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COMMENT

Tort Law and In Vitro Fertilization: The Need for Legal Recognition of "Procreative Injury"

Even when the facts are humanly grievous, plaintiffs do not often win their in vitro fertilization (IVF) tort suits.[1] In Utah, an IVF clinic fertilized a woman's eggs with the wrong man's sperm; she ultimately bore a stranger's rather than her husband's children.[2] A New York clinic mistakenly implanted one woman's embryos in another's uterus.[3] A Florida clinic implanted a woman's embryos after possibly exposing them to Mad Cow Disease.[4] Nonetheless, these plaintiffs, along with others like them,[5] lost—not before juries and not because their doctors were careful, but because their claims were adjudged legally incognizable. Their claims failed because the law lacks a category of injury fitted to the harm parents and prospective parents endure when IVF goes wrong. Put another way, of a tort's four elements (duty, breach, causation, injury), it is with the last—injury—that existing law falls short of the demands of the new technology.

What is needed, then, if IVF plaintiffs are to recover, is a new category of injury—"procreative injury"—based on the legal recognition of the human

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1. IVF is a form of assisted reproduction in which egg and sperm are combined outside the body to produce embryos in vitro ("under glass"), primarily for the purposes of treating infertility and managing the risk of genetic disease. *See generally* PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES (2004) (addressing scientific and ethical issues at the intersection of assisted reproduction and genetics). I worked on this report, and the two cited *infra* note 8, while a Research Analyst and Senior Research Analyst with the President's Council on Bioethics.

2. Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67 (Utah 1998).

3. Creed v. United Hosp., 600 N.Y.S.2d 151 (App. Div. 1993).

4. Doe v. Irvine Scientific Sales Co., 7 F. Supp. 2d 737 (E.D. Va. 1998). The embryos miscarried and the woman did not contract the disease. *Id.* at 739, 741.

5. *See infra* Part I.

interest in procreation. I will argue that tort law should recognize and protect this procreative interest.[6] In practice, the right to have this procreative interest protected would be the basis for a new cause of action. Call it the tort of "reprogenetic malpractice"[7]: Where a doctor undertakes a duty to care for a patient's procreative interest, and negligently breaches that duty so as to cause the patient procreative injury, the law should provide a remedy.

A word is needed about why the IVF context is important—why the "embryo switching," "wrong sperm," and other cases discussed below are more than isolated curiosities. The extra-corporeal manipulation of gametes and embryos is the first, indispensable step in genetic engineering, genetic screening, embryonic stem cell research, the creation of human-animal hybrids and chimeras, certain forms of sex selection, and human cloning.[8] Consequently, IVF doctors and clinics are the gatekeepers to these much-publicized activities at the border of medicine, research biology, genetics, and eugenics. And individual IVF-related injuries, even if they are rare now,[9] are not going to stay rare for long. The field is young,[10] large,[11] growing,[12] prone to

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6. The constitutional privacy tradition includes a right to procreation, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942), as well as related rights to decide whether or not to bear or beget a child, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). *See also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851-53 (1992); Roe v. Wade, 410 U.S. 113 (1973). This Comment concerns private action and tort rights in the circumscribed area of IVF, not state action and constitutional rights. Yet these constitutional precedents strengthen procreation's claim to private law's protection.

7. The term "reprogenetic" is common parlance in the bioethics community. *See* ERIK PARENS & LORI P. KNOWLES, THE HASTINGS CTR., REPROGENETICS AND PUBLIC POLICY: REFLECTIONS AND RECOMMENDATIONS, at S4 (2003) (defining "reprogenetics" as "the field of research and application that involves the creation, use, manipulation, or storage of gametes or embryos").

8. PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 1, at xlii-xliv, 16-17, 89-145; *see also* PRESIDENT'S COUNCIL ON BIOETHICS, BEYOND THERAPY: BIOTECHNOLOGY AND THE PURSUIT OF HAPPINESS 30-44, 50 n.*, 57-61, 118 & n.* (2003) (addressing the science and ethics of using biotechnology for purposes of human enhancement); PRESIDENT'S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY xxv-xxvii, 57-73 (2002) (addressing the science and ethics of human cloning) [hereinafter HUMAN CLONING AND HUMAN DIGNITY].

