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Misappropriation of Human Eggs and Embryos and the Tort of Conversion: A Relational View

Judith D. Fischer

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I. INTRODUCTION

As technological breakthroughs change the world, old legal theories may seem inadequate to address new legal problems.[1] Issues surrounding human body products are particularly challenging to courts and scholars attempting to address the problems of human material within a legal context.[2] In particular, cases involving doctors' misappropriation of human eggs or embryos present especially emotional concerns.[3]

Some of these cases may be influenced by a decision on a related issue, misappropriation of human cells. *Moore v. Regents of*

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1. *See* Michael J. Markett, Note, *Genetic Diaries: An Analysis of Privacy Protection in DNA Data Banks*, 30 SUFFOLK U. L. REV. 185, 185 (1996) (noting that "[r]apid advances in DNA technology have outpaced American courts and legislatures").

2. *See infra* notes 73-95, 229-80 and accompanying text.

3. *See infra* notes 31-41 and accompanying text.

the University of California[4] involved the alleged misappropriation for profit of cells from a patient's excised spleen.[5] In *Moore*, the California Supreme Court held that no claim for conversion of the cells would lie.[6] Two of the court's bases for this holding were, first, that Moore had abandoned the spleen cells and thus lacked ownership interest in them,[7] and second, that allowing a conversion claim would discourage medical research.[8] The *Moore* holding may have already affected the Irvine fertility cases,[9] which concern doctors' misappropriation of human eggs and embryos at the University of California at Irvine (UCI).[10] At a fertility clinic there, doctors implanted human eggs and embryos into other patients without the donors' knowledge or consent.[11] In two of the ensuing lawsuits, the trial court granted the defendant doctors' demurrers to conversion claims, although with leave to amend.[12] The defendants' moving papers relied heavily on *Moore*.[13]

Human reproduction concerns some of society's most deeply held values. It arouses the most sensitive of personal concerns,

4. Moore v. Regents of the Univ. of Cal., 51 Cal. 3d 120, 793 P.2d 479, 271 Cal. Rptr. 146 (1990). For a fuller discussion of the case, *see infra* notes 181-219 and accompanying text.

5. *See id.* at 126, 793 P.2d at 481, 271 Cal. Rptr. at 148.

6. *See id.* at 147, 793 P.2d at 497, 271 Cal. Rptr. at 164.

7. *See id.* at 136-37, 793 P.2d at 488-89, 271 Cal. Rptr. at 155-56.

8. *See id.* at 144, 793 P.2d at 494, 271 Cal. Rptr. at 161.

9. *See supra* notes 125-70 and accompanying text.

10. *See supra* notes 125-70 and accompanying text.

11. *See* Davan Maharaj, *Egg Theft Charged in UCI Fertility Case,* L.A. TIMES, Nov. 19, 1997, at B4.

12. *See* Clay v. Asch, No. 752294 (Orange County Super. Ct. Nov. 17, 1995) (Minute Order); Challender v. Regents, No. 748303 (Orange County Super. Ct. Apr. 3, 1996) (Minute Order). The demurrers were granted with leave to amend and the conversion claim was restated in amended complaints and not demurred to. *See* First Amended Complaint at 15, Clay v. Asch, No. 752294 (Orange County Super. Ct. Nov. 17, 1995) (Minute Order); Second Amended Complaint at 12, Challender v. Regents, No. 748303 (Orange County Super. Ct. Apr. 3, 1996) (Minute Order). Activity in the cases was then stayed to facilitate pending settlement negotiations.

13. *See* Defendant Ricardo H. Asch's Memorandum of Points and Authorities in Support of Demurrer to Plaintiffs' Complaint at 4, Clay v. Asch, No. 752294 (Orange County Super. Ct. Nov. 17, 1995) (Minute Order); Demurrers by the Regents of the University of California to Plaintiffs' First Amended Complaint at 14, Challender v. Regents, No. 748303 (Orange County Super. Ct. Apr. 3, 1996) (Minute Order).

affecting an individuals' sense of sexual adequacy, personal identity, and connection to the future. Misappropriation of reproductive material has lifelong implications, since it may mean the victims are foreclosed from becoming parents or, even more disturbingly, that their biological children are being raised, without permission, by unrelated families. This article argues that these concerns should be accorded appropriate weight, and that to do so, courts should recognize the tort of conversion in this context. Part II proposes that a relational view of the problem should be applied; Part III discusses related cases and scholarship; Part IV discusses the tort of conversion and its application to misappropriation of eggs and embryos; and Part V concludes that conversion claims should be allowed in these cases.

II. A RELATIONAL VIEW OF THE ISSUES

Judge John T. Noonan wrote about the importance of dropping the mask of impersonality in the law. He stressed the "enormous" evils produced by the "neglect of persons" in legal analysis.[14] Similarly, Immanuel Kant stressed the importance of considering legal issues in light of social relationships.[15] Thus, the Kantian reasoner

14. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 7, 18-19 (1976).

15. Professor Radin traces to Kant the argument that property and contract must be considered part of social relationships. MARGARET JANE RADIN, CONTESTED COMMODITIES 57 (1996) [hereinafter RADIN, CONTESTED COMMODITIES] (citing IMMANUEL KANT, *Metaphysical First Principles of The Doctrine of Right ("Rechtshlehre"), in* THE METAPHYSICS OF MORALS 82-95 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797)).

Radin has also noted psychologist Carol Gilligan's focus on relational thinking. *See* Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1712 & n.36 (1990) [hereinafter Radin, *The Pragmatist and the Feminist*] (citing CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 100 (1982)). Gilligan argued that women's moral perspective tends to be based on an ethic of care, while men's tends to be based on an ethic of justice. *See* GILLIGAN, *supra*, at 100. Her theories have strongly influenced feminist legal scholarship. *See* Katharine T. Bartlett, *Feminist Perspectives on the Ideological Impact of Legal Education upon the Profession*, 72 N.C. L. REV. 1259, 1260 & n.7 (1994).

Radin's initial development of her relational approach to property predated Gilligan's work. *See* Margaret Jane Radin, *Lacking a Transformative Social Theory: A Response*, 45 STAN. L. REV. 409, 423 (1993). Radin has criticized Gilligan's connection of perspective to gender. *See* Radin, *The*

disapproves of "objectification," that is, "failure to respect in theory and to make space in practice for the human subject."[16] Building on this philosophical foundation, Professor Radin has advocated a relational or personhood analytic viewpoint.[17] This approach rejects blind and impersonal legal reasoning, and instead calls for pragmatic consideration of personal concerns. Applying this approach to the analysis of property rights, Radin classifies property into two categories: "personal," which "denote[s] the kind of property that individuals are attached to as persons," and "fungible," which "denote[s] the kind of property that individuals are not attached to except as a source of money."[18] The categories are not rigid. Radin gives the example of a wedding ring, which could be fungible in the jeweler's display case, but personal once it takes on "symbolic emotional significance" to the spouse who wears it.[19] "Personal" property, Radin argues, should not be as freely alienable as fungible property.[20]

In her relational analysis, Professor Radin concluded that neither complete commodification—everything in markets—nor universal noncommodification—nothing in markets—is the best approach to solving questions about the appropriate relationship of things to the market.[21] Describing herself as a pragmatist,[22] she argues that once a

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Pragmatist and the Feminist, supra note 15, at 1712 (arguing that the association of a relational approach with women is mistaken, since both men and women have used the approach).

16. RADIN, CONTESTED COMMODITIES, *supra* note 15, at 155.

17. *See id.* at 57-58; *see also* Michelle Bourianoff Bray, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 239-40 (1990) (applying Radin's personhood analysis to urge that "individuals' interests in their bodies should be protected as property interests because the body is central to the individuals' sense of identity").

18. MARGARET JANE RADIN, REINTERPRETING PROPERTY 2 (1993) [hereinafter RADIN, REINTERPRETING PROPERTY].

19. *Id.* at 16; *see also* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

20. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1907 (1987) [hereinafter Radin, *Market-Inalienability*]. Elsewhere, Radin explores the double meaning of "alienation" as both "transfer" and "estrangement," and notes that the two can "harbo[r] an ironic pun about capitalist private property." MARGARET J. RADIN, *The Rhetoric of Alienation*, *in* REINTERPRETING PROPERTY, *supra* note 18, at 192-93 (discussing the capitalist, Marxist and popular meanings of alienation) [hereinafter Radin, *The Rhetoric of Alienation*].

21. *See, e.g.*, RADIN, CONTESTED COMMODITIES, *supra* note 15, at xiii.

commodity is categorized as "personal," the next step is to determine what action would best protect the personal interests. This is not always simple, particularly in instances where both commodification and noncommodification may have harmful effects on persons, producing a "double bind."[23] For example, a double bind occurs in the analysis of prostitution. If sexual intercourse is determined to be market inalienable, that would have the harmful effect of depriving some poor women of an otherwise available means of support. But if it is commodified, that might have the harmful effect of "unleash[ing] market forces onto the shaping of our discourse regarding sexuality. . . ."[24] Therefore, Radin suggests, the best approach to prostitution may be "incomplete commodification": decriminalizing prostitution so that women can be paid for the work, while regulating it and declaring prostitution contracts unenforceable.[25]

Radin acknowledges the continuing debate over how to categorize human eggs and embryos, but leaves the resolution of the issue open.[26] It seems clear that human eggs and embryos are of such intensely individual significance that, if they are property at all,[27] they fit into Radin's "personal" category.[28]

When eggs or embryos are misappropriated, their donors suffer the deep "psychological harm of knowing that their genetic children will exist in the world without any connection to them."[29] This article proposes that a relational view should guide the analysis of issues raised by misappropriation of human eggs and embryos. In other words, the analysis should be guided by careful attention to the delicate balance of human flourishing.[30]

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22. *See, e.g.*, RADIN, REINTERPRETING PROPERTY, *supra* note 18, at 1-2.

23. *See* RADIN, CONTESTED COMMODITIES, *supra* note 15, at 127.

24. *Id.* at 133.

25. *See id.* at 134-35.

26. *See* Radin, *Market-Inalienability*, *supra* note 20, at 1856 & n.33.

27. Whether human eggs and embryos should be classified as property is examined *infra* notes 229-280 and accompanying text.

28. *See* RADIN, CONTESTED COMMODITIES, *supra* note 15, at 57-58.

29. Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 405 (1986) [hereinafter Andrews, *Legal Status of the Embryo*]. Andrews points out that "The traumatic nature of such a situation has been emphasized in the adoption literature . . . . [Birth parents feel] loss, pain, mourning, and a continuing sense of caring for that long vanished child." *Id.* at 405 n.260.

30. *See* Radin, *Market-Inalienability*, *supra* note 20, at 1937 (stating that our "best conception of human flourishing" ought to inform our analysis of

III. IN VITRO FERTILIZATION: BACKGROUND

A. Vulnerability of Those Seeking In Vitro Fertilization

> [W]hen Rachel saw that she [bore] Jacob no children, Rachel envied her sister; and she said unto Jacob, "Give me children, or else I die!"[31]

Rachel's story shows that the intense desire to have children is as old as early recorded history. Rachel solved her problem through a surrogacy arrangement: she urged her husband to impregnate her maid and then raised the two resulting children as her own.[32]

For contemporary couples, infertility can be no less devastating than it was for Rachel.[33] The infertile person may feel the need to have children "to make life worth living,"[34] and report feeling "less fulfilled if they did not have a child."[35] As a result, persons of both sexes have often found infertility "extremely stressful," experiencing feelings of "anxiety, guilt, depression, anger, denial, and isolation."[36] They are "likely to feel inadequate at the core of their being," and feel driven to try every alternative available.[37]

While adoption is a possibility for some childless couples, fewer children are available for adoption now than in the past,[38] and not all

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market alienability). Radin believes the best view of human flourishing will take into account a person's freedom, identity, and contextuality. *See id.* at 1904.

31. *Genesis* 30:1.

32. *Genesis* 30:3-6.

33. *See* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 98 (1994) [hereinafter ROBERTSON, CHILDREN OF CHOICE] (describing couples' anguish at being infertile).

34. Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 627 (1991) (quoting Ann Lalos et al., *The Wish to Have a Child*, 72 ACTA PSYCHIATRICA SCANDINAVIA 476 (1985)).

35. *Id.* (quoting Victor J. Callan & John F. Hennessey, *Emotional Aspects and Support in In Vitro Fertilization and Embryo Transfer Programs*, 5 J. IN VITRO FERTILIZATION & EMBRYO TRANSFER 290, 293 (1988)).

36. *Id.* at 629.

37. ROBERTSON, CHILDREN OF CHOICE, *supra* note 33, at 98; *see also* Deborah Kay Walther, *"Ownership" of the Fertilized Ovum In Vitro*, 26 FAM. L.Q. 235, 237 (1992) (stating that "[c]ommon feelings such as loss of control, isolation from friends and family, depression and grief may seem overwhelming to the couple who are denied a child they so earnestly wish to conceive.").

38. *See* ROBERTSON, CHILDREN OF CHOICE, *supra* note 33, at 98.

infertile couples have the option of adopting.[39] Other couples reject adoption because they want a genetic connection to their children.[40] Men may desire biological parenthood to confirm their virility, just as women may desire it to confirm their femininity.[41] It is with these intense feelings that patients present themselves for fertility treatment.

