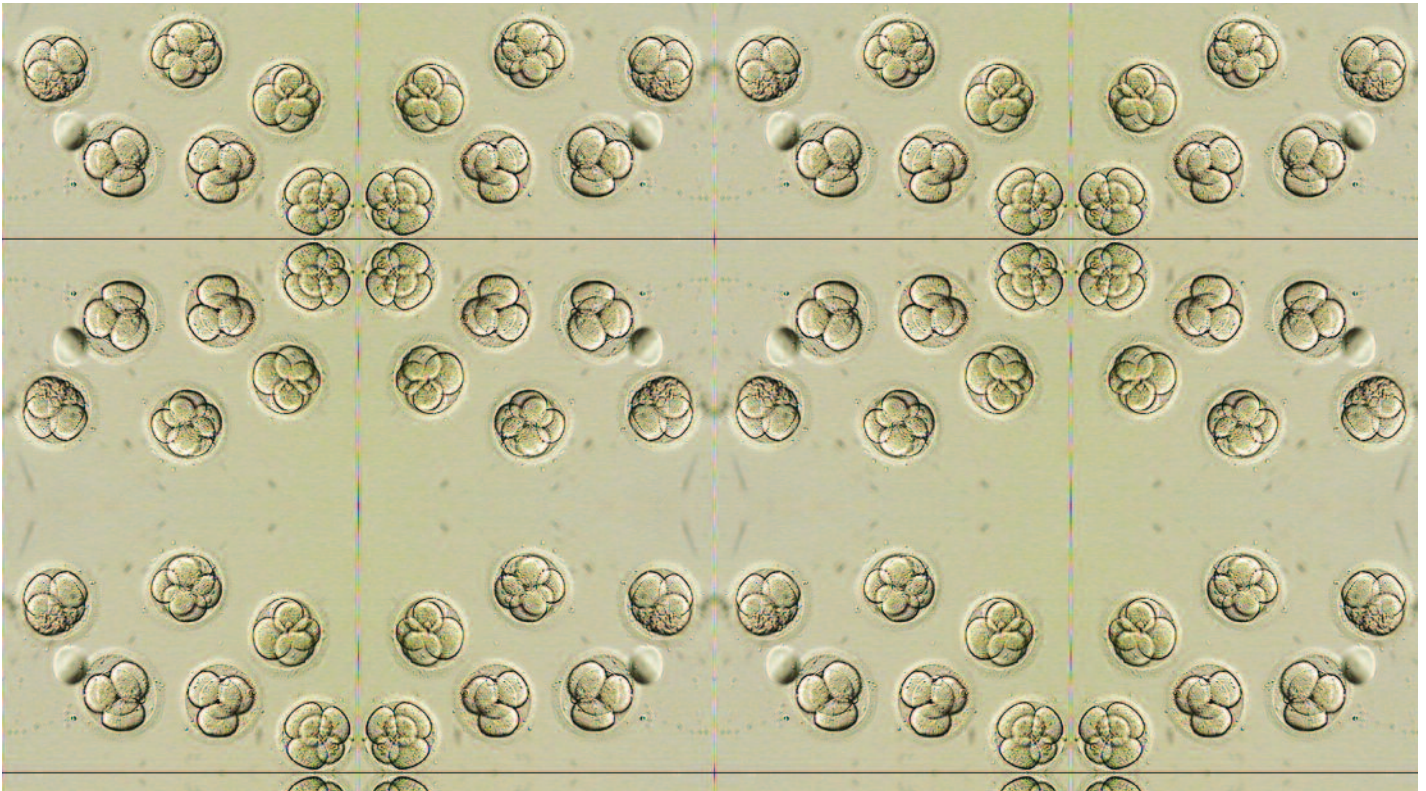


ANALYSIS

The Brave New World of Assisted Reproductive Technology

by Alan C. Milstein



On July 2, 1977, gynecologist Patrick Steptoe and physiologist Robert Edwards stunned the world by announcing the birth of Louise Brown, the first test-tube baby, winning the Nobel Prize in medicine for Sir Edwards. Since then, there have been more than three million *in vitro* fertilization (IVF) births. This relatively new technology is a miraculous gift to the 15 percent of Americans, and approximately 60 to 80 million couples worldwide, who are infertile. And these numbers do not include same-sex couples who want to be parents.

The cost of IVF today is about \$12,500 an attempt, an amount usually not covered by most healthcare plans. Sperm donors can receive about \$150 per deposit, and egg donors upwards of \$10,000 per retrieval. Currently, some 600,000

embryos sit cryogenically frozen and stored in facilities across the United States.