9. A big "if." It is not currently possible to know the extent of IVF-related injuries: "There is no uniform, comprehensive, and enforceable system of data collection, monitoring, or oversight for the biotechnologies affecting human reproduction." PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 1, at 174 (emphasis omitted); *see also id.* at 174-79, 205-14. The amount of litigation in this area is no help, because an unfavorable legal landscape might discourage suit. We do know that twinning is far more common in IVF-based pregnancies, and major birth defects appear to be at least twice as common. *Id.* at 38-39.

10. IVF began in 1978 with the famous birth of Louise Joy Brown. HUMAN CLONING AND HUMAN DIGNITY, *supra* note 8, at 21.

experimentation,[13] and relatively unregulated.[14] With no theory of rights fitted out for IVF, tort law is trailing the new technology,[15] unprepared to perform either of its two functions: individual justice or social regulation.[16]

I. FAMILIAR CATEGORIES OF LEGAL INJURY

For some aggrieved IVF patients—those who sue their doctors or clinics after sustaining injury to their procreative possibilities—no existing legal theory quite seems to fit. Sometimes courts stretch the law and permit a claim; more often, they dismiss. For if the law chooses not to protect a certain interest, then even the most negligent abuse of that interest does not make a tort.[17] The law does not recognize IVF plaintiffs' procreative interest, so they cannot recover for "procreative injury," no matter how egregious. Thus, plaintiffs turn to an array of more familiar but less accurate accounts of their injury, most of which will not stick.

Emotional distress is an example. In *Harnicher v. University of Utah Medical Center*, the nearly infertile David Harnicher and his wife Stephanie mixed his sperm with the sperm of a donor selected to resemble David; the resulting child might or might not be David's, but either way the couple could "believe and represent" the child to be his.[18] As it turned out, Stephanie gave birth to

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11. IVF has accounted for over a million births worldwide, *id.* at 16, and nearly 300,000 in the United States as of 2002. Am. Soc'y for Reproductive Med., Frequently Asked Questions About Infertility, http://www.asrm.org/Patients/faqs.html (last visited Sept. 3, 2005).

12. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., 2002 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 13, 52 (2004), *available at* http://www.cdc.gov/reproductivehealth/ART02/pdf/ART2002.pdf.

13. PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 1, at xliii-xliv.

14. *See, e.g.*, *id.* at xliii, 71-75, 167-71 (noting, as the primary focus of the report, the current lack of regulation).

15. Technology has pressed tort law forward before. *See, e.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (arguing that tort law, faced with novel threats from things like "instantaneous photographs," should evolve a privacy right to protect the natural human interest in being "let alone") (internal quotation marks omitted).

16. *See generally* Guido Calabresi, *Neologisms Revisited*, 64 MD. L. REV. 736, 742-45 (2005) (discussing deterrence and cost avoidance as regulatory goals of tort law); Jules Coleman, *The Costs of* The Cost of Accidents, 64 MD. L. REV. 337, 350-54 (2005) (discussing the moral goals of tort law, compensation particularly).

17. Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928) (Cardozo, J.) ("Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right.").

18. Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67, 68 (Utah 1998).

triplets who looked nothing like David; the clinic had switched donors #83 and #183. The Harnichers were devastated,[19] but just what were they to argue in court? They had not been physically injured. They had no financial losses beyond those they had bargained for. For lack of a better alternative, they claimed emotional distress—and ran afoul of the old common law rule forbidding recovery for negligently inflicted emotional distress absent accompanying physical injury.[20] Many other IVF plaintiffs make the same claim and lose for the same or similar reasons.[21] What was true for the Harnichers in their mixed-sperm scenario was equally true for Cora Creed when her embryos were implanted in another woman in *Creed v. United Hospital*,[22] or Jane Doe when hers were put in a preservative solution possibly infected with Mad Cow disease in *Doe v. Irvine Scientific Sales Co.*[23]: There was no physical injury to which emotional distress could attach, and tort law does not generally protect an individual's bare interest in tranquility of mind.[24]

A second type of injury, one the law wholeheartedly protects against, is physical injury. If IVF plaintiffs could point to even a minor form of physical injury associated with their doctors' negligence, they could get their grievances to a jury; emotional distress could then attach and swell the damages. Cora Creed and Jane Doe tried to find a physical injury hook by arguing that the IVF procedure itself constituted physical injury: Extracting eggs and implanting embryos (painful surgeries both) constitute compensable physical injuries,

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19. *Id.* at 68-69.