B. The Process of In Vitro Fertilization

In vitro fertilization (IVF)[42] allows couples who have been unable to achieve coital pregnancy the opportunity to experience parenting of their own biological children. It is an expensive,[43] arduous, and risky process.[44]

In order to increase the woman's egg production, and thereby increase the chances for success, the first phase of the treatment involves the use of drugs to stimulate ovulation.[45] The drugs are administered daily by needle for a two-week period,[46] thereby stimulating the ovaries to increase production from the usual one egg to perhaps twenty eggs per month.[47] The shots are painful and cause unnatural bloating and sharp mood swings.[48] They also subject the

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39. For example, adoption agencies prefer married couples over single persons, and older or homosexual couples may find themselves entirely excluded from the process. *See* Andrews & Douglass, *supra* note 34, at 627 & n.11.

40. *See id.* at 627.

41. *See id.* at 628.

42. *See infra* app.1 for definitions of this and other scientific terms used in this article.

43. A single IVF costs approximately $7,500. *See* Jean Voutsinas, *In Vitro Fertilization*, 12 PROB. L.J. 47, 49 (1994). The average cost for a successful delivery ranges from $114,286 to $800,000, depending on individual complications. *See* Keith Alan Byers, *Infertility and In Vitro Fertilization*, 18 J. LEGAL MED. 265, 285 (1997).

44. Feminists have criticized the process as "part of [women] making a patriarchal bargain rather than being a free choice or a gift." Leslie Bender, *Teaching Feminist Perspectives on Health Care Ethics and Law: A Review Essay*, 61 U. CIN. L. REV. 1251, 1267 (1993) (citing Judith Lorber, *Choice, Gift, or Patriarchal Bargain? Women's Consent to In Vitro Fertilization in Male Infertility*, *in* FEMINIST PERSPECTIVES IN MEDICAL ETHICS 177 (Helen B. Holmes & Laura M. Purdy eds., 1992)).

45. *See* Voutsinas, *supra* note 43, at 48.

46. *See* Byers, *supra* note 43, at 277.

47. *See* Voutsinas, *supra* note 43, at 48.

48. *See* Byers, *supra* note 43, at 277.

patient to other risks,[49] including the possibility of kidney failure.[50] The patient is required to undergo daily blood testing and ultrasound examinations[51] to determine when ovulation will occur and to allow the doctor to remove the eggs.[52] The complexity, cost, and difficulty of the process of egg removal dictate that the doctor gather more eggs than will be immediately implanted in the woman.[53] The operation requires a general anesthetic, thus subjecting the patient to the additional risk and unpleasantness of being unconscious.[54]

The period of time between the fertilization of the egg in vitro and the transfer to the recipient's uterus may be as long as fourteen days.[55] After the embryos are transferred, the couple must wait to see if any of the embryos implant themselves on the walls of the woman's uterus.[56] In addition to the fact that sometimes the embryos fail to attach themselves to the uterine wall, IVF carries a thirty percent chance of miscarriage.[57] The introduction of multiple embryos also increases the chance of a multiple pregnancy and the potential

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49. One UCI patient described how the medication had overstimulated her ovaries on the day forty-six eggs were taken from her, causing lightheadedness, bloating, and high blood pressure that prevented a planned retransfer to her tubes of some of her eggs and her husband's sperm. *See* Debbie Challender & Susan Littwin, *Fertility Fraud: Why One Mother May Never Know Her Babies,* REDBOOK, Dec. 1995, at 87.

50. *See* Cindy Schreuder, *Embryo Issue From American View: Unlike Britain We Have Little Regulation,* CHI. TRIB., Aug. 4, 1996, § 2 (METRO), at 1; Gina Kolata, *As Price of Donor Eggs Rises So Does Debate,* ORANGE COUNTY REG., Mar. 8, 1998, at A16 (discussing renal failure resulting from overstimulation of the ovaries).

51. *See* Byers, *supra* note 43, at 277.

52. *See* Voutsinas, *supra* note 43, at 48. This is generally done through a laparoscopy, a surgical procedure in which an incision is made into the naval area and a tiny telescope is inserted through the incision to bring the ovaries into view. *See* Byers, *supra* note 43, at 278 (quoting Doug Brouen, *Childless See New Hope "In Vitro"*, L.A. TIMES (Orange County Edition) Oct. 6, 1985, § 6 (VIEW) at 1). The physician manipulates the needle to remove the eggs from their follicles. *See id.*

53. *See* ROBERTSON, CHILDREN OF CHOICE, *supra* note 33, at 99 (stating that multiple eggs are gathered to increase the chance of pregnancy).

54. *See* Voutsinas, *supra* note 43, at 48-49. Alternative procedures have been developed that do not require general anesthesia but the efficacy of the alternative procedures have yet to be determined. *Id.* at 49-50.

55. *See id.*

56. *See* Byers, *supra* note 43, at 280.

57. *See id.* at 281.

need for selective reduction of the implanted embryos.[58] The whole process takes a heavy toll on the infertile couple, and requires "a great commitment of time, energy, and resources."[59] Moreover, it has "incredibly low success rates."[60]

Scientific technology has made it possible to freeze and store embryos created through IVF but not used in the initial procedure.[61] The doctor freezes, or "cryopreserves," the extra preembryos for future use, if the initial transfer does not produce a live birth, or if the couple desires a subsequent pregnancy.[62] The embryos are first treated with a solution to protect them from damage during freezing.[63] They are then gradually cooled to a temperature of minus-sixty to minus-eighty degrees centigrade and placed in liquid nitrogen for long-term storage.[64] About thirty-five percent of the embryos do not survive the thawing process.[65]

With one billion dollars being spent annually on fertility and assisted reproduction programs, clinics are conducting market research and advertising to attract couples to their facilities.[66] People are often given high hopes which may be unsupported or unjustified. Clinics may refer to the "success" rates of their programs, without explaining what they mean by "success," and actually inflate those success rates. Emotional appeals emphasizing the joys of having a

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58. *See* ROBERTSON, CHILDREN OF CHOICE, *supra* note 33, at 99.

59. Deborah Kay Walther, *"Ownership" of the Fertilized Ovum In Vitro,* 26 FAM. L.Q. 235, 237 (1992).

60. Bender, *supra* note 44, at 1265.

61. *See* Wendy Dullea Bowie, *Multiplication and Division—New Math for the Courts: New Reproductive Technologies Create Potential Legal Time Bombs,* 95 DICK. L. REV. 155, 161 (1990).

62. *See id.* at 162.

63. *See id.* at 161.

64. *See id.*

65. *See id.* at 161-62.

66. *See* Rick Weiss, *Babies in Limbo: Laws Outpaced by Fertility Advances,* WASH. POST, Feb. 8, 1998, at A1 (stating that the industry is on an "aggressively entrepreneurial track").

Doctors Ricardo Asch and Jose Balmaceda have co-authored two research reports. *See* Roberta Lessor et al., *An Analysis of Social and Psychological Characteristics of Women Volunteering to Become Oocyte Donors in* FERTILITY & STERILITY, Jan. 1993, at 65 (stating the objective of designing a recruitment program); Roberta Lessor et al., *A Survey of Public Attitudes Toward Oocyte Donation Between Sisters,* 5 HUMAN REPRODUCTION 889 (1990).

child are very common. Little is mentioned of the cost, risk, physical discomfort, or limited chances of actually having a baby.

In addition to advertising to infertile couples, many fertility clinics advertise seeking women willing to donate their eggs.[67] Advertisements seeking donors run in campus newspapers,[68] and can even be found on the Internet.[69]

The great amounts of money to be made and the attendant danger of exploitation in this field suggest a need for regulation of in vitro fertilization.[70] Regulation through statutory schemes has been suggested,[71] but these schemes may not provide redress for aggrieved couples.[72] One means of validating their serious loss and providing them with appropriate redress is to allow aggrieved couples to bring claims for the tort of conversion.

C. Cases Arising Out of In Vitro Fertilization

1. Cases involving custody of reproductive material

Custody disputes over human reproductive material provide some illumination for the cases involving misappropriation of eggs

67. *See* NORTHWEST HUNTINGTON BEACH PENNYSAVER, June 3, 1998 at 23 (advertisement).

68. *See* UC-IRVINE NEW UNIVERSITY, May 18, 1998, at 10 (advertisement offering $3500 to a woman who has a European background); UC-IRVINE NEW UNIVERSITY, June 1, 1998, at 23 (advertisement offering $5,000 to a woman who has European background); Adrienne Knox, *Have Brokers Gone Overboard for Human Ova?,* THE STAR-LEDGER (Newark, N.J.), Mar. 8, 1998, at 1 (egg broker advertises $35,000 plus expenses for the egg of a Princeton University student).

69. *See* The Egg Donor Program, *How to Become an Egg Donor or Surrogate Mother*, (last visited Nov. 7, 1998) <http://www.eggdonation.com> (advertisement offering an egg donor $3000); Tasc Classified Advertising Section, *Prospective Egg Donors,* (last visited Nov. 7, 1998) <http://www.surrogacy.com/classifieds/egg_sum.html> (featuring multiple advertisements for human eggs).

70. *See* Byers, *supra* note 46, at 265 (proposing regulation of the in vitro industry).

71. *See id.*

72. *See, e.g.,* CAL. PENAL CODE § 367(g) (West Supp. 1998) (providing for imprisonment and fines, but creating any new civil claims, for "unauthorized use or implantation of sperm, ova, or embryos.").

or embryos.[73] In the major reported custody cases, courts have found it necessary to discuss whether or not gametic material is property.

In *York v. Jones,*[74] a couple underwent fertility treatment at a Virginia clinic and, before the procedure was complete, moved to California.[75] When the couple sought to have their "pre-zygote" transferred to a Los Angeles hospital,[76] a custody dispute arose between them and the Virginia clinic, and the couple asked the court to order the transfer.[77] The court viewed the case as a contract dispute and ruled that since the parties' contract referred to the frozen embryos as property, it would treat them as bailed property.[78] Accordingly, the court held that the couple stated a claim for detinue.[79] In a footnote, the court commented that the parties' agreement was consistent with the Ethical Considerations of the American Fertility

73. These cases are to be distinguished from those involving custody of children born through in vitro fertilization, which are beyond the scope of this article. *See, e.g.*, Johnson v. Calvert, 5 Cal. 4th 84, 851 P.2d 776, 19 Cal. Rptr. 2d 194 (1993) (husband and wife whose embryo had been implanted in surrogate mother were granted custody of the child, with the court holding the surrogate mother was not the "natural mother" of the child). A bizarre circumstance arose in one such case, *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280 (1998), in which a husband and wife contracted to have a child, Jaycee, through implantation of a genetically unrelated embryo in the womb of a surrogate mother. After Jaycee's birth, the couple separated, and the husband claimed in the dissolution proceeding that he had no paternal duties to Jaycee. *See id.* at 1412, 72 Cal. Rptr. 2d at 282. The trial court "reached an extraordinary conclusion: Jaycee had *no* lawful parents," reasoning that neither the gamete donors, the surrogate, nor the divorcing couple had all the incidents of parentage. *See id.* The Court of Appeals reversed, holding that the divorcing couple were Jaycee's parents because Jaycee would never have been born had they not initiated the surrogacy process. *See id.* at 1428, 72 Cal. Rptr. at 293.

74. 717 F. Supp. 421 (E.D. Va. 1989).

75. *See id.* at 423.

76. *See id.*

77. *See id.* at 421.

78. *See id.* at 424, 427. The agreement provided that in the event of a divorce, ownership of the pre-zygotes would be determined in a "property settlement." *Id.* at 426.

79. *See id.* at 427. Detinue is "a possessory action for the recovery of personal chattels unjustly detained." Durst v. Durst, 193 A.2d 26, 28 (Md. Ct. App. 1963).

Society, which identified gametes and embryos as the property of their donors.[80]

Another dispute over custody of reproductive material arose in a divorce case, *Davis v. Davis.*[81] The wife wanted to use the couple's frozen preembryos to have a child, but the husband did not approve of her use of the preembryos.[82] Therefore, each sought custody of the preembryos.[83] Unlike in *York,* the Davises had executed no written agreement specifying disposition of the frozen embryos in the event of a dispute or divorce.[84] Finding no statute or case law to help determine the rightful custodian of the frozen embryos, the court turned to legal journals[85] and to the American Fertility Society[86] for assistance. The court concluded that frozen preembryos are neither persons nor property but occupy an interim category that entitles them to special respect because of their potential for human life.[87] The court awarded custody of the preembryos to the husband on the ground that "the party wishing to avoid procreation should prevail."[88]

The California Court of Appeal took the significant step of identifying a property right in a human body product in *Hecht v. Superior Court.*[89] *Hecht* involved a dispute over custody of sperm deposited in a sperm bank by the deceased partner of the plaintiff.[90]

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80. *Id.* at 427 n.5 (citing the Ethics Committee of the American Fertility Society, *Ethical Statement on In Vitro Fertilization,* 46 FERTILITY AND STERILITY 89S (Supp. 1986) [hereinafter *AFS Ethical Statement*]). The cited provision reads in full: "It is understood that the gametes and concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items, provided disposition is within medical and ethical guidelines as outlined herein." *Id.*

81. 842 S.W.2d 588 (Tenn. 1992).

