses and complicates the law. In many cases, the miscategorization of sperm denies men the right to sell or donate their sperm, and women—often single or lesbian women—the right to purchase or receive sperm.

One of the frequently cited cases regarding the disposition of sperm as property is *Hecht v. Superior Court*.[48] In *Hecht*, prior to taking his own life, 48-year-old William Kane had deposited fifteen vials of sperm with the California Cryobank.[49] Kane signed a "Specimen Storage Agreement" with the sperm bank which states that "[i]n the event of the death of the client [William E. Kane], the client instructs the Cryobank to: . . . [c]ontinue to store [the specimens] upon request of the executor of the estate [or] [r]elease the specimens to the executor of the estate."[50] In its discussion of the disposition of the cryopreserved sperm, the *Hecht* court

45. United States v. Garber, 607 F.2d 92, 95 (5th Cir. 1979).

46. *See* Pharma Bio, Inc. v. TNT Holland Motor Express, Inc., 102 F.3d 914 (7th Cir. 1996) (affirming that the Carmack Amendment imposes liability on a common carrier for loss or damage); *see also* Bio-Lab, Inc. v. Pony Express Courier Corp., 911 F.2d 1580 (11th Cir. 1990).

47. *See, e.g.*, Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 282-83 (Ct. App. 1993) (citing Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992)); *see also* Waintraub, *supra* note 25, at 7-9 (noting inconsistencies between reasoning in cases involving (pre-)embryos and the reasoning in cases involving sperm).

48. *Hecht*, 20 Cal. Rptr. at 275.

49. *Id.* at 276.

50. *Id.*

notes that "the decedent's interest in his frozen sperm vials, even if not governed by the general law of personal property, occupies 'an interim category that entitles them to special respect because of their potential for human life' . . . [t]hus, decedent had an interest in his sperm which falls within the broad definition of property" under probate law.[51] However, in arriving at this conclusion that the sperm fell in an interim category, the court proceeded to erroneously rely on the reasoning in *Davis v. Davis*,[52] a case out of Tennessee dealing only with pre-embryos.[53] Even after devoting several paragraphs to the discussion of the inapplicability of "pre-embryos" in the case, the court then inexplicably leaps to the conclusion that *Davis* is persuasive in helping define that "[s]perm which is stored by its provider with the intent that it be used for artificial insemination is thus unlike other human tissue because it is 'gametic material' that can be used for reproduction. Although it has not yet been joined with an egg to form a pre-embryo, as in *Davis*, the value of sperm lies in its potential to create a child after fertilization, growth, and birth."[54] This failure to distinguish sperm from fertilized eggs establishes sperm as life rather than a freely transferable substance.

Similarly, *In re Estate of Kievernagel*[55] follows *Hecht* and its reliance on *Davis* in treating sperm as life or potential life rather than a freely transferable substance. The *Kievernagel* case involved a fight over a deceased husband's sperm that had been cryo-preserved prior to his death in a helicopter crash.[56] The California court ultimately found that the sperm should be destroyed based on the clear intent of the donor.[57] However, in its discussion, the court also incorrectly used *Hecht* and its faulty reliance on *Davis* in ruling "that gametic material, with its potential to produce life, is a unique type of property and thus not governed by the general laws relating to gifts or personal property or transfer of personal property upon death."[58] Even though the *Kievernagel* court notes the significant difference between sperm and pre-embryos, the court failed to correct the illogical leap from fertilized pre-embryos in *Davis* to sperm in *Hecht*.[59] However, the court ultimately made its decision based on the

51. *Id.* at 281-82.

52. *Davis*, 842 S.W.2d at 588.

53. *Id.* at 589.

54. Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993) (citing *Davis*, 842 S.W.2d at 597).

55. 83 Cal. Rptr. 3d 311 (Ct. App. 2008).

56. *Id.* at 313.

57. *Id.* at 317.

58. *Id.* at 316.