The response by the Catholic Church to IVF has been consistently negative, Pope Benedict declared as late as 2012 that the “dignity of procreation does not lie in a ‘product,’ but in its bond with the conjugal act: that expression of the spouses’ love for one another, that union which is not only biological but also spiritual...The marital union is the only worthy place for a new human being to be called into existence.”¹ Jewish law, on the other hand, approves of homologous IVF, the product of gametes from each of the wanting parents, but not heterologous IVF, which depends on donated eggs, sperm, or both.

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in desperate need of commonsense regulations. America is still the Wild West of alternative reproductive technology, known as ART.

ART Litigation

What makes even homologous IVF the subject of litigation is that frequently there is a delay between the creation of embryos and implantation, during which time couples can become estranged. In the Illinois case of *Szafransky v. Dunston*, for instance, Dunston had been diagnosed with lymphoma and was prescribed a course of chemotherapy, which could render her infertile. She persuaded her boyfriend to participate in the creation of frozen embryos. When they broke up a few

pregnancy. Jacobson then moved on to establish a fertility clinic at George Washington University Medical School. Dubbed the “Babymaker,” the 55-year-old Jacobson used his own sperm to inseminate at least 15 of his patients, who believed the donors were anonymous. In addition to the civil suits, he was convicted of numerous counts of fraud and sentenced to five years in prison.³

Then there was law student Ben Seisler, who was looking for a way to earn a few bucks by donating sperm, only to find out he was the father of 70 children, most of them located nearby.⁴ Currently, no federal or state agency regulates or even monitors how many times an individual may donate his sperm, how such material may be distributed and, perhaps most dis-

ny called Xytex. Like Great Britain, France, and Israel, Canada prohibits payment to sperm and egg donors resulting, as one might imagine, in a paucity of material for wanting parents. So the couple took advantage of what has come to be called ‘reproductive tourism,’ traveling to countries like the United States, whose fertility industry is loosely regulated, for the purpose of producing a child.

Social Media Impact— Sperm Bank Facebook

Xytex’s Facebook page (yes, a sperm bank has a Facebook page), proclaims it has been “Helping Families Realize Their Dreams Since 1975.” So enticed, the couple did what sperm shoppers frequently do: perused the inventory for a

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months later, Szafransky had second thoughts about fatherhood with his ex-girlfriend, and asked that the embryos be destroyed, though Dunston had agreed he would have no financial obligation to the child.

No less than 10 prior cases involving a couple’s dispute over the disposition of frozen embryos had held that, whatever the initial intent of the parties, the right not to be a parent won out over the desire to have the embryos implanted. Dunston, however, prevailed at the trial level through the appellate courts,² including a denial of *certiorari* by the United States Supreme Court. What distinguished her case was that the frozen embryos represented her only chance of becoming a natural parent.

The heterologous cases are more troubling. One from the early days of IVF involved Dr. Cecil Jacobson, a physician credited with introducing amniocenteses as a test to detect birth defects in early

turbingly, how many children an individual can father by such distribution. Seisler is certainly not the only sperm donor to have so aggressively, if unwittingly, heeded the commandment “P’ru Ur’vu” or “be fruitful and multiply.”⁵ His familial proliferation came to light through something called the Donor Sibling Registry (DSR), created by an IVF child, which encourages similar offspring to register their anonymous donor by the unique number sperm banks are required to assign him. While the DSR may be of benefit to those seeking to discover new siblings, what does the Seisler case do to our concepts of family, consanguinity and personhood? And, of course, there is the risk posed by such siblings unknowingly finding each other and falling in love.

A case in Georgia reflects further deficiencies in the multi-billion-dollar IVF business. A Canadian lesbian couple desiring parenthood traveled to Atlanta to purchase male gametes from a compa-

donor with ‘the right stuff’—good looks, good health and superior intelligence. They found what they allege Xytex told them was one of the company’s “best donors”: He had blue eyes, was musically gifted and mature beyond his years, had no health problems, and was so intelligent he was a doctorate candidate in neuroscience engineering. The problem was, apart from the fact that there is no such thing as a neuroscience engineer, the couple alleged the donor actually had limited education, had been charged with residential burglary, and had a history of schizophrenia.

The couple learned the truth seven years after the birth of their healthy son, and filed suit, claiming the need for medical monitoring to determine if the child’s genome made him, and the 36 other children produced by the donor’s sperm, more likely to follow the path of his biological father. The court dismissed the case, holding all the claims were for

wrongful birth, which is not recognized in Georgia.⁶ In an email to the *Toronto Star*, the mothers said: “We love our son dearly and we want to provide him with the best possible outcome, which is why we hope to establish a...fund for all the children to help prevent psychosis. We would also like to initiate improvements within the fertility industry (i.e. improved accountability, better screening and higher standards).”⁷