82. *See id.* at 589.

83. *See id.* The wife eventually wished to donate the eggs while the husband wanted to dispose of them. *See id.* at 590

84. *See id.* at 590.

85. *See id.* at 590 & nn.3, 5 (citing Note, *The Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law,* 17 J. LEGIS. 97 (1990), and *Andrews, Legal Status of the Embryo, supra* note 29).

86. *See Davis,* 842 S.W.2d at 596.

87. *See id.* at 597.

88. *Id.* at 604.

89. 16 Cal. App. 4th 836, 20 Cal. Rptr. 2d 275 (1993).

90. *See id.* at 840, 20 Cal. Rptr. 2d at 276.

The deceased partner had stipulated in a "Specimen Storage Agreement" that in the event of his death the semen specimen was to be released to the plaintiff, who intended to conceive his child posthumously.[91] The decedent's adult son and daughter obtained an order that the sperm be destroyed, and the plaintiff petitioned for a writ vacating the order.[92] The court, distinguishing the case from *Moore*,[93] ruled that the deposited sperm was "property" over which the probate court had jurisdiction because the contract showed the decedent's "expectation that he would in fact retain control over the sperm following the deposit."[94] The *Hecht* court cited both *York* and *Davis*, as well as the American Fertility Society's Ethical Statement to support the classification of sperm as "property."[95]

These cases indicate a willingness by some courts to classify human eggs and embryos as property, or at least to place them in an intermediate category between persons and property and determine that the progenitors have some right of control over them.

2. Cases involving misappropriated eggs or embryos

a. previous and pending cases

There have already been several publicized instances of misappropriation of human eggs or embryos. While most have not yet resulted in reported opinions or court cases involving conversion claims, they illustrate the increasing prevalence of the problem.

Del Zio v. Presbyterian Medical Center[96] arose from the first known attempt at in vitro fertilization. The Del Zios agreed to be

91. *See id.* at 840-41, 20 Cal. Rptr. 2d at 276-78.

92. *See id.* at 844, 20 Cal. Rptr. 2d at 279.

93. *See id.* at 850, 20 Cal. Rptr. 2d at 283. For a discussion of *Moore*, see *supra* notes 181-219 and accompanying text.

94. *Hecht*, 16 Cal. App. 4th at 846 n.4, 20 Cal. Rptr. 2d at 280-81 n.4. *But see* David A. Rameden, *Frozen Semen as Property in* Hecht v. Superior Court*: One Step Forward, Two Steps Backward*, 62 UMKC L. REV. 377, 393 (1993) (criticizing the *Hecht* court as not engaging in a theoretical analysis of property).

95. *See Hecht*, 16 Cal. App. 4th at 848, 849, 20 Cal. Rptr. 2d at 282, 283 (citing the Ethics Committee of the American Fertility Society, *supra* note 80, at 89S).

96. No. 79-Civ.-3588 (S.D.N.Y. Nov. 14, 1978), *reprinted in* MICHAEL H. SHAPIRO & ROY G. SPECE JR., CASES, MATERIALS, AND PROBLEMS ON

part of an experiment in the new procedure, and the husband's sperm and the wife's egg were mixed. However, a physician at the medical center, apparently believing that it was morally wrong to conduct such experiments, destroyed the reproductive material.[97] The couple sued the medical center, and the jury awarded damages for emotional distress. The judge observed that the jury may have meant to include conversion damages in that amount.[98] Professor John A. Robertson views the decision as a recognition of the couple's ownership interest in the human material.[99]

A second case involved misuse of gametes, with a doctor's hubris leading to questions about the paternity of as many as seventy babies.[100] Doctor Cecil Jacobson was well regarded in his field, having performed the nation's first amniocentesis.[101] From 1976 to 1988,[102] at his clinic in Virginia,[103] Doctor Jacobson told his patients

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BIOETHICS AND LAW 522, 523 (1981).

97. *See* Andrews, *The Legal Status of the Embryo*, *supra* note 29, at 367-68. Because it is unknown whether the attempt resulted in fertilization, it cannot be said with certainty whether an embryo was involved. *See* Christine A. Djalleta, Comment, *Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of the New Reproductive Technology*, 67 TEMP. L. REV. 335, 350 n.119 (1994).

98. *See Del Zio*, No. 79-Civ.-3588 (S.D.N.Y. Nov. 14, 1978), *reprinted in* MICHAEL H. SHAPIRO & ROY G. SPECE JR., CASES, MATERIALS, AND PROBLEMS ON BIOETHICS AND LAW 522, 527 (1981). *See also* Lynne M. Thomas, Comment, *Abandoned Frozen Embryos And Texas Law of Abandoned Personal Property: Should There Be a Connection?* 29 ST. MARY'S L.J. 255, 278 (1997) (stating, that, because the basis of the jury verdict was unclear, "arguably, conversion could have been applicable in this [Del Zio] case, which would thereby imply that embryos are more analogous to property than to life or as deserving special respect.").

99. *See* John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 459, 515-17 (1990) (noting the lack of consensus on the status of the early embryo but urging recognition of the couple's decisional authority).

100. *See* Teri Sforza, *Who Rules How Babies are Made?*, ORANGE COUNTY REG., May 28, 1995, at A1; *see also* Diane M. Gianelli, *Fraud Scandal Closes California Fertility Clinic*, AM. MED. NEWS, June 19, 1995, at 1.

101. *See* Sforza, *supra* note 100, at A1.

102. *See id.*

103. *See* Randolph Goode, *Court Backs Up Jacobson Over His Insurer: Firm Contended It Had No Responsibility to Defend Him, Pay off Lawsuits*, RICHMOND TIMES, Feb. 18, 1995, at B5; *Insurer Can't Duck 'Sperm Doctor' Liability*, THE INSURANCE REGULATOR, Mar. 6, 1995, at 8 [hereinafter *Insurer Can't Duck*].

undergoing fertility treatment that he was using sperm from either anonymous donors[104] or the patients' husbands.[105] Instead, he inseminated approximately 120 of his patients with his own sperm, fathering perhaps 70 children.[106]

Both criminal and civil suits were filed against Doctor Jacobson, and he was convicted of fraud in 1992.[107] Before charges were filed prosecutors, fearing potential intermarriage among the unsuspecting but genetically related children, told the patients that Doctor Jacobson might be the genetic father of their children.[108] Parents filed at least six civil suits against Jacobson.[109]

Another case involving misuse of sperm arose in Florida. Michael and Elizabeth (Betty) Higgins were an infertile couple who wanted to have biological children together.[110] Michael is black and Betty is white.[111] In 1994, the couple underwent fertility treatment at Memorial Hospital, in Jacksonville, Florida.[112] However, when their twins were born it was discovered that Betty was their biological mother, but someone other than Michael was the biological father. The wrong sperm was apparently used, and the children appear

104. *See Insurer Can't Duck, supra* note 103, at 8.

105. *See* Goode, *supra* note 103, at B5.

106. *See* Sforza, *supra* note 100, at A1.

107. *See Insurer Can't Duck, supra* note 103, at 8. Jacobson was convicted of 52 felony counts "for mail fraud, wire fraud, travel fraud and perjury for using his own sperm in a series of artificial insemination procedures in which he had promised to use the sperm of his patient's husband or of an anonymous donor." *Id.* At the time of this writing, Doctor Cecil Jacobson is serving a five-year sentence at a federal prison. He was also ordered to pay $116,805 in fines and restitution. *See Judges Open Door for New Jacobson Suits*, WASH. TIMES, Feb. 20, 1995, at C6.

108. *See* David Parrish & Kim Christensen, *UCI Cases May Spawn Custody Wars*, ORANGE COUNTY REG., July 9, 1995, at A1, *available in* 1995 WL 5859219.

109. *See* St. Paul Fire & Marine Ins. Co. v. Jacobson, 48 F.3d 778, 779 (4th Cir. 1995) (stating that parents brought claims for "various counts of fraud, battery, negligence, tort of outrage, negligent infliction of emotional distress, medical malpractice, and child support").

110. *See* 20/20: *A Miracle Gone Wrong: Update on the Higgins Family and Their In Vitro Twins*, (ABC television broadcast, May 23, 1997).

111. *See* Deborah Sharp, *Fla. Suit Highlights In Vitro Industry's Controversies*, USA TODAY, Nov. 15, 1996, at 3A.

112. *See* Mike Stobbe, *Alleged Mix-Up Leads to Lawsuit*, FLORIDA TIMES-UNION, Sept. 1, 1997, at A5, *available in* 1997 WL 11325157.

white.[113] The Higginses sued the hospital in April 1996[114] for negligence.[115] Michael's severe disturbance over discovering that his wife bore another man's children may have contributed to the breakup of their marriage.[116]

Three cases concerning misappropriation of embryos are pending in Rhode Island. The Frisnas,[117] the Lamontagnes,[118] and the Doyles[119] sued the hospital where they each received fertility treatment, alleging that their frozen embryos were destroyed in contravention of their directions to the hospital.[120] Some of these embryos may have been given to other women.[121]

Problems with misuse of reproductive material have also occurred outside the United States. For example, in the Netherlands, a couple paid for an in vitro procedure offered by the fertility clinic of the University Hospital located in Utrecht, so that they could have their own biological child.[122] The wife gave birth to twins, but one of the twins was of noticeably darker complexion than the parents and was discovered to have been fathered by the sperm of a Caribbean man.[123] The mistake may have occurred because a pipette was not thoroughly cleaned between usages.[124]

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113. *See id.*
114. *See id.*
115. *See* Ann Davis, *High Tech Births Spawn Legal Riddles*, WALL ST. J., Jan. 26, 1998, at B1.
116. *See* Sharp, supra note 111, at 3A.
117. *See* Frisna v. Women and Infants Hosp. (R.I. Super. Ct. filed June 24, 1995) (No. 95-4037).
118. *See* Lamontagne v. Women and Infants Hosp., (R.I. Super. Ct. filed Aug. 16, 1995) (No. 95-4469). [The author thanks plaintiffs' attorney David J. Oliveira of Providence, Rhode Island, for making this complaint available and for providing other information about the pending cases.]
119. *See* Doyle v. Women and Infants Hosp., (R.I. Super. Ct. filed Aug. 31, 1995) (No. 95-5827).
120. *See Frisna*, Complaint at 2; *Lamontagne*, Complaint at 3; *Doyle*, Complaint at 3.
121. *See* Weiss, *supra* note 66, at A1 (quoting plaintiffs' attorney David J. Oliveira).
122. *See* Dorinda Elliott & Friso Endt, *Twins—With Two Fathers*, NEWSWEEK, July 3, 1995, at 38.
123. *See id.*
124. *See id.*

b. the Irvine fertility cases

The best publicized cases involving misappropriation of reproductive material are the Irvine fertility cases.[125] They arose at the Center for Reproductive Health, a clinic associated with the University of California at Irvine and run by doctors Ricardo Asch, Jose Balmaceda, and Sergio Stone.

Before joining the University, Asch and Balmaceda were widely known for their fertility work.[126] Asch, with the help of Balmaceda, developed the fertilization process known as gamete intra fallopian-tube transfer, or GIFT,[127] in which mixed eggs and sperm are implanted within the fallopian tube.[128] Dr. Asch cultivated his reputation as a successful fertility doctor, claiming that GIFT greatly increased the chance of having a baby over the traditional in vitro fertilization technique.[129] In 1990, these doctors, along with Doctor Sergio Stone, moved their fertility clinic from Garden Grove into the

125. For discussions of the Irvine fertility cases, see Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 609-14, 637-42 (1997) (pointing out a need for regulation of the fertility industry and calling for reliance on existing regulatory schemes); Karen T. Rogers, Comment, *Embryo Theft: The Misappropriation of Human Eggs at an Irvine Fertility Clinic Has Raised a Host of New Legal Concerns for Infertile Couples Using New Reproductive Technologies*, 26 SW. U. L. REV. 1133 *passim* (1997) (discussing custody issues presented by the cases); Rebecca S. Snyder, *Reproductive Technology and Stolen Ova: Who Is the Mother?*, 16 LAW AND INEQ. J. 289, 289-90 (1998) (same); Nina Martin, *Scrambled Eggs: A Scandal at a World-Famous Fertility Clinic Has Stirred up a Legal Mess*, CAL. LAW., Oct. 1995, at 21 (summarizing early progress of the cases).

126. *See, e.g.*, Jill Smolowe, *The Test-Tube Custody Fight: Victims of the Irvine Stolen-Egg Scandal Go After Twins*, TIME, Mar. 18, 1996, at 80 (describing Asch as a "celebrated fertility specialist").

127. *See* Richard Kelly Heft, *A Fertility Clinic in California is at the Center of a Storm over Accusations of Illegal Trade in Human Eggs*, THE GUARDIAN, Sept. 11, 1995, at T8, *available in* 1995 WL 9943046.

128. *See* Kim Christensen, et al., *50 Egg Suits Settled*, ORANGE COUNTY REG., July 19, 1997, at B1.