59. *Id.* at 316 n.1 ("In this regard, we note the gametic material at issue here is distinguishable from the preembryos at issue in Davis . . . . It is further removed from

intent of the donor, a result that likely would have been unaffected had the court rightly made the distinction between sperm and fertilized egg rather than indicating that the court believed that sperm had the potential to create life.[60]

And it is unclear how the incorrect connection between sperm and fertilized egg was made in the first place. An analysis of the relied-upon case, *Davis v. Davis*, reveals no mention of sperm alone. *Davis* is solely about post-fertilized cells, embryos and pre-embryos; it includes no discussion about sperm or eggs separately.[61] Ironically, the *Davis* court noted that "there is a great deal of discussion about the proper descriptive terminology to be used in this case. Although this discussion appears at first glance to be a matter simply of semantics, *semantical distinctions are significant in this context, because language defines legal status and can limit legal rights*."[62] As noted, pre-embryos, embryos, and all other fertilized materials can, given the right circumstances, grow into human life. Sperm, however, will not—despite the Hebraic instruction not to spill seed as if it could grow on its own.[63]

While relying on—though better avoiding—the illogical leap made from *Davis* to *Hecht* discussed above, the District Court of Appeals in Florida found that, for the purpose of compensating a loss, sperm is more appropriately characterized as compensable property.[64] In *Kurchner v. State Farm*, the Kurchners cryopreserved Mr. Kurchner's sperm prior to his undergoing chemotherapy for cancer.[65] The sperm was placed in tanks designed to keep the sperm frozen and had alarms to notify the facility in case of cooling system failure.[66] The cooling apparatus failed on the container that held all of the plaintiff's sperm, subsequently destroying all five of the plaintiff's samples.[67] The appeals court, relying in part on a Florida Statute, affirmed the trial court's decision stating that "sperm outside of the body is property and is not a part of the body."[68] The court

---

potential life because Joseph's sperm could not produce life until joined with an egg. We express no opinion as to the proper resolution of a dispute regarding disposition of preembryos.").

60. *Id.*

61. *See* Davis v. Davis, 842 S.W.2d 588, 592 (Tenn. 1992).

62. *Id.* (emphasis added).

63. *Kievernagel*, 83 Cal. Rptr. 3d at 316 ("It is further removed from potential life because Joseph's sperm could not produce life until joined with an egg.").

64. *See* Kurchner v. State Farm Fire & Cas. Co., 858 So. 2d 1220, 1221 (Fla. Dist. Ct. App. 2003).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

never made mention of the property being in any special category of potential life even though it relied on the *Hecht* case.[69] Not faced with a case of the sperm having been used to create an embryo, the court clearly stated that sperm, once removed from the body, "no longer constitute[s] part of the body and instead constitute[s] property whose destruction is not considered bodily injury."[70]

Of particular interest in the *Hecht* case is that, while reaching an illogical conclusion that sperm, as potential life, is in a special category of property, the opinion notes the difficulties and inconsistencies created by a legislative void regarding the ownership and transferability of sperm. The court noted that of the various state statutes modeled after the Uniform Parentage Act,

> [n]one of the statutes . . . indicate who owns the sperm donation, but sperm banks generally require those donors who are to be anonymous to sign a written waiver of any rights to the deposit and any paternity claims to children born from it. In return, the sperm bank guarantees the donor's anonymity. Thus, according to the contract between the parties, the donor no longer "owns" the sperm. Men who use sperm banks to store their sperm for their own future use, however, do own their donation(s) of sperm and are required to pay for its maintenance and its later withdrawal.[71]

The court further notes that "the American Fertility Society, in its Ethical Statement on in vitro fertilization, has written that '[i]t is understood that the gametes and concepti are the property of the donor. The donors therefore have the right to decide at their sole discretion the disposition of these items, provided such disposition is within medical and ethical guidelines . . . .'"[72] Given these references, the *Hecht* ruling is surprising given its significant legal restrictions on the transferability of sperm and its elevation of sperm to a category of potential life.

At least one court has understood this lack of clarity and offered a clear distinction between sperm and fertilized eggs. The Pennsylvania Supreme Court in *Ferguson v. McKiernan*[73] made the clear distinction that a donation of sperm is merely that, a donation of a bodily fluid. *Ferguson* was a child support case in which the donor and the recipient of sperm

---

69. *Id.*

70. *Id.* While this case dealt with a fight over compensation under an insurance policy for "bodily injury," the issue that sperm is more akin to property rather than life is made clearer. The Florida court treated sperm removed from the body as property, ignoring references in *Hecht* to potential life.

71. Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 282 (Ct. App. 1993) (quoting Shapiro & Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J. LAW & HEALTH 229, 243-244 (1986)).