20. *Id.* at 69-70 (citing RESTATEMENT (SECOND) OF TORTS § 313 (1965)); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 359-66 (5th ed. 1984).

21. *See, e.g.*, Doe v. Irvine Scientific Sales Co., 7 F. Supp. 2d 737, 740-41 (E.D. Va. 1998); Adams v. Cavins, No. B163375, 2003 WL 22456117, at *2-4 (Cal. Ct. App. Oct. 30, 2003); Cohen v. Cabrini Med. Ctr., 730 N.E.2d 949, 951-52 (N.Y. 2000); Creed v. United Hosp., 600 N.Y.S.2d 151, 152-53 (App. Div. 1993); Paretta v. Med. Offices for Human Reprod., 760 N.Y.S.2d 639, 645-47 (Sup. Ct. 2003); Frisina v. Women & Infants Hosp. of R.I., Nos. CIV. A. 95-4037, 95-4469, 95-5827, 2002 WL 1288784, at *3-8 (R.I. Super. Ct. May 30, 2002); Chen v. Genetics & IVF Inst., Inc., No. L-153343, 1996 WL 1065627, at *2 (Va. Cir. Ct. Oct. 21, 1996). An exception is *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d 28, 29-30 (App. Div. 2001), which permitted recovery because the emotional distress was foreseeable and manifested physically. *See also* Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 1-3 (2003) (discussing the remarkable *Perry-Rogers* case at length).

22. 600 N.Y.S.2d at 151.

23. *Irvine Scientific Sales Co.*, 7 F. Supp. 2d at 737; *see also* Lubowitz v. Albert Einstein Med. Ctr., N. Div., 623 A.2d 3, 4-5 (Pa. Super. Ct. 1993) (holding that plaintiff suffered no "legally cognizable injury" when mistakenly informed that her implanted embryos had been exposed to the AIDS virus).

24. *Harnicher*, 962 P.2d at 72 ("[M]uch of the emotional distress which we endure . . . is not compensable." (quoting Thing v. La Chusa, 771 P.2d 814, 829 (1989))).

they argued, when doctors negligently handle the eggs and embryos. The courts would have none of it.[25] For one thing, the plaintiffs consented to the "injury" of surgery. For another, the surgery would have occurred regardless of the alleged negligence of implanting the embryos in the wrong woman or using the infected preservative—a fatal causation problem.

A third familiar type of tortious injury that IVF plaintiffs have alleged is loss of property. In *Frisina v. Women and Infants Hospital of Rhode Island*, three women whose embryos were accidentally lost or destroyed joined as plaintiffs and alleged injury insofar as they were deprived of their embryo-property. The court not only permitted the suit to go forward but also, attending to the "unique qualities of the IVF context," allowed emotional distress claims to attach to the loss of "irreplaceable" property.[26] It is not clear why other plaintiffs have not taken a property-loss approach. In any event, even if this theory takes hold, some IVF plaintiffs have no property loss to allege.

Pure pecuniary loss, such as medical expenses and lost wages, is a fourth recognizable category of injury. It has the same strength and weakness as property-loss claims: Courts permit recovery for it, but it applies only to certain IVF cases. In *Paretta v. Medical Offices for Human Reproduction*, for example, the doctor knew that the egg donor had the recessive gene for cystic fibrosis, but nonetheless skipped a routine test to see if the husband was also a carrier. When the child was born with the disease, the Parettas successfully sued for the cost of caring for their baby.[27] Yet this theory would be of no help to a couple like the Creeds, who, due to medical error, did not have a child in the first place.

Finally, could the plaintiffs in these cases sue for breach of contract? Breach of contract is different in kind from things like "emotional distress" and

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25. *Irvine Scientific Sales Co.*, 7 F. Supp. 2d at 741; *Creed*, 600 N.Y.S.2d at 152-53; *see also Cohen*, 730 N.E.2d at 952-53 (denying both the physical injury claim and the "speculative" claim of "deprivation of genetic parenthood").