129. *See* Ellen Goodman, *Ethics Needed in the Genetic Warehouse*, CINCINNATI POST, June 13, 1995, at 11A, *available in* 1995 WL 8621654.

UCI Medical Center.[130] Doctor Stone apparently did not perform fertility procedures, but shared in the Center's profits.[131]

In February, 1994, UCI received a whistle-blower complaint that accused the doctors of not fully reporting income and of prescribing an unapproved drug to patients.[132] In September of that year, another whistle blower accused the doctors of implanting eggs without the donors' consent,[133] alleging that the doctors "stole eggs from women undergoing fertility treatments from the late 1980's through the early 1990's, implanting the eggs in other women and funneling others into research."[134] There have also been allegations of improper handling of records and finances and mail fraud.[135] In response to the allegations, a panel of academic investigators from other universities was appointed to investigate the UCI Center for Reproductive Health.[136] The panel found "plausible evidence" that the doctors implanted human eggs without donor consent, as well as evidence of some of the other alleged violations.[137] At least fifteen births allegedly resulted from unlawful transfers from unconsenting couples.[138]

130. *See* Kim Christensen & Michelle Nicolosi, *Money Doesn't Buy Relief: Some Who Received Six-Figure Settlements Still Feel Pain From The UCI Ordeal*, ORANGE COUNTY REG., Aug. 16, 1997, at B2.

131. *See* Christensen, et al., *supra* note 128, at B1.

132. *See* Nick Anderson & Esther Schrader, *50 Couples to get $10 Million to End UCI Fertility Clinic Suits*, L.A. TIMES, July 19, 1997, at A1. The unapproved drug was HMG Massone, a fertility drug produced in Argentina and not approved for use in the United States. *See* Davan Maharaj, *Fertility Doctor Charged with Egg Theft*, L.A. TIMES, Nov. 19, 1997, at A3.

133. *See* Marcida Dodson, *21 More Claims Against UCI's Fertility Clinic Settled for $4.4 Million*, L.A. TIMES, Oct. 1, 1997, at B4.

134. Davan Maharaj, *Egg Theft Charged in UCI Fertility Case*, L.A. TIMES, Nov. 19, 1997, at B1.

135. *See* Marcida Dodson, *Charges of Income Tax Evasion Broaden UCI's Fertility Scandal*, L.A. TIMES, June 21, 1997, at B1.

136. *See* Anderson & Schrader, *supra* note 132, at A1.

137. *See id.* Doctor Asch also admitted to dispensing HMG Massone to two patients, but the panel found evidence that he gave the unapproved drug to at least nine. UCI then launched its own investigation where they discovered financial misconduct. *See* Michelle Nicolosi, *Negotiations Stretched Under Six-Month Period*, ORANGE COUNTY REG., July 19, 1997, at 18.

138. *See* Lawrence Eisenberg, *What's at Stake in the Trial of Dr. Stone*, ORANGE COUNTY REG., Oct. 5, 1997, at G1.

Asch resigned and the two other doctors were placed on leave in June of 1995.[139]

The allegations relating to the fertility clinic have given rise to numerous lawsuits. The University filed a lawsuit against the clinic in May, 1995,[140] alleging, among other things, that the Center for Reproductive Health "transplanted patients' eggs into other patients without obtaining the donors' consent."[141]

Starting in June, 1995,[142] patients enrolled in the fertility clinic brought 105 civil lawsuits against UCI.[143] At this time, seventy-five of the cases have settled, costing the university nearly fifteen million dollars.[144] The monetary awards for these settlements range up to $650,000 and average more than $200,000 apiece.[145] About twenty cases remain unsettled,[146] including two naming Cornell University as a recipient of some of the missing eggs or embryos for research purposes.[147] The scandal also prompted passage of a California statute that criminalizes misappropriation of eggs or embryos.[148]

The doctors' conduct caused grave consequences for many people. Some fertility patients found themselves in the disturbing position of knowing that someone else was raising their genetic children without their consent.[149] For example, Loretta and Basilio Jorge

139. *See* Diane M. Gianelli, *Fraud Scandal Closes California Fertility Clinic,* AM. MED. NEWS, June 19, 1995, at 1, *available in* 1995 WL 10008857.

140. *See* Anderson & Schrader, *supra* note 132, at A1.

141. First Am. Compl. at 2, Regents of the Univ. of Cal. v. Asch (Orange County Super. Ct. filed May 25, 1995) (No. 747155).

142. *See* Dodson, *supra* note 133, at B4.

143. *See* Kim Christensen, *21 Additional Settlements in UCI Egg Cases,* ORANGE COUNTY REG., Sept. 27, 1997, at B4 *available in* 1997 WL 7445643.

144. *See* Marcida Dodson, *Fertility Patient OKs $460,000 UC Settlement,* L.A. TIMES, Feb. 20, 1998, at B4 [hereinafter Dodson, *$460,000 Settlement*].

145. *See* Dodson, *supra* note 133, at B4.

146. *See* Dodson, *$460,000 Settlement, supra* note 144, at B4.

147. *See* First Am. Compl. at 74, Dubont v. Regents of the Univ. of Cal. (Orange County Super. Ct. filed Nov. 9, 1995) (No. 755021); Beasley v. Regents of the Univ. of Cal. (Orange County Super. Ct. filed Oct. 31, 1995) (No.755023). *See also* Jack McCarthy, *Grieving over Lost Embryos,* PRESS-ENTERPRISE (Riverside, Cal.) Aug. 25, 1997, at A1 (recounting alleged shipment of three of plaintiff Kimberley DuBont's embryos to Cornell).

148. *See* CAL. PENAL CODE § 367(g) (West Supp. 1998) (providing for imprisonment and fines for unauthorized use or implantation of sperm, ova or embryos).

149. *See* Challender & Littwin, *supra* note 49, at 84 (describing the Chal-

alleged that her eggs were stolen by the doctors and transferred to another woman who gave birth to twins.[150] The Jorges received a $650,000 settlement for their claim.[151]

Most of the cases involve misappropriation of eggs rather than embryos, but at least three couples have filed custody suits claiming that they are the biological parents of children born to other couples.[152] In one such case, a married couple, Renee Ballou and Wesley Presson, sought fertility treatment.[153] Doctor Asch performed a GIFT on Ballou,[154] but she was ultimately unable to conceive a child at the fertility clinic.[155] Presson and Ballou later learned that one or more of the eggs taken from Ballou had been fertilized with Presson's sperm[156] and then placed into the body of another woman without their consent.[157] The woman who received the implant bore a son who is allegedly the biological child of Ballou and Presson.[158] In suits against the clinic, plaintiffs alleged multiple claims for such torts as conversion; negligence; fraud; intentional infliction of emotional distress; negligent spoliation of evidence; intentional spoliation of evidence; [159] conspiracy; and battery.[160]

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lenders' anguish at learning that they had "unwittingly given away two babies"); Karen Brandon, *Emerging Fertility Clinic Scandal Has Californians Rapt*, CHI. TRIB., Mar. 24, 1996, at A6 (quoting plaintiff Renee Ballou as saying, "He [Asch] basically took my hopes and dreams and gave them to someone else"); McCarthy, *supra* note 147, at A1 (recounting patient Pamela Kaoud's sense of betrayal because she will not know if she has additional biological children until a child appears and says, "Guess what?").

150. *See* Christensen, *supra* note 143, at B4.

151. *See id.*

152. *See id.*

153. *See* Compl. at 7, Ballou v. Regents of the Univ. of Cal. (Orange County Super. Ct. filed June 5, 1996) (No.759238).

154. *See id.*

155. *See* Brandon, *supra* note 149, at A6.

156. *See* Compl. at 10, Ballou v. Regents of the Univ. of Cal., (Orange County Super. Ct. filed June 5, 1996) (No. 759238).

157. *See id.* at 9.

158. *See id.* at 10; see *also* Dodson, *$460,000 Settlement, supra* note 144, at B4 (fertility test revealed Ballou was the genetic mother of the child).

159. This claim is no longer recognized in California. *See* Cedars-Sinai Med. Ctr. v. Superior Ct., 18 Cal. 4th 1, 18, 954 P.2d 511, 521, 74 Cal. Rptr. 2d 248, 258 (Cal. 1998) (holding that "there is no tort remedy for intentional spoliation of evidence by a party to a cause of action to which the spoliated evidence is relevant in cases where . . . the spoliation victim knows or should have known of the alleged spoliation before the trial . . .").

Doctors Asch and Balmaceda fled the country in 1995 following the accusations of wrongdoing.[161] Asch, a native of Argentina, is reported to be operating a fertility clinic[162] and teaching at a university[163] in Mexico City. Balmaceda is reportedly operating a fertility clinic in his native Chile.[164] Both are wanted on charges arising out of events at the clinic.[165]

Doctor Stone, who remained in the United States, was convicted on October 30, 1997, of "nine counts of mail fraud for listing his partners' names on billing forms for procedures performed by doctors in training."[166] Stone reportedly admitted to prosecutors that he and other physicians at the Center for Reproductive Health participated in a conspiracy to overbill insurance companies and failed to report nearly eight million dollars in partnership revenue to UCI.[167]

Because Asch and Balmaceda have fled and are not available to testify, their level of intent and culpability concerning their patients' misappropriated eggs and embryos is unclear.[168] There is some

160. *See, e.g.,* Compl., at 1, Clay v. Asch, (Orange County Super. Ct. filed June 5, 1996) (No.752294); First Am. Compl. at 1, Ballou v. Asch, (Orange County Super. Ct. filed June 5, 1996) (No.759238).

161. *See* Susan Kelleher, *Fertility Doctor to Stand Trial Alone*, ORANGE COUNTY REG., Sept. 22, 1997, at B1.

162. *See* David Haldane, *Firm Sues UCI Over Unclaimed Embryos, Sperm*, L.A. TIMES, Dec. 6, 1997, at A1.

163. *See* John McDonald & Kim Christensen, *No Jail: Fertility Doctor Gets Home Detention, Fine*, ORANGE COUNTY REG., May 12, 1998, at B2.

164. *See* Haldane, *supra* note 162, at A1.

165. *See Orange County Perspective: UCI Scandal's Bottom Line*, L.A. TIMES, Mar. 31, 1998, at B8 [hereinafter *Orange County Perspective*]. Doctors Asch and Balmaceda were indicted on federal charges of mail fraud and income tax evasion, but have not been tried. *See* Anderson & Schrader, *supra* note 132, at A1.

166. McDonald & Christensen, *supra* note 163, at B2. Stone was sentenced to a year of home detention where he must wear an electronic bracelet. *See* Michelle Nicolosi, *Indictment: Asch, Others Hid Incomes*, ORANGE COUNTY REG., June 21, 1997, at 2. He was also fined $50,000. *See* Susan Kelleher, *UCI Accused of Blocking Justice*, ORANGE COUNTY REG., June 3, 1998, at B2.

167. *See* Davan Maharaj, *Fertility Doctor Told of Conspiracy in Talks*, L.A. TIMES, Oct. 10, 1997, at B1.

168. Professor Robertson has theorized that a switch of embryos or gametes is usually due to human error such as mislabeling, but notes that the material could also be deliberately stolen. *See* John A. Robertson, *The Case of the Switched Embryos*, HASTINGS CTR. REP., Nov. 21, 1995, at 13, [hereinafter Robertson, *Switched Embryos*].

suggestion that their conduct was deliberate and done with a profit motive,[169] but Asch said in an interview that the misuse of eggs and embryos occurred because of sloppy record keeping that was not in his control.[170] Therefore, although the term "theft" may accurately describe their conduct, this article usually uses the broader term "misappropriation," which means here an unauthorized taking, misuse of, or failure to return material belonging to others.

IV. APPLYING A RELATIONAL ANALYSIS TO THE TORT OF CONVERSION FOR MISAPPROPRIATION OF EGGS AND EMBRYOS

A. Conversion

Statutory and regulatory schemes have been proposed to curb abuses in the fertility industry.[171] Such schemes, however, may not provide for recovery by the aggrieved fertility patients.[172] Redress for the harm through the tort system is an important means of both recognizing the relational concerns and attempting to make the aggrieved patients whole. The tort of conversion, which is defined as "the wrongful exercise of dominion over personal property of another,"[173] seems a logical choice for the victim patients. Conversion

169. *See* Louise Kiernan, *The Science of Fertility Gives Birth to Dilemma,* BUFFALO NEWS, July 23, 1995, at F7 (speculating that the doctors may have transferred eggs from younger to older women to inflate the clinic's success rate and thus reap financial gain); Marcida Dodson et al., *Fertility Patients Agree on Settlements*, L.A. TIMES, Aug. 16, 1997, at A23 (quoting plaintiffs' attorney Melanie Blum as stating that the records show the large number of misappropriated eggs and embryos could not have been an accident).

170. *See, e.g.,* Kim Christensen & Jim Mulvaney, *Asch Blames All on Staff, UCI*, ORANGE COUNTY REG., Feb. 27, 1996, at A1 (illustrating Asch's position that he had little or no knowledge of the record keeping procedures for consent forms).

171. *See, e.g.,* Byers, *supra* note 43, at 265-66 (proposing regulation of the fertility industry).