72. *Id.* (quoting York v. Jones, 717 F. Supp. 421, 426 (E.D. Va. 1989)).

73. Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007).

entered into an oral agreement to release the donor from any and all financial obligations regarding any child conceived from his donation of sperm.[74] Following the same faulty logic as *Hecht* and *Davis*, the lower court found that, although the parties had properly entered into an oral agreement, the agreement was unenforceable because "a parent cannot bind a child or bargain away that child's right to support."[75] The lower court, in effect, found that the donation of sperm was not just a transfer of property, but a transfer of a potential child—the right to child support going with the sperm. However, the Pennsylvania Supreme Court overturned the finding, clearly noting that the contract was made prior to the donation of sperm and was solely for sperm, not for a fertilized egg.[76] The contract, the court understood, was separate from the subsequent insemination process.[77] Therefore, the Pennsylvania Supreme Court did not deal with a substance that was the potential of life or life itself—it dealt with a donation of a bodily fluid. The contract stood as a contract for the donation of sperm, not the donation of potential life. To correct the long-held misinterpretation of sperm as life, judicial rulings that draw a clear distinction between sperm and fertilized eggs (as *Ferguson* does) must inform other cases—rather than decisions informed by Hebraic scripture.

VI. GRANTING FALSE IMPORTANCE TO A SUBSTANCE THAT IS NOT HUMAN LIFE: THE ERROR OF POTENTIALITY

A. As Compared to Other Body Parts

What happens to the argument that sperm, with its potential for life, is in a category unto itself, when science is able to make sperm irrelevant? With medical and scientific advances allowing for the creation of artificial sperm from bone marrow[78] and the possibility of cloning from other cells, many if not all cells in the human body would have the same potential to create life

74. *Id.* at 1238.

75. *Id.* at 1241 (quoting Kesler v. Weniger, 744 A.2d 794, 796 (Pa. Super. Ct. 2000)).

76. *See id.* at 1246.

77. *Id.* at 1248 ("This Court takes very seriously the best interests of the children of this Commonwealth, and we recognize that to rule in favor of Sperm Donor in this case denies a source of support to two children who did not ask to be born into this situation. Absent the parties' agreement, however, the twins would not have been born at all, or would have been born to a different and anonymous sperm donor, who neither party disputes would be safe from a support order.").

78. Brian Alexander, *Will Science Render Men Unnecessary?*, MSNBC.COM (June 27, 2007 10:58 AM), http://www.msnbc.msn.com/id/17937813 (discussing creation of artificial sperm from bone marrow). *See generally* Loane Skene, *Deriving Sperm and Eggs from Human Skin Cells: Facilitating Community Discussion*, 25 J. CONTEMP. HEALTH L. & POL'Y 76 (2008) (discussing the science of deriving gametes from human tissue).

if the flawed understanding of *Davis* were followed. Blood and bone marrow are regularly used to give or preserve life. Should they also be entitled to a special category?

The donation of blood or even a liver is particularly similar to the donation of sperm: blood, the liver,[79] and sperm are all regenerating fluids or organs. For example, it is common knowledge that blood and portions of the liver are both donated for the purpose of saving the life of another. Both are regenerated and, in theory, can be given time and time again, much like sperm. Because a liver is an organ and is, therefore, subject to special legislation restricting its transfer,[80] the analogy of blood to sperm is closer, yet the two substances are treated differently because of a judicially created status of sperm as having the "potential to create life."[81] But what if sperm had additional uses? What if sperm could also remove wrinkles, cure cancer, or provide stem cells for treatment of genetic illnesses? In those cases, this regenerative bodily fluid would likely be freely transferable, just as blood or other substances, such as animal products, are treated today. But what if blood could provide the genetic material to produce life? Would it then come with the same obligations as sperm currently does? Clearly it would be far-fetched to believe that a court would impose any sort of support obligations or grant any parental rights in a child saved by the donation of blood, bone marrow, or any other organ or bodily fluid. And yet, courts are forcing such obligations on sperm donors in states lacking legislation like the Uniform Parentage Act of 2000 (UPA) to protect donors and recipients.[82] These questions lead to an obvious distinction, necessary in future rulings regarding sperm: to provide consistent and logical rulings, courts must consider sperm and its donation as property without the potential of life in itself, akin to blood.