26. *Frisina*, 2002 WL 1288784, at *8-11 (internal quotation marks omitted). This opinion, although probably the most thoughtful of the set, is not clear as to the cause of action for which property loss is the injury—contract or tort, and, if tort, what tort. *See also* York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989) (permitting property-based detinue and breach of contract claims when IVF clinic refused to return plaintiffs' cryopreserved embryos).

27. Paretta v. Med. Offices for Human Reprod., 760 N.Y.S.2d 639 (Sup. Ct. 2003). *But see* Doolan v. IVF Am., Inc., No. 993476, 2000 WL 33170944, at *4-5 (Mass. Super. Ct. Nov. 20, 2000) (granting defendants' motion for summary judgment against parents of IVF child with preventable cystic fibrosis). The *Paretta* and *Doolan* courts also dealt with "wrongful life" claims. *See Paretta*, 760 N.Y.S.2d, at 643-46; *Doolan*, 2000 WL 33170944, at *2-4. Although the IVF context often brings wrongful life claims to mind, these claims concern children's efforts to recover for physical injuries sustained at birth or in the womb, not parents' efforts to recover for thwarted procreative possibilities.

"property loss." It is not a type of injury. It is, rather, an end run around tort law's requirement of showing injury. But it has its own problems. Courts routinely treat medical error as sounding in tort unless a doctor warrants the result of his care.[28] Sensible doctors never do.

The cases above organize into four factual scenarios. First are cases in which reproductive material (egg, sperm, or embryo) is lost or damaged (*Irvine* and *Frisina*). Second are cases in which a third party's reproductive material is mistakenly put into the plaintiff (*Harnicher*). Third are cases in which the plaintiff's reproductive material is mistakenly put into someone else (*Creed*). Fourth are cases in which IVF negligence results in a damaged child (*Paretta*).

These four fact patterns describe what we can sense is a common injury. The injury is not, at base, a broken contract, financial expense, lost property, a damaged body, or depression and anxiety. Perhaps those categories could be defined loosely enough to permit recovery in more IVF cases. Yet the impulse to tamper with the law for the sake of IVF plaintiffs is like an arrow pointing to some neglected and important concern beyond the law as it stands. Needlessly injured people yearning for children should recover, but not under a legal fiction.

II. DEFINING "PROCREATIVE INJURY"

Existing notions of legal injury are inadequate in the IVF context because IVF accomplishes something that no other technology has ever accomplished: It brings new human life into being outside the body, such that the link between genetic parent and child-bearer, so indubitably entwined in nature, can be severed. When the severing is unintended and culpable, a type of injury is done that the law has not previously had to face. This is "procreative injury." Understanding it requires developing an account of the procreative interest.

The procreative interest has three prongs:

1. *Genetic transmission.* Organisms have a basic interest in passing on their genes.
2. *Mate selection*. In nature, human procreation is more than sheer individual genetic transmission, for individuals contribute just half a

28. KEETON ET AL., *supra* note 20, § 32. *But see* Itskov v. N.Y. Fertility Inst., 782 N.Y.S.2d 584, 588-89 (Civ. Ct. 2004) (finding breach of contract where physician-defendant promised to effectuate surrogacy arrangement, extracted eggs, and then refused to implant embryos); *Frisina*, 2002 WL 1288784, at *11-14 (finding a genuine issue of material fact supporting a breach of contract claim in denying a motion for summary judgment). The underlying issue here is a deep one and an old chestnut: What is the boundary between tort and contract?

genome. The procreative interest is partly an interest in being able to select one's own mate.

3. *Bearing and rearing one's own genetic progeny*. Human beings are born, after a lengthy period of gestation, immature and educable. There is in nature a parental interest in bearing and rearing one's own genetic progeny.

In short, the procreative interest consists in bearing and rearing one's own genetic progeny with the mate of one's choice.