172. *See* CAL. PENAL CODE § 367(g) (West Supp. 1998) (providing for criminal penalties but not establishing any new civil remedy for misappropriation of eggs or embryos).

173. 5 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS § 610 (9th ed. 1988); *see also* BARLOW BURKE, PERSONAL PROPERTY IN A NUTSHELL 88 (1993) ("It [conversion] is the wrongful exercise of dominion or control over personalty . . ."); Suarez-Negrete v. Trotta, 705 A.2d 215, 218 (Conn. App. Ct. 1998) (conversion is "an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's

is the closest civil counterpart to criminal theft,[174] and recognizing that a theft, or something akin to a theft,[175] has occurred accords appropriate weight to the doctors' wrongful conduct and the violation of the victims.

The claim could be applied to the misappropriation of eggs or embryos on the theory that the health care providers are bailees; that is, that they have custody of the reproductive material in trust for the patients, with the obligation to observe the express and implied terms of the bailment and to return the bailed material when asked.[176] In *York v. Jones*,[177] which involved custody of frozen embryos, the court viewed the custodian as a bailee.[178] This theory could be applied to eggs and embryos taken in fertility treatment, which are given to a custodian with the assumption that they will be kept for the donor couple. Failure to return the bailed material, or other misuse of it, would amount to a conversion.[179]

However, the largest group of current misappropriation cases, the Irvine fertility cases, are pending in California, where the *Moore*[180] case raises issues about the applicability of conversion.

1. The *Moore* case

Moore concerned misappropriation of human tissue.[181] Moore, suffering from leukemia, had his spleen removed at the Medical Center of the University of California at Los Angeles (UCLA).[182] Unknown to Moore and without any payment to him, his physician

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rights.")

174. *See* James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. REV. 29, 36 (1996) (stating that "the crime of theft corresponds to the tort of conversion").

175. *See supra* notes 168-70 and accompanying text.

176. *See* Roy Hardiman, Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 244-48 (1986) (discussing bailment theory as applied to human tissue).

177. 717 F. Supp. 421 (E.D. Va. 1989).

178. *See id.* at 425. For a discussion of the *York* case, see *supra* notes 74-80 and accompanying text.

179. *See* Hardiman, *supra* note 28, at 248-50.

180. Moore v. Regents of the Univ. of Cal., 51 Cal. 3d 120, 793 P.2d 479, 271 Cal. Rptr. 146 (1990).

181. *See id.* at 127, 793 P.2d at 481-82, 271 Cal. Rptr. at 146.

182. *See id.* at 126, 793 P.2d at 481, 271 Cal. Rptr. at 148.

working in cooperation with drug companies used cells from his excised spleen to develop a cell line with a potential $3.01 billion dollar market.[183] Moore sued various parties, including the Regents of the University of California and his surgeon, who established the cell line, alleging various theories, including conversion.[184] Moore alleged that doctors and drug companies made large profits because of his spleen cells, and failed to acknowledge that he deserved any compensation or had any interest in the cells.[185] His outrage was exacerbated by his physicians' insistence that he make repeated trips to UCLA from his home in Seattle so doctors could collect blood and other samples.[186] These were ostensibly collected to monitor Moore's health, but he alleged that the doctors actually collected them so they could benefit financially from their continued access to his cells.[187]

The trial court granted demurrers to most of the claims, including the conversion claim, and Moore appealed.[188] The California Court of Appeal reversed, holding that Moore had stated a cause of action for conversion.[189] The California Supreme Court again reversed, holding in a strongly debated opinion that Moore could not bring a conversion claim on these facts, although the court allowed claims for breach of fiduciary duty and lack of informed consent.[190]

Moore, in some respects, appears analogous to the Irvine fertility cases. However, it is not necessary for courts to disregard or overrule *Moore* in order to hold that misappropriation of human eggs and embryos will support a conversion claim. The *Moore* court restricted its holding when it stated that "we do not purport to hold that excised cells can never be property for any purpose whatsoever," tying the holding to a policy favoring medical research.[191] That

183. *See id.* at 127, 793 P.2d at 482, 271 Cal. Rptr. at 149.
184. *See id.* at 128 & n.4, 793 P.2d at 482 & n.4, 271 Cal. Rptr. at 149 & n.4.
185. *See id.* at 132-33, 793 P.2d at 485-86, 271 Cal. Rptr. at 152-53.
186. *See id.* at 126, 793 P.2d at 481, 271 Cal. Rptr. at 148.
187. *See id.*
188. *See id.* at 128, 793 P.2d at 482-83, 271 Cal. Rptr. at 149-50.
189. *See id.* at 128, 793 P.2d at 483, 271 Cal. Rptr. at 150.
190. *See id.* at 128-29, 136, 144, 793 P.2d at 483, 488, 494, 271 Cal. Rptr. at 150, 155, 161. The adequacy of the other claims is discussed *infra* at notes 336-45 and accompanying text.
191. *Moore*, 51 Cal. 3d at 142, 793 P.2d at 493, 271 Cal. Rptr. at 160. Some research may have been done on the UCI patients' eggs and embryos, but this

policy, whatever its advisability on the *Moore* facts, should not apply to human eggs and embryos, which are taken in fertility treatment not for research purposes, but to produce human babies. There is no reason for society to encourage this misappropriation. On the contrary, concern for human flourishing means that society should label such conduct repugnant and actively discourage it.[192]

An overarching criticism of the *Moore* decision rests on its failure to sufficiently weigh personal considerations.[193] In his dissent, Justice Mosk eloquently invoked concerns of human dignity and fundamental fairness as outweighing any concerns over increased litigation raised by allowing the conversion claim.[194] Concurring and dissenting, Justice Broussard castigated the court's inconsistency in what he saw as allowing an exception to conversion liability, thus foreclosing an important avenue of recovery to the plaintiff, but permitting the doctors and drug companies to retain their "ill-gotten gains free of their ordinary common law liability."[195] Indeed, some commentators have faulted the court as engaging in unsound legal analysis in order to protect the research industry.[196] These concerns

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was done without their permission. *See* McCarthy, *supra* note 147, at A1. Policy should not favor this conduct.

192. *See supra* notes 14-30 and accompanying text.

193. Several commentators have criticized the court for failing to include relational concerns in its policy considerations. *See, e.g.*, Laura M. Ivey, Comment, Moore v. Regents of the University of California: *Insufficient Protection of Patients' Rights in the Biotechnological Market*, 25 GA. L. REV. 489, 512 (1991) (arguing that the *Moore* court failed to accord sufficient weight to patients' rights); James P. Leeds, Note, Moore v. Regents of the University of California: *More for Biotechnology, Less for Patients*, 25 IND. L. REV. 559, 587 (1991) (arguing that the *Moore* decision was "a victory for biotechnology" that insufficiently protects patients' rights); Danielle M. Wagner, Comment, *Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology*, 33 DUQ. L. REV. 931, 942 (1995) (agreeing with Mosk's argument that the *Moore* majority deviated from fundamental fairness in allowing the defendants' unjust enrichment at Moore's expense).

194. *See* 51 Cal. 3d at 173-74, 793 P.2d at 515-16, 271 Cal. Rptr. at 182-83 (Mosk, J., dissenting).

195. *Id.* at 160, 793 P.2d at 506, 271 Cal. Rptr. at 173 (Broussard, J., concurring and dissenting).

196. *See, e.g.*, Ivey, *supra* note 193, at 507, 519 (stating that "[t]he opinion . . . failed to convincingly justify its rejection of Moore's conversion cause of action" and "attributed inordinate importance to protecting the research industry"); Leeds, *supra* note 193, at 587 (describing the opinion as "a victory for the biotechnology industry"); Lisa Mundrake, Note, *Biotechnology and* Moore

over relational issues, important as they should have been in *Moore*, are much more important with respect to human eggs and embryos, because they are of such intimate importance to their progenitors.

Each of the specific bases for the court's holding has been cogently criticized and should not apply to misappropriation of eggs and embryos.

(1) The court said that Moore had abandoned his spleen cells and therefore had no ownership interest in them.[197] This is the most convincing basis for the holding, although it has been criticized.[198] However, it has no application to misappropriation of eggs and embryos. Moore had no further use for the excised cells. Eggs and embryos, on the other hand, are more like the stored sperm in *Hecht*, where the court acknowledged that a donor to a sperm bank does not abandon his sperm.[199] Similarly, the UCI patients' eggs and embryos, far from being abandoned, were precious to their progenitors, who parted with possession only temporarily and expected to retain control over them.[200]

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v. Regents of the University of California: *The Revolution of the Future,* 13 WHITTIER L. REV. 1009, 1042 (1992) (stating that the court appeared to be "searching for any argument which would prevent the extension of tort liability, for the sole purpose of protecting the medical research industry"); *but see* Anthony R. LoBiondo, *Patient Autonomy and Biomedical Research: Judicial Compromise in* Moore v. Regents of the University of California, 1 ALB. L.J. SCI. & TECH. 277, 299 (1991) (stating that "[t]he California Supreme Court's decision not to extend the law of conversion to encompass a patient's ownership right to excised tissue is a prudent exercise in judicial restraint").

197. *See Moore*, 51 Cal. 3d at 136-37, 793 P.2d at 488-89, 271 Cal. Rptr. at 155-56.

198. *See* Philippe Ducor, *The Legal Status of Human Materials,* 44 DRAKE L. REV. 195, 252-53 (1996).

199. *See* Hecht v. Superior Court, 16 Cal. App. 4th 836, 846 n.4, 20 Cal. Rptr. 2d 275, 280-81 n.4 (1993).

200. *See* Plaintiff's [Challenders'] Memorandum of Points and Authorities to Demurrers to Complaint of Defendant Regents of the University of Cal. at 8, Challender v. Regents, (Orange County Super. Ct. filed Nov. 9, 1995) (No. 748303) (arguing that they "placed great value on their eggs, sperm, and embryos," which "were to be removed temporarily in order to achieve fertilization through 'assisted' means and then returned or preserved"); Plaintiff's [Clays'] Opposition to the Demurrer of Defendant, The Regents of the University of Cal.; Memorandum of Points and Authorities in Support Thereof at 7, Clay v. Regents of the Univ. of Cal., No. 752294 (Orange County Super. Ct. filed Nov. 9, 1995) (arguing that rather than abandoning their reproductive materials, the plaintiffs retained dominion and control over them and expected they would be

(2) The court determined that Moore's tissue was not property and therefore could not be converted.[201] This holding was based on the idea that existing legislation so drastically limited Moore's rights in his tissue that it could not be characterized as property.[202] However, the cited legislation is more limited in scope,[203] prescribing only how to dispose of body parts used for research.[204] Therefore, it should not be an obstacle to claims for conversion of eggs or embryos.

The court's holding that Moore's cells were not property has been questioned by commentators who believe it is flatly wrong,[205] some seeing irony in the court's denial of Moore's property right while affirming the doctor's.[206] A federal district court has reached a contrary result, holding that a cell line *is* a chattel capable of being converted.[207] Furthermore, the *Hecht* court has distinguished *Moore* to hold that there is a property interest in human sperm,[208] material that is more analogous to eggs and embryos than a spleen.

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used only by them or would be destroyed).

201. *See Moore*, 51 Cal. 3d at 140-41, 793 P.2d at 491, 271 Cal. Rptr. at 159.

202. *See id.*

203. *See id.* at 140, 793 P.2d at 492, 271 Cal. Rptr. at 159 (citing CAL. HEALTH & SAFETY CODE § 7054.4 (West Supp. 1997), which prescribes the method of disposal of body parts and tissues after "scientific use").

204. *See Moore*, 51 Cal. 3d at 156, 793 P.2d at 503, 271 Cal. Rptr. at 170 (Broussard, J., concurring and dissenting). *See also* Ivey, *supra* note 193, at 515 (finding the majority's "imprecise interpretation" of the statutes to be "extremely suspect").

205. *See* Jeffrey A. Potts, Note, Moore v. Regents of the University of California: *Expanded Disclosure, Limited Property Rights*, 86 NW. U. L. REV. 453, 488 (stating that Moore's cells were property under California law and therefore would support a conversion claim); Robertson, *Switched Embyros*, *supra* note 168, at 17 (stating that misappropriation of gametes and embryos could be characterized as "conversion of property").

206. *See Moore*, 51 Cal. 3d at 160, 793 P.2d at 506, 271 Cal. Rptr. at 173 (Broussard, J., concurring and dissenting); Catherine Caturano Horan, *Your Spleen Is Not Worth What It Used to Be:* Moore v. Regents of UCLA [sic], 24 CREIGHTON L. REV. 1423, 1444 (1991); Wagner, *supra* note 193, at 942.

207. *See* United States v. Arora, 860 F. Supp. 1091, 1099 (D. Md. 1994), *aff'd*, 56 F.3d 62 (4th Cir. 1995) (holding researcher's destruction of new research cell line was conversion). The court cited *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) (holding interest in genetically engineered organism was ownership interest under patent laws) and *Institut Pasteur v. United States*, 814 F.2d 624, 626 (Fed. Cir. 1987) (assuming donated cell line was property).

208. *See Hecht*, 16 Cal. App. 4th at 281, 20 Cal. Rptr. 2d at 281-82.