B. An Illogical Approach to Sperm as Potentiality

While an egg and sperm joined together may in fact result in a child, the simple truth is that, separately, they are merely substances. Alone, neither

79. *Understanding the Mechanisms of Liver Regeneration Through Computer Simulation*, SCIENCEDAILY (June 7, 2010), http://www.sciencedaily.com/releases/2010/ /100607065856.htm.

80. Boulier, *supra* note 32, at 711.

81. *See supra* notes 52-59 and accompanying text.

82. UNIF. PARENTAGE ACT §§ 701-704 (2000) (amended 2002) (delineating rights of donors and recipients in artificial insemination cases). The Uniform Parentage Act of 1973 does not apply to unmarried women and therefore offers no protection in artificial insemination cases. In the UPA 2000, "[a] donor is not a parent of a child conceived by means of assisted reproduction." *Id.* § 702. Without such protections, as in states with an earlier version of the UPA or with no legislation at all, courts are placing support obligations on donors in artificial insemination cases and rarely distinguishing between sperm as property for artificial insemination procedures and sperm as a potential life. *See* Fiser & Garrett, *supra* note 3, at 7-10.

egg nor sperm is human life. In mathematical terms, A + B = C; neither A nor B equals C. Yet courts have dismissed this reality in favor of the Hebraic understanding of seed. One may have water, an acorn, or dirt, but one does not have a tree unless one has all three, and even then, circumstances impact the potential tree. No one would argue that water has a special status because it could potentially become a tree. Sperm is the same. Sperm does have one function: to join with an egg and to create a fertilized egg that might become a living person. However, sperm alone has no potentiality in itself. At the time sperm is donated or sold, it is merely a substance. It is a substance separate from the body and not on its way to becoming anything other than itself.[83]

C. Semantics Matter–If Sperm Is Potential Life

Several states have proposed "Personhood Amendments"[84] to their constitutions in an effort to define when a person is created. For example, the proposed amendment defeated in 2011 by a 58% to 42% vote[85] in Mississippi stated that "the term 'person' or 'persons' shall include every human being from the moment of fertilization, cloning or the functional equivalent thereof."[86] While this paper discusses the semantic differences between a fertilized egg and mere sperm, *Davis* and its progeny have mixed the use of these terms, finding sperm and fertilized egg to both be potential life or life. Allowing such an improper use of these terms to infect rulings can lead to unintended consequences. Clearly the proposed Mississippi law refers to fertilization, but also mentions "every human" or "functional equivalent thereof."[87] The danger in mislabeling sperm as life or potential life allows such far-reaching laws to be potentially interpreted as banning the destruction or manipulation of sperm or egg cells. It would be bizarre indeed if a state were to ban the destruction or mistreatment of sperm at the hands of an adolescent. But, is it a stretch to think that such legislation—as interpreted by a court using *Davis*—might ban the destruction of sperm held at a cryobank awaiting the joining with an egg? If a court can go that far, what other consequences might we see? Indeed, the implications that have and might flow from Hebraic texts are not as remote in such a context; allowing its application despite increased scientific knowledge about sperm and egg must be challenged.

---

83. *See supra* note 59 and accompanying text.

84. *See generally* Eckholm, *supra* note 7.

85. Cheryl Wetzstein, *Abortion Foes Undeterred by Mississippi Setback*, WASH. TIMES (Nov. 9, 2011), http://www.washingtontimes.com/news/2011/nov/9/abortion-foes-undeterred-by-mississippi-setback/.

86. Eckholm, *supra* note 7.

87. *Id.*

VII. CONCLUSION

In one of approximately twenty-nine states that have failed to pass legislation protecting sperm donors and recipients, a woman wishing to receive donated sperm as part of a reproductive procedure is subject to the will of a judge who may ultimately be called upon to decide custody or support for a child resulting from the use of donated sperm. By wrongfully allowing the use of the terms "life" or "potential life" to describe sperm, judges have precedent to invalidate contracts for insemination based on those contracts not being in the best interest of a child. Furthermore, failure to distinguish between sperm and fertilized egg allows courts to rule based on issues involving the responsibility for a child rather than issues involving the transfer of property. A judge can merely argue, as did Burger and, before him, Marshall, that Judeo-Christian tradition insists life or potential life cannot be sold or donated. That judge can invalidate a contract for a sperm donation because it is an impermissible contract for the transfer of potential life. Furthermore, the judge can make the donor pay child support, or even grant custody rights for the child. These rulings have already occurred, resulting from the flawed analogy between sperm and fertilized eggs.[88] Neither science nor honest legal interpretation can support such conclusions. Perhaps judges have not considered the origins of the privileging of sperm, but an allegiance to the ancient idea that "spilling one's seed" is a moral sin is illogical and unscientific.