Procreative injury, of course, is just the infringement of the procreative interest. The test of procreative injury as a useful legal concept is whether it gives sound reasons for recovery in the four IVF fact patterns discussed above. When plaintiffs' reproductive material is lost or damaged, plaintiffs suffer procreative injury insofar as their interest in genetic transmission is frustrated (prong 1, above). When the wrong reproductive material is implanted, plaintiffs lose the opportunity to transmit their genes (prong 1) and choose their mate (prong 2), and their parental duties come unhinged from their genetic relationships (prong 3). When plaintiffs' reproductive material is mistakenly implanted in third parties, plaintiffs' interest in passing on their genes is at best delayed (prong 1), and their genetic progeny falls under other parents' control, at least during pregnancy (prong 3). Finally, when IVF negligence results in children with avoidable genetic diseases, parents may lose the opportunity to found a lasting genetic line (prong 1) or rear their progeny (prong 3), and their choice of a mate's genes turns out to be preventably erroneous (prong 2).[29]

Spelling out the nature of procreative injury suggests its remedies. Damages for the most serious procreative injuries—such as one's child being permanently (i.e., genetically) the product of the wrong mate—should be the monetary "value" of a child. Fixing such damages is a familiar challenge; the cost of raising a child or the damages awarded when a child is killed might be fair approximations. For less serious injuries, the damages might be the monetary cost of producing a baby. In a "lost embryos" case, for example, a

29. Applying the concept of procreative injury to *Paretta*, as I do here, is the most far-reaching of my suggestions in terms of the amount of litigation affected. While *Paretta* involved an IVF child, most instances of injury to newborns through medical negligence do not. Recovery goes through on straightforward claims of physical injury or pecuniary loss. Nonetheless, I think the concept of procreative injury applies. The same is true where non-IVF, fertility-related medical procedures hamper prospective parents' attempts to have children.

court might award the amount required for a new IVF cycle, together with restitution for the previous, thwarted IVF cycle.[30]

Proposing that tort law protect the procreative interest could be a far-reaching claim.[31] Life is full of everyday procreative injuries (those caused, for example, by adultery or divorce); I do not mean to suggest that plaintiffs recover in all such cases. What sets IVF and other medical contexts apart is the duty doctors take up when patients place their procreative interest in doctors' hands. Only when a doctor has undertaken and then breached this duty is an actionable right violated. This suggests a new cause of action: Where a doctor has undertaken a duty to care for a patient's procreative interest, and negligently breaches that duty so as to cause the patient procreative injury, there is a prima facie case for "reprogenetic malpractice."

CONCLUSION

In vitro fertilization is one aspect of our increasing mastery over human genesis. It is a new form of freedom—freedom from our biology—and of power—power over nature. This freedom and power bring new hope for would-be parents, but also new possibilities for harm. So the law must regulate this area, just as it must regulate the other powers of a professionalized and technologized modernity. My proposed tort would help with the regulation by making individual plaintiffs whole and precipitous experimentation costly. But I would like to close by attending to the limits of my proposed tort, and indeed of private law generally, for the regulation of the new reproductive technologies.

This Comment stems from tort law's too-narrow conception of injury, a conception that excludes procreative injury. That is a fixable problem. But private law has deeper limitations with regard to its ability to define and find injury. Imagine that IVF, coupled with genetic engineering, one day succeeds in producing healthy, enhanced children for willing parents. That success—if it is that—would produce no plaintiff. Yet it might still injure: It might injure a

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30. The cost of an IVF cycle in the United States averages $12,400. Am. Soc'y for Reproductive Med., *supra* note 11. Very often, achieving pregnancy requires more than one cycle.

31. Indeed, by proposing that the law protect the procreative interest, I necessarily propose a new procreative right—or, at least, a new dimension to the procreative right already recognized. *See supra* note 6. As Cardozo remarked, a legally protected interest *is* a right. *See supra* note 17. Fleshing out the scope of this right is beyond the scope of this Comment. Yet it is important to point out that the right, as reflected in my proposed tort of reprogenetic malpractice, would be limited. It is also interesting to ask about the ultimate foundation of the right. It would seem to be a human right (as opposed to economic, social, or political) insofar as it arises out of what a human being *is* (mortal).

culture lessened by an instrumental manner of having children, or injure society by distancing it from a normatively laden account of human nature, or even injure the happy, talented, but perhaps nonetheless deprived children themselves. These forms of injury are entirely beyond private law's reach, for private law regulates only insofar as an activity produces aggrieved parties with standing to sue. Regulating the new biotechnology therefore requires legal action that courts cannot provide alone. It requires public choices.

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