(3) The court also cited the lack of any cases allowing such a conversion claim.[209] However, dissenting Justice Broussard retorted that there were also no reported decisions rejecting such a claim,[210] saying that this was "simply a case of first impression."[211] Justice Mosk agreed, pointing out that the issue had not been previously decided because the technology was new.[212] Similarly, the lack of cases explicitly allowing a conversion claim for eggs or embryos should not cause courts to shrink from allowing the claim in a factual situation arising from new technology.

(4) The court said that traditional conversion principles could not be applied to the facts of *Moore*.[213] However, Justice Broussard stated, "In reality, it is the majority opinion that departs from established common law principles by fashioning a novel exception that shields the defendants in this case from the ordinary reach of conversion liability."[214] Several commentators agree that under traditional analysis, a conversion claim for misappropriation of human reproductive material should be allowed.[215]

(5) The court said that if conversion were to be extended, the legislature and not the courts should do so.[216] Justice Mosk found this reasoning "[s]urely . . . out of place in an opinion of the highest court of this state," citing some of the California Supreme Court's ground-breaking decisions in the field of tort law.[217]

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209. *See Moore*, 51 Cal. 3d at 135, 793 P.2d at 487, 271 Cal. Rptr. at 154.

210. *See id. at* 165, 793 P.2d at 502, 271 Cal. Rptr. 169 (Broussard, J., concurring and dissenting).

211. *Id.* (Broussard, J., concurring and dissenting).

212. *See id.* at 161, 793 P.2d at 507, 271 Cal. Rptr. at 171 (Mosk, J., dissenting). *See also* Wagner, *supra* note 193, at 942 (criticizing *Moore* as motivated by "blind adherence to tradition" and stating that "[t]he courts should not refrain from recognizing a right simply because such a right was not traditionally recognized").

213. *See Moore*, 51 Cal. 3d at 140-41, 793 P.2d at 492, 271 Cal. Rptr. at 159.

214. *Id.* at 157 n.4, 793 P.2d at 503-04 n.4, 271 Cal. Rptr. at 170-71 n.4 (Broussard, J., concurring and dissenting).

215. *See* Daar, *supra* note 125, at 657 (mentioning conversion as a "perfectly appropriate tool for gaining legal relief against physician abuse of fertility patients"); Robertson, *Switched Embryos*, *supra* note 168, at 17 (stating that conversion is an appropriate claim for misappropriation of gametes or embryos).

216. *See Moore*, 51 Cal. 3d at 147, 793 P.2d at 496, 271 Cal. Rptr. at 163.

217. *Id.* at 161, 793 P.2d at 507, 271 Cal. Rptr. at 171 (Mosk, J., dissenting) (citations omitted).

(6) The court said that a conversion claim was not needed in *Moore* because there are other claims that can vindicate the plaintiff's rights.[218] But these other claims may be illusory, as is developed below,[219] and their existence is not a convincing reason to preclude a conversion claim.

Because of the differing policy considerations, the court's limitation of *Moore* to its facts, and the inapplicability of some of the other bases of the *Moore* holding, the case should not preclude application of conversion theory where reproductive material is concerned.

2. The required state of mind for conversion

Prosser and Keeton have described conversion as "a fascinating tort . . . [h]ighly technical in its rules and complications . . . ."[220] One unusual feature of this "intentional" tort[221] is that the required intent is not the conscious wrongdoing that one usually associates with intentional acts.[222] Rather, it is simply the intent "to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights."[223] Thus, a third party to the original misappropriation, such as a buyer of stolen goods, is a converter, even though she buys them in good faith.[224] Accordingly, conversion is sometimes called a "strict liability tort," a position taken by the California Supreme Court in *Moore*.[225] In using this as a reason for denying a conversion claim, the court's real concern was to avoid imposing unwarranted liability on innocent third parties such as researchers who receive cells from the original physician, and who would thus be discouraged from conducting medical research.[226] However, it is possible to adequately protect innocent third parties

218. *See id.* at 147, 793 P.2d at 496-97, 271 Cal. Rptr. at 163-64.
219. *See infra* notes 336-45 and accompanying text.
220. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 15, at 88 (5th ed. 1984).
221. *See, e.g.*, Dickerson v. Young, 332 N.W.2d 93, 98 (Iowa 1983) (classifying conversion as an intentional tort).
222. *See, e.g.*, KEETON ET AL., *supra* note 220 § 15, at 92.
223. *Id.*
224. *See id.* at 92-93.
225. *Moore*, 51 Cal. 3d at 144, 793 P.2d at 494, 271 Cal. Rptr. at 161.
226. *See id.*

through the doctrine of accession and through accepted damages principles,[227] while still allowing for liability of the true wrongdoers where other claims may be more difficult to establish.[228]

3. The characterization of eggs and embryos

Because conversion is defined as dominion over property, the question of whether eggs and embryos are property must be addressed. This question is not easily answered. Courts and commentators have struggled with the characterization of human body parts and products.[229] Nor does the decision to take a relational view resolve the issue, for there has been continuing debate about whether calling human body products "property" affirms or discourages human flourishing.[230]

Simply put, property is whatever the law says it is. As the United States Supreme Court has observed, "[N]ot all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them . . . ."[231] The legal analysis conceptualizes property as a bundle of rights inherent in a person's relation to a physical thing.[232] The bundle includes rights to "possess, use, exclude others, enjoy the fruits and profits, destroy, and alienate."[233] But not all of these rights are necessary for full

227. *See infra* notes 290-335 and accompanying text.

228. *See infra* notes 336-45 and accompanying text.

229. For thorough discussions of the historical treatment and current characterizations of human body parts and products, see William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 731 (1995) (reviewing historical and current developments, and urging adoption of "a full property right in the human body"); Bray, *supra* note 17, at 210 (reviewing historical and current developments in categorizing body parts and urging adoption of a quasi-property approach). An earlier but creative and influential treatment of the subject appears in Andrews, *My Body, My Property*, HAST. CTR. RPT., Oct. 1996, at 28, 37 [hereinafter Andrews, *My Body, My Property*] (calling for recognition of a limited property right in body parts and products).

230. *See* RADIN, CONTESTED COMMODITIES, *supra* note 15, at 125-26.

231. United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).

232. *See Moore*, 51 Cal. 3d at 165, 793 P.2d at 509, 271 Cal. Rptr. at 176 (Mosk., J., dissenting); Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987). For a fuller discussion of the bundle of rights concept, see J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996).

233. Shelby D. Green, *The Public Housing Tenancy: Variations on the*

ownership.[234] Thus, "some types of properties can be given, but not sold (items made of fur or feathers of endangered species, for example). Other types of properties (such as holdings of a person who is bankrupt) can be sold, but not given as gifts."[235] The question, then, is how our society should view body parts and products.

While it is unlikely that anyone would argue that eggs are persons,[236] some have vehemently maintained that embryos are.[237] Characterizing human embryos as "persons" would seem to reinforce relational concerns, but students of the issue have found the problem more complex than that. Our jurisprudence has not treated embryos as persons.[238] The Supreme Court has held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[239] Nor are they persons in other contexts such as homicide and wrongful death.[240] If we did characterize embryos as persons, they would acquire rights that we have historically been unwilling to accord them. For example, health care professionals could not

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Common Law that Give Security of Tenure and Control, 43 CATH. U. L. REV. 681, 716-17 (1994).

234. *See* United States v. Ben-Hur, 20 F.3d 313, 317-18 (7th Cir. 1994); *see also* James D. Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1512 (stating "The removal of one or more sticks from the bundle should have no particular implications for the legally protected interests that remain").

235. Andrews, *My Body, My Property*, *supra* note 229, at 29.

236. *See* Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 920 (1997) (stating that "only the most extreme view would characterize sperm or unfertilized eggs as 'persons'") (citing PETER SINGER & DEANE WELLS, MAKING BABIES: THE NEW SCIENCE AND ETHICS OF CONCEPTION 71 (1985)).

237. *See id.* at 918 (observing that there is controversy about the status of the embryo, but that "'the embryo as person' view is not a position that is reflected either in American common law or current constitutional law").

238. *See id.* (treating gametes as property); *see generally* Michelle F. Sublett, Note, *Frozen Embryos: What Are They and How Should the Law Treat Them?*, 38 CLEV. ST. L. REV. 585, 600-08 (1990) (reviewing law on status of embryos). *But see* LA. REV. STAT. ANN. § 9:123 (West 1991) (providing that in vitro fertilized ovum is a biological human being).

239. Roe v. Wade, 410 U.S. 113, 158 (1973) (establishing a constitutional right to choose an abortion).

240. *See* Sublett, *supra* note 238, at 589-90 (noting that the death of a fetus will not support a wrongful death claim or homicide prosecution); *see also* Schiff, *supra* note 236, at 918 (mentioning constitutional, homicide, and wrongful death law as areas in which embryos are not treated as persons).

dispose of them without legally committing murder; disputes over embryos would be governed by the "best interest of the child" rule;[241] and embryos would have all the rights of persons, including the right to sue.[242] Thus, this characterization has not received strong support among the commentators who advocate a relational view of the issue,[243] and it is ultimately unsatisfactory.

This raises the question whether human eggs and embryos should be classified as property. Interestingly, while the sale of human eggs and embryos is illegal in many foreign countries,[244] only a few United States jurisdictions have taken the same approach.[245] Society currently recognizes property rights in certain body products: for example, blood, sperm, ova,[246] cells, and hair are alienable.[247]

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241. *See infra* note 286 and accompanying text.

242. *See* Schiff, *supra* note 236, at 917.

243. *See infra* note 267 and accompanying text.

244. *See, e.g., Japanese Couple to Donate Fertilized Eggs to U.S. Couple*, JAPAN SCI. SCAN, Jan. 19, 1998, *available in* 1998 WL 8029751 (donating eggs and embryos is illegal in Japan); Gina Kolata, *U.S. Fertility Centers Attract Eager Foreigners*, TIMES-UNION, Jan. 4, 1998, at A5, *available in* 1998 WL 7239066 (making payments to egg donors is illegal in Australia and England).

245. *See* FLA. STAT. ANN. § 873.05 (West 1994) (advertising or sale of human eggs is illegal in Florida); LA. REV. STAT. ANN. § 9:122 (West 1991) (sale of a human ovum, fertilized human ovum, or human embryo is illegal).

246. *See* Ann Alpers & Bernard Lo, *Commodification and Commercialization in Human Embryo Research*, 6 STAN. L. & POL'Y REV. 39, 41 (1995) (stating that payment for sperm and eggs is now "widespread in American clinical infertility programs"). *But see* LA. REV. STAT. ANN. § 9:122 (West 1991) (sale of ova and embryos is prohibited).

247. *See* Boulier, *supra* note 229, at 712 (citing RUSSELL SCOTT, THE BODY AS PROPERTY 180-81, 190-91 (1981)). Boulier notes that blood, semen, hair, teeth, sweat, urine, skin, muscle, and even pituitary glands have been "treated as commodities appropriate for sale with very little legal involvement." *Id.* Boulier also notes that the current statutory schemes leave many issues unaddressed. *See id.* at 712-13.

The Uniform Anatomical Gift Act, now passed "in some form, by all fifty states," authorizes donations of body parts for medical research, while the National Organ Transplantation Act, 42 U.S.C. §§ 201, 273, 274(e) (Supp. 1994), prohibits the sale of organs for transplant, but is silent on dispositions of organs for other purposes. *See* Boulier, *supra* note 223, at 712-13. Boulier also explains that most states have laws similarly limited in scope, while only a few have passed more detailed schemes. *See id.* at 713 nn.145-46. *See also* Schiff, *supra* note 236, at 916 (citing Gloria J. Banks, *Legal and Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Or-*

Although those who provide eggs are often referred to as "donors," and their payment described as payment for services, not goods,[248] the transfer of money for human eggs [249] and, to a lesser extent, embryos[250] is occurring on a widespread basis in the United States. Some commentators have therefore suggested that they should be characterized in the law as property.[251] Professor Robertson has made the related point that, "[s]ince eggs and embryos would appear to be things of value, there is no barrier in principle to applying theft and larceny laws to their misappropriation."[252]

At the same time, many legal commentators have been reluctant to unequivocally classify human eggs and embryos as "property."[253] Indeed, we ought to question whether complete commodification of eggs and embryos is appropriate, since they involve the most

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gan Transplantation System, 21 AM. J.L. & MED. 45, 65-66 (1995)).

248. *See, e.g.*, Byers, *supra* note 46, at 275 n.69; Katheryn D. Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past*, 57 ALB. L. REV. 733, 739 (1994) (stating that egg providers are not donors, but "are paid $2000 for their 'time and effort'").

249. *See* Marie McCullough, *Egg Donor's Role in Baby-Making Grows*, TIMES-UNION, Mar. 9, 1998 at A1, *available in* 1998 WL 7248102 (eggs are now bought and sold on the open market); Knox, *supra* note 68, at 1 (egg broker advertises $35,000 plus expenses for egg of Princeton University student).

250. *See* Terry Anderson, *Too Much Technology is a Bad Thing*, BUFF. NEWS, Nov. 26, 1997, at B3, *available in* 1997 WL 6476716 (discussing the emerging business in embryos from surplus eggs fertilized through commercial sperm banks).