Certainly, the right to contract must be preserved for property that is not life. Clear lines must be drawn between potential life (such as a fertilized egg) and sperm or egg prior to any merging. Failures to distinguish between sperm and a fertilized egg have and will continue to result in obtuse rulings—rulings that, in the case of artificial insemination, unduly penalize a sperm donor or recipient.[89] The implications of further mischaracterizing sperm are astounding. For instance, in *Kurchner v. State Farm*, when Kurchner's cryopreserved sperm was destroyed because of a malfunctioning storage container, instead of merely compensating Kurchner for the loss of property, the South Florida Institute for Reproductive Medicine would be charged with negligent homicide for destroying potential life, or life. If Federal Express were delivering sperm from the California Cryobank and it were lost in shipment, would courts be considering criminal charges for the destruction of potential life, or life?

Clearly, the courts must evolve in light of contemporary scientific evidence and in light of practical application of sperm donation. Neither version of the UPA sufficiently applies to cases of sperm donation

88. *See* Waintraub, *supra* note 25, at 4-5.

89. *See id.* at 6.

occurring outside of heterosexual contexts. In most situations, upholding Hebraic codes for sexual mores is considered archaic. For example, most men do not sleep away from their menstruating wives and most adulterers are not put to death. And yet, courts still rule as if sperm were life itself—the seed alone able to grow into a child. Such application renders both sperm donors and recipients unable to contract for the substance, leaving such transfers in an unduly uncertain legal context.

Surely biology must inform our current legal treatment of sperm. Otherwise, courts must recognize the significance of sperm in every situation, including those involving drugs for the increased delivery of sperm—an outcome not likely to occur in our pro-Viagra, anti-birth-control contemporary world. In the movie Legally Blonde, the heroine, Elle Woods, highlights the absurdity of elevating sperm to a special category as if it were life itself.[90] When her former boyfriend and her law professor debate a case, Elle identifies the absurdity of the legal argument:

> **Warner:** According to *Swinney v. Neubert*, Swinney, who was also a private sperm donor, was allowed visitation rights as long as he came to terms with the hours set forth by the parents. So, if we're sticking to past precedent, Mr. Latimer wasn't stalking—he was clearly within his rights to ask for visitation.
>
> **Professor Donovan:** But Swinney was a one-time sperm donor, and in our case, the defendant was a habitual sperm donor, who also happens to be harassing the parents in his quest for visitation.
>
> **Warner:** But, without this man's sperm—the child in question would not exist. [He grins and looks around as the class murmurs their agreement]
>
> **Professor Donovan:** Now you're thinking like a lawyer.
>
> **Elle:** Although Mr. Huntington makes an excellent point, I have to wonder if the defendant kept a thorough record of each sperm emission made throughout his life? . . . Well, unless the defendant attempted to contact every single one-night-stand to determine if a child resulted in those unions—then he has no parental claim whatsoever over this child. Why this sperm? Why now? For that matter, all masturbatory emissions where his sperm was clearly not seeking an egg could be termed reckless abandonment.[91]

Such a proposal from the bimbo-esque Elle is played in the movie as at once absurd and thought-provoking. In the context of other legal treatment of sperm, however, it is hardly absurd. Perhaps Reese Witherspoon's fictional character was anticipating the realities now acceptable with

---

90. *See* KAREN MCCULLAH LUTZ & KIRSTEN SMITH, LEGALLY BLONDE 54-56 (Metro-Goldwyn-Mayer Shooting Draft July 31, 2000), *available at* http://www.dailyscript.com/scripts/legallblonde-shooting.pdf.

91. *Id.* at 56.

scientifically inaccurate and semantically careless characterization of sperm in courts today. Laws regarding sperm donation must be revised to treat sperm consistently with other bodily substances rather than as a "special class," as if sperm, alone, could produce a child. Or, in contrast, courts must initiate more thorough treatment of spilling of seed, perhaps putting the spiller to death, as in Genesis, or at least charging him with abandonment, as in Legally Blonde.