The case is troubling for a number of reasons. The operation of sperm banks falls under federal regulations as “Human Cells, Tissues, and Cellular and Tissue Based Products.”⁸ But such facilities are only required to maintain careful records and to screen applicants for sexually transmitted diseases and other blood- or fluid-borne illnesses. It may be wise to strengthen the regulations to require a complete health profile of a donor, and for some due diligence to inquire about the truth of the personal information he submits. This could prevent an occurrence such as the one reported by the *Journal of the American Medical Association*, where a donor with a genetic heart condition passed on his defect to at least eight babies, including one who died of heart-related problems.⁹

Shopping for Donors

The manner in which potential parents shop for biological products may also be worth reviewing. It is one thing to inquire about the health history of the donor, a history that can be absent of material information the future parent and subsequent child might need; it is quite another to choose the product based on what are perceived as desirable physical or social qualities. For one thing, the question arises whether traits such as intelligence, musical ability, or good looks are hereditary as opposed to environmental. But equally unsettling could be the concept of designer babies, of parents believing, whether true or not, they can choose what traits their

new child will possess throughout life.

This is a potential problem with either homologous or heterologous IVF. Consider, for example, an enterprising sperm bank purchasing product from Usain Bolt for, say, \$10 million, an offer he can't refuse, so it could market the sperm at an exorbitant price. Might an enterprising sports-minded couple, even a fertile one, consider raising a future fastest man alive?

Surrogates Weigh In

Then there are the problems caused when IVF is coupled with surrogacy. Surrogacy without IVF is as old as the Bible. When Abraham's wife Sara thought she was infertile, she suggested her husband have their child the old-fashioned way with the hand servant Hagar. When the child Ishmael was born, however, Sara was far from overjoyed, and she banished mother and son from the home.¹⁰

Perhaps that should have been a hint to attorney Noel Keane, who brokered the first surrogacy contract. His most famous clients were Mary Beth Whitehead, wife of a refuse worker, and Mr. and Mrs. Stern, both professionals. The critical mistake in that deal was having the surrogate also serve as the egg donor, so the child she bore was truly her own biologically. When Whitehead refused to turn over Baby M, as she was called in the pleadings, the matter went all the way to the New Jersey Supreme Court, which held the surrogacy contract illegal but awarded custody to Mr. Stern, the sperm donor, concluding it was in the best interests of the child.¹¹ Whitehead, however, as the biological mother, was still awarded visitation rights. Keane went on to broker 600 more surrogacy deals, most of which ended happily. Some appreciative parents even named their baby after the lawyer.

While most surrogacy arrangements are completed without a hitch, dozens of court rulings detail what happens when one party has second thoughts. Fact pat-

terns and court opinions run the gamut, addressing virtually every scenario imaginable. In the space of 12 years, the California Supreme Court awarded the child to the paying mother and father, declaring in *Johnson v. Calvert*, “for any child California recognizes only one natural mother;”¹² granted joint custody to each member of a lesbian couple in *K.M. v E.G.*, one of whom was the egg donor the other the birth mother; and declared the prior decision “does not preclude a child from having two parents both of whom are women.”¹³ The question these opinions bring to light is: “What makes a mother?” Is it carrying the baby for nine months, and, thus, being the birth mother? Is it donating the egg, and, thus, being the biological mother? Or is it having the original intention to care for and love the child?

Perhaps because of American litigiousness, and because many countries have outlawed surrogacy for pay, much of the business has moved overseas, where poor women agree to be surrogates primarily for well-to-do westerners. Again, while most transactions have heartwarming endings, the ones that don't are heartwrenching. In a recent case, a poor Asian woman gave birth to twins, one healthy and one with Down's Syndrome. The contracting Australian couple only took the healthy child home.¹⁴

In India, surrogacy is a half billion-dollar industry, with 25,000 surrogate babies born each year. Typically, the agency reaps \$17,500 for the transaction while the surrogate earns \$2,500. That was enough to entice Primila Vaghela, a 30-year-old mother of two from Ahmedabad.

Pregnancy is, however, not without risks, and Vaghela suffered cardiac arrest in her eighth month, while sitting in the agency's medical clinic. The baby survived and was delivered to the contracting parents in the United States.¹⁵

Like Hagar and Mary Beth Whitehead, paid surrogate mothers are likely

to be the economically disadvantaged, offering their wombs for those in the upper tiers. It can be difficult not to view such relationships as exploitive, even if in the end they provide beautiful gifts to couples desperate to have children.

In Sum

All this is not to say IVF, with or without surrogates, is a technology society would be better off without. Literally millions of human beings live productive happy lives as a result, and are raised by parents no less loving than those born through the natural process of procreation. Still, concerns do exist over the prospect of the creation of life being reduced to an unregulated business, a mere “product” in the words of Pope Benedict, where customers can shop for the perfect baby, where anonymous donors can become fathers of 50 or more, where the propensity of donors to pass on genetic defects can go

unchecked, and where the poor can be exploited by the not-so-poor. ❧

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ENDNOTES

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