251. *See, e.g.*, Barry Brown, *Reconciling Property Law with Advances in Reproductive Science*, 6 STAN. L. & POL'Y REV. 73, 76 (1995) (noting that the Supreme Court of Tennessee treated human preembryos as though they were property of the couple). *See also* Boulier, *supra* note 229, at 731 (advocating a "full property right in the human body").

252. John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 919 (1996).

253. *See, e.g.*, Radin, *Market-Inalienability*, *supra* note 20, at 1856 n.33 (noting that status of sperm, eggs, and embryos is subject of debate); Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 207 (1997) (suggesting that traditional categories of person and property may not be useful to analyze problems concerning reproductive material). *Cf.* Andrews, *My Body, My Property*, *supra* note 85, at 29 (suggesting that human body parts might be classified as quasi-property that would not be treatable as property by third parties); Hardiman, *supra* note 176, at 258 (proposing that instead of an absolute property right the law should recognize a "right of commerciality" in human tissue).

personal of concerns. Their retrieval involves a more invasive and risky process than does retrieval of either blood, semen, or hair.[254] Furthermore, the potential of embryos to become human beings makes them more personal and valuable to the donors than blood or hair.

Moreover, they are undeniably a form of life, and our past should caution us about referring to life as property. Two of the least savory aspects of our cultural history are the treatment of slaves[255] and women[256] as property. This history illustrates how complete alienability can adversely affect peoples' well-being. Yet ownership in the context of slavery, where one human being owns another, is significantly different from the ownership rights in one's own body.[257] The right of alienability and control over one's own regenerative body products affirms personhood and offers psychological benefits, including a salutary sense of autonomy.[258] Therefore, the moral arguments against slavery actually favor recognition of a property right in human tissue.[259] Recognizing a property right in human eggs and embryos may thus be appropriate to advance people's well-being.

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254. *See* Katz, *supra* note 248, at 772 (stating "[T]he retrieval of eggs is more complex and requires more sophisticated techniques than the collection of sperm").

255. *See* United States v. The Libellants & Claimants of the Schooner Amistad, 40 U.S. 518, 593, 597 (1841) (holding that rebellious Africans were not property but had been kidnapped and were therefore entitled to their freedom); KATHARINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW; THEORY DOCTRINE, COMMENTARY 8 (2d ed. 1998) (reviewing the history of slaves as property of their masters).

256. *See* BARTLETT & HARRIS, *supra* note 255, at 9-16 (reviewing the legal history of married women as property of their husbands).

257. *See* Karen G. Biagi, Note, Moore v. Regents of the University of California: *Patients, Property Rights, and Public Policy*, 35 ST. LOUIS U. L.J. 433, 433 (1991).

258. *See* Andrews, *My Body, My Property*, *supra* note 229, at 37; *but see* Stephen R. Munzer, *An Uneasy Case Against Property Rights in Body Parts*, *in* PROPERTY RIGHTS 259 (Ellen Frankel Paul et al. eds., 1994) (arguing on relational grounds against a property right in human bodies and body products).

259. *See* Hardiman, *supra* note 176, at 225; *see also* John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 512 (1990) (observing that, although treatment of human embryos as sellable property may be offensive as "smack[ing] too much of the buying and selling of human beings that occurred in chattel slavery," the purchased embryos differ from slaves in that they would not be the slaves of their "owners").

However, at least one court and some commentators who acknowledge the need for recognition of a property right believe that it should be limited.[260] The common law already includes a way to recognize a limited property right: the category of "quasi-property."[261] Restricted to certain narrow situations, this category finds its most widespread use in assuring the rights of next-of-kin to determine how a corpse will be disposed of.[262] The majority of United States jurisdictions recognize this right,[263] which commonly includes "the right to custody of the body; to receive it in the condition in which it was left, without mutilation; to have the body treated with decent respect, without outrage or indignity thereto; and to bury or otherwise dispose of the body without interference."[264] Quasi-property rights have also been recognized in trademarks[265] and in a stillborn fetus on behalf of its mother who objected to introduction of evidence found during its autopsy.[266]

The common law classification of these items as quasi-property occurred where courts had to deal with rights that did not fit neatly into traditional classifications but which they felt clearly deserved protection. The quasi-property category is therefore a reasonable choice for eggs and embryos,[267] which also do not fit neatly into

260. *See infra* note 267 and accompanying text.

261. *See* 22A AM. JUR. 2D *Dead Bodies* § 3 (1988); Hardiman, *supra* note 176, at 217 n.44.

262. *See* 22A AM. JUR. 2D *Dead Bodies* § 3.

263. *See* Brotherton v. Cleveland, 923 F.2d 477, 480 (6th Cir. 1991).

264. Whitehair v. Highland Memory Gardens, Inc., 327 S.E.2d 438, 441 (W. Va. 1985) (citations omitted).

265. *See, e.g.,* Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 955 F. Supp. 605, 613 n.7 (E.D. Va. 1997) (recognizing "an owner's quasi-property right in a famous mark"); LeBas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group, 50 Cal. App. 4th 548, 561, 59 Cal. Rptr. 36, 50 (1996) (stating that common law misappropriation creates quasi-property right in a "word or style").

266. *See* Jackson v. State, 430 S.E.2d 781, 784 (Ga. Ct. App. 1993).

267. The *Davis* court held that embryos occupy an intermediate category. *See supra* notes 81-87 and accompanying text. Several commentators have reasoned similarly. *See* Andrews, *Legal Status of the Embryo, supra* note 29, at 368 (stating that an embryo is "neither person nor property"); Bray, *supra* note 17, at 239-40 (arguing that "individuals' interests in their bodies should be protected as property interests" that are nonetheless market inalienable); Guzman, *supra* note 253, at 251-52 (concluding that we must recognize some property rights in frozen embryos, but that previous "safe and easy" distinc-

traditional categories, and which involve interests that deserve protection.[268] Precisely because eggs and embryos are so personal and important,[269] they should be placed in a category that assures their donors some property rights.[270] Characterizing them as quasi-property would allow for vesting of rights similar to those already recognized in other quasi-property,[271] securing for donors the rights to custody of the material, to receive it in the condition in which it was left, and to determine its ultimate disposition.[272] The right to exclude others, which is recognized as "one of the most essential sticks

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tions will not apply); John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1038 (1994) (stating that regardless of whether a conversion action will lie under *Moore*, "a property interest in gametes must exist"); Schiff, *supra* note 236, at 921 (advocating classification of embryos in an intermediate category between persons and property); Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1145 (1997) (stating that most courts and commentators have favored placing preembryos in an intermediate category between property and personhood). *But see* Richard Gold, *Owning Our Bodies: An Examination of Property Law and Biotechnology*, 32 SAN DIEGO L. REV. 1167, 1170-72 (1995) (arguing that the human body should not be subject to property analysis); Munzer, *supra* note 258, at 259 (arguing on relational grounds against a property right in human bodies and body products).

268. *See* James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1513-14 (1992) (arguing that the problem should be addressed by first identifying the goals at stake and then determining what remedy will adequately achieve them).

269. *See* Andrews, *My Body, My Property*, *supra* note 229, at 31 (stating that characterizing gametes and embryos as property is appropriate to accord weight to the biological parents' wishes).

270. *See id.* at 30 (stating that "if body parts are not considered property, there may be little protection for people who entrust their bodily materials to others").

271. *See id.* at 29, 37 (mentioning quasi-property theory and advocating that body parts be placed in an intermediate category under which regenerative body parts would be saleable by the individual but not by third parties); *see also* Hardiman, *supra* note 176, at 250 (arguing that a quasi-property right exists in excised tissue and will support a conversion claim); Horan, *supra* note 206, at 1445 (suggesting that quasi-property rights would be appropriately applied to human tissue).

272. *See* Brown, *supra* note 251, at 84 (stating that "application of property theory regarding the traditional bundle of rights associated with ownership will enhance the coming public policy debate" concerning ownership of genetic material).

in the bundle of . . . property,"[273] would survive under this approach. It accords with the Ethical Statement of the American Fertility Society, which provides that the donors of gametic material should have the right to control its disposition within the law.[274]

This intermediate treatment could be tailored to forestall an evil pointed out by Professor Andrews: allowing third persons to sell an individual's body products.[275] Complete alienability might encourage the poor to sell body parts to pay bills or taxes, encourage persons to sell their family members' body parts, and subject body parts to tax or physicians' liens.[276] Therefore, the better proposal is that persons should be allowed dominion over their own body products and regenerative parts, but others should not be allowed to treat them as alienable.[277]

An intermediate categorization of body products and regenerative parts as property of the individual would support an action for conversion. The plaintiff need not have "absolute ownership" to maintain a conversion action.[278] A qualified interest in property, such as possession of a lien, is sufficient.[279] Thus, if society desires some qualification of the progenitors' rights,[280] that can be accomplished without depriving the plaintiff of a conversion claim.

4. Conversion remedies—application to eggs and embryos

Even if the obstacles to identifying a sufficient property interest in eggs and embryos are overcome, there remains another obstacle to

273. *Nollan*, 483 U.S. at 831 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)).

274. *See AFS Ethical Statement, supra* note 80, at 89S.

275. *See* Andrews, *My Body, My Property, supra* note 229, at 36.

276. *See id.; see also* Boulier, *supra* note 229, at 728 (noting the dangers of persons "selling off . . . 'loved ones' to make a fast dollar").

277. *See* Andrews, *My Body, My Property, supra* note 229, at 37. *Cf.* Brown, *supra* note 251, at 80 (proposing that "remote gestation," with its possibility of "cryogenic orphans," should be banned).

278. *See* Leeds, *supra* note 193, at 582 (citing Everfresh, Inc. v. Goodman, 131 Cal. App. 2d 818, 820, 281 P.2d 560, 561 (1955)).

279. *See id.* (citing Bastanchury v. Times-Mirror Co., 68 Cal. App. 2d 217, 156 P.2d 488 (1945) and Ruiz v. Bank of Am. Nat'l Trust & Sav. Ass'n, 135 Cal. App. 2d Supp. 860, 287 P.2d 409 (1955) which states that a "qualified interest" in an automobile is sufficient).

280. *See* Byers, *supra* note 43, at 303.

applying the conversion tort. The traditional remedies for conversion are replevin and damages,[281] each of which is problematic in this context.

a. replevin

Replevin judicially returns the misappropriated property to the plaintiff.[282] While such a remedy makes sense with chattels like diamond rings or automobiles, it is unsuitable where human eggs and embryos are concerned. In the typical case, the plaintiff is suing because her egg or embryo was implanted in another woman. The procedure may have failed, meaning the material no longer exists, or it may have resulted in a live birth.[283] In that event, traditional conversion doctrine dictates that the gestational parent is a converter.[284] This remedy, then, would replevy a living child, greatly different from the misappropriated reproductive material. Such a result would be unsatisfying for any number of reasons, one of which is a repugnance toward treating human beings as property.[285] A second reason is the now generally accepted principle that the best interests of the child should apply in child custody cases.[286] It is widely believed that taking a child from the only parents she has known and placing her with persons who are strangers to her can be psychologically harmful.[287] Moreover, the doctrine of accession[288] would limit

281. *See* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 5.13(1), at 835, § 5.17(1), at 917 (2d ed. 1993).

282. *See id.* § 5.17(1), at 917.

283. *See supra* note 138 and accompanying text.

284. *See Moore*, 51 Cal. 3d at 144, 793 P.2d at 494, 271 Cal. Rptr. at 161.

285. *See supra* notes 255-56 and accompanying text.

286. *See* Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 275 (1998); Sublett, *supra* note 238, at 604 (commenting that courts "most frequently adopt the doctrine of the 'best interests of the child' in custody cases").

287. *See* Katz, *supra* note 248, at 757 & nn.112-14 and accompanying text (emphasizing importance of child's attachments to adults who may not be part of the nuclear family). Psychologists warn against the potential psychological harm to a child if she is taken from the only parents she has ever lived with. *See* David Parrish & Kim Christensen, *UCI Cases May Spawn Custody Wars*, ORANGE COUNTY REG., July 9, 1995, at A1 (quoting psychologist Frances Latimore).

288. *See infra* notes 327-32 and accompanying text.

application of this remedy where the material has undergone a significant change. Consequently, this traditional conversion remedy will serve to promote neither practical nor relational concerns where human eggs and embryos are concerned.[289]

b. damages

Even where replevin is inappropriate, conversion principles provide for money damages. The traditional measure of damages for conversion is the market value of the property at the time and place of conversion, plus, if appropriate, interest and costs incurred in recovering the property.[290] Here a conceptual difficulty arises. Fixing a market value for eggs or embryos is difficult as well as unsettling. It is difficult because of the widely varying prices people offer for them,[291] and because eggs and embryos are often characterized as "donated," with the donor simply being paid for her expenses.[292] It is unsettling because it suggests that these human materials are not personal at all, but fungible.[293]

But market value is not the only permissible measure of damages for conversion. Notwithstanding the frequently repeated general rule, many jurisdictions allow other measures where necessary to avoid injustice.[294] Depending on the circumstances, these may include such items as consequential damages,[295] the cost of recreating the converted property,[296] or emotional distress damages.[297]

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289. *See* Hardiman, *supra* note 176, at 253-55 (observing that the traditional rules for replevin are difficult to apply in the context of human tissue).

290. *See id.* at 251-52; *see also* 1 DOBBS, *supra* note 281 § 5.13(1), at 835.

291. *See supra* notes 248-49 and accompanying text.

292. However, whether their donation is called a sale or a service, it is possible to determine prices paid for eggs. *See supra* notes 248-49 and accompanying text.

293. *See supra* notes 18-30 and accompanying text.

294. *See, e.g.*, American E. India Corp. v. Ideal Shoe Co., 400 F. Supp. 141, 169 (E.D. Pa. 1975) (stating that the general purpose of conversion damages is to provide indemnity for loss sustained, and whatever measure will accomplish that end is appropriate).

295. *See* Grant v. Newsome, 411 S.E.2d 796, 798 (Ga. Ct. App. 1991) (stating that consequential damages would be recoverable in inmate's claim for conversion of personal property); Staub v. Staub, 376 A.2d 1129, 1133 (Md. Ct. Spec. App. 1977) (stating that consequential damages to compensate for "other injurious consequences . . . of the . . . conversion" may be allowed, but denying them because of lack of proof); Southern Mo. Bank v. Fogle, 738

In California, a statutory rule governs. Enacted in 1872, the conversion statute has two alternative damages provisions: "The value of the property at the time of the conversion, with the interest from that time, or an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted."[298] The courts have determined that the first measure, based on the value of the converted property at the date of conversion, is the ordinary measure.[299] However, courts apply the second measure when application of the first would be manifestly unjust,[300] allowing recovery in special circumstances for items such as lost profits[301] and emotional distress.[302] Various courts have held similarly in other jurisdictions.[303]

S.W.2d 153, 158 (Mo. Ct. App. 1987) (stating that lost profits during a reasonable time for replacement of the chattel may be recoverable in a conversion case, but denying them on the facts); Virgil T. Walker Constr. Co. v. Flores, 710 S.W.2d 159, 161 (Tex. App. 1986, no writ) (allowing recovery of cost of shipping farm equipment that defendant converted before plaintiff could sell it as the "natural and proximate result of the defendant's wrong").

296. *See, e.g.,* United States v. Arora, 860 F. Supp. 1091, 1100 (D. Md. 1994) (allowing as damages the cost of creating or recreating converted human cells).

297. *See* Gonzales v. Personal Storage, Inc., 56 Cal. App. 4th 464, 477, 65 Cal. Rptr. 2d 473, 481 (1997) (holding that emotional distress damages were recoverable for conversion of personal property by storage company); Ducote v. City of Alexandria, 677 So. 2d 1118, 1122 (La. Ct. App. 1996) (allowing damages for mental anguish for conversion of truck); Morrow v. Kings Dept. Stores, Inc., 290 S.E.2d 732, 735 (N.C. Ct. App. 1982) (stating that emotional distress damages are recoverable in conversion claims where "malice, wantonness, or other aggravating circumstances" are present); Fredeen v. Stride, 525 P.2d 166, 168 (Or. 1974) (stating that emotional distress damages for conversion of dog may be awarded if the defendant's conduct was "aggravated").

298. CAL. CIV. CODE § 3336 (West 1991).

299. *See* Krueger v. Bank of America, 145 Cal. App. 3d 204, 215, 193 Cal. Rptr. 322, 329 (1983) (awarding damages based on the value of converted property at the date of conversion).

300. *See* Lint v. Chisholm, 121 Cal. App. 3d 615, 624-25, 177 Cal. Rptr. 314, 319 (1981) (awarding damages for loss of use because they exceeded the interest measure).

301. *See* Myers v. Stephens, 233 Cal. App. 2d 104, 117-19, 43 Cal. Rptr. 420, 430-31 (1965) (allowing lost profits damages for wrongful removal of house from property).

302. *See Gonzales,* 56 Cal. App. 4th at 477, 65 Cal. Rptr. 2d at 481 (allowing emotional distress damages where the plaintiff's personal belongings were

Misappropriation of eggs and embryos qualifies for this second measure of damages for at least three reasons. First, because the misappropriation affects the donors' deepest personal interests,[304] it cannot be termed "ordinary." Second, with widely varying prices being offered for eggs and embryos, establishing a market value for them is problematic as well as unsatisfying.[305] Third, the replevin remedy will not provide redress in this situation.[306] Yet some remedy for the misappropriation is needed, and to avoid injustice, a money remedy must be fashioned. This can be achieved by using the second measure of damages provided in the California statute.

Determining appropriate compensation is difficult where an item is not completely commodified.[307] Yet in our jurisprudence, lack of commensurability does not mean lack of compensibility.[308] Our legal system recognizes that even where losses are not mathematically commensurable with dollar amounts, monetary compensation may provide some solace to victims by "recognizing the wrong and signifying its weightiness."[309] For example, dignitary torts, like nonharmful batteries and denial of the right to vote,[310] support damages

converted).

303. *See supra* notes 295-97 and accompanying text.

304. *See supra* notes 31-41 and accompanying text.

305. *See supra* notes 248-49 and accompanying text.

306. *See supra* notes 282-89 and accompanying text.

307. *See* RADIN, CONTESTED COMMODITIES, *supra* note 15, at 187-89. Radin comments, "If corrective justice requires rectification, and if injury cannot be translated into money, how can payment of money ever amount to rectification, so as to satisfy the demands of corrective justice? The problem, an important one, has been too little noticed, perhaps because the connection between compensation and commensurability has been too little noticed." *Id.* at 191.

308. *See* 1 DOBBS, *supra* note 281 § 3.1, at 277-78; *Arora*, 860 F. Supp. at 1100 (stating that "mere difficulty in ascertaining damages is not a basis for denying them").

309. RADIN, CONTESTED COMMODITIES, *supra* note 15, at 195 (citing Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 224 (1953)); *see also* 1 DOBBS, *supra* note 281 § 3.1, at 282

310. Dignitary torts have been defined as "injuries to one's personality or the dignity one has as a person." J. Martin Burke & Michael K. Friel, *Getting Physical: Excluding Personal Injury Awards Under the New Section 104(a)(2)*, 58 MONT. L. REV. 167, 179 (1997). Where bodily interests are involved, dignitary interests rest "not only in our bodily integrity, but in our dignity." Sharon Nan Perley, Note, *From Control Over One's Body to Control Over*

awards even though the awards are not commensurable with a pecuniary value.[311] The misappropriation of eggs and embryos bears some similarity to dignitary torts,[312] because it involves an injury to aspects at the very core of human dignity, sexuality and reproduction. Just as remedies are fashioned for dignitary torts, they can also be devised for the misappropriation of human reproductive material.

Where market value is difficult to fix, some courts have awarded the cost of replacing the converted material.[313] This remedy was applied to a human body product in *United States v. Arora*[314] where the court awarded the cost of recreating a converted human cell line.[315] This remedy may yield substantial damages in fertility treatment, where the costs of retrieving the reproductive material are high.[316]

Other measures of damages may also be available. Various kinds of nonpecuniary harm, most notably pain and suffering and emotional distress, are compensated under the tort system, sometimes resulting in "substantial damages."[317] For misappropriation of human eggs and embryos, courts could award emotional distress damages, for which there is precedent in existing conversion law.[318] There is also precedent for awarding damages for the "special and intrinsic value" of the converted material, as has been done with items such as personal collections, antiques, and photographs.[319]

One's Body Parts: Extending The Doctrine of Informed Consent, 67 N.Y.U. L. REV. 335, 350 (1992) (arguing that "we retain dignitary interests in what happens to our tissues and cells, even after they have been removed from our bodies").

311. *See* 1 DOBBS, *supra* note 281 § 3.1, at 281.

312. *See* Perley, *supra* note 310, at 350 (identifying a dignitary interest in human cells and tissues).

313. *See* Lakewood Eng'g & Mfg. v. Quinn, 604 A.2d 535, 542-43 (Md. Ct. Spec. App. 1992) (awarding replacement value of lost household items); Rajkovich v. Alfred Mossner Co., 557 N.E.2d 496, 500 (Ill. App. Ct. 1990) (allowing recovery for architect's time to redo damaged architectural drawings).

314. 860 F. Supp. 1091 (D. Md. 1994).

315. *See id.* at 1100.

316. *See supra* note 43 and accompanying text.

317. *See* 1 DOBBS, *supra* note 281 § 3.1, at 281.

318. *See supra* note 297 and accompanying text.

319. *See* Walters v. Hatcher, 41 B.R. 511, 514 (Bankr. W.D. Mo. 1984) (awarding amount to compensate for special value of antiques, collections, and photograph of plaintiff's mother).

Finally, courts might also analogize loss of an embryo to loss of a fetus, for which damages have been awarded.[320]

Against the wrongdoers, any of these measures might result in substantial awards[321] that would approach adequate compensation of the aggrieved plaintiffs and serve to deter the offending behavior. They may also be accompanied by punitive damages. Because some degree of wrongful intent is required for punitive damages, they are not automatically awarded for conversion claims.[322] However, a converter's conduct will often demonstrate the needed malice,[323] as it might in the UCI cases, where the doctors' conduct was arguably deliberate.[324]

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320. *See, e.g.*, Gullborg v. Rizzo, 331 F.2d 557, 560-61 (3d Cir. 1964) (awarding damages for death of unborn fetus of $5,000 based upon present value of prospective earnings less anticipated maintenance expense taking into account that the deceased unborn's father is a college graduate).

321. *See, e.g., Gonzales*, 56 Cal. App. 4th at 468-69 n.1, 65 Cal. Rptr. 2d at 475 n.1 (awarding damages of $232,582 in emotional distress damages for the conversion of woman's personal items including the only photograph of a deceased child).

322. *See* Hicks v. Lilly Enters., 608 P.2d 186, 189 (Or. Ct. App. 1980) (stating that punitive damages are appropriate in conversion cases only where there has been a "particularly aggravated disregard of the rights of the victim") (quoting Noe v. Kaiser Found. Hosp., 435 P.2d 306, 308 (Or. 1967)); Staub v. Staub, 376 A.2d 1129, 1133-34 (Md. Ct. Spec. App. 1977) (disallowing punitive damages where converter acted in good faith).

323. *See, e.g.*, Roberson v. Ammons, 477 So.2d 957, 961 (Ala. 1985) (holding evidence that car was converted in knowing violation of plaintiff's rights supported award of punitive damages); Krusi v. Bear, Stearns & Co., 144 Cal. App. 3d 664, 679-80, 192 Cal. Rptr. 793, 803 (1983) (holding that substantial evidence supported jury's findings that stock brokerage firm's conversion of stock was malicious and supported award of punitive damages); Molenaar v. United Cattle Co., 553 N.W.2d 424, 428-29 (Minn. Ct. App. 1996) (holding punitive damages recoverable for conversion of livestock where defendant acted in deliberate disregard for the rights or safety of others); *Hicks*, 608 P.2d at 189 (Or. Ct. App. 1980) (upholding award of punitive damages where jury could have found defendant wilfully converted some of plaintiff's property without a good faith belief it was entitled to have the property).

324. *See Arora*, 860 F. Supp. at 1101 (holding that the researcher's intentional and malicious conversion of a cell line supported an award of punitive damages). In California, punitive damages may be awarded when there is clear and convincing evidence of malice, fraud, or oppression, some or all of which would appear easily provable against physicians who engage in conscious or reckless misuse of reproductive material. *See* CAL. CIV. CODE § 3294 (West 1997). Whether punitive damages could also be awarded against

The *Moore* court was particularly concerned about the potential assessment of damages against innocent converters of tissue—that is, medical researchers—if it allowed a conversion claim.[325] In the egg and embryo cases, the real wrongdoer is typically a physician or other health care provider who acts either intentionally or negligently—that is, who bears some moral blame. But the *Moore* court's concern about innocent third parties draws attention to the gestational parents, who presumably would be innocent. Having exercised dominion over the reproductive material in contravention of the donors' rights, they would be converters.[326] However, concerns about their liability can be allayed by reference to the doctrine of accession.

That doctrine provides that "if materials of one person are combined or united with the materials of another by skill and labor, forming a single, joint product, the owner of the principal materials which go to make up the whole acquires by accession the right of property in the whole."[327] Most courts require the enhanced item to be substantially different from the old.[328] Although this language seems startling when applied to human tissue,[329] the concept is nevertheless applicable: the mother in whom the egg or embryo is implanted adds effort and her own bodily products in order to nurture the developing fetus and give birth to the child, who easily satisfies the requirement of substantial difference from the original material. The doctrine of accession would therefore cut off any right of the

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an employer such as UCI would depend on whether the plaintiffs met the statute's requirement to show an employer's participation in or ratification of the offending conduct. *See id.*

325. *See Moore*, 51 Cal. 3d at 144-45, 793 P.2d at 494-95, 271 Cal. Rptr. at 161-62.

326. *See id.* at 144, 793 P.2d at 494, 271 Cal. Rptr. at 161.

327. 1 AM. JUR. 2D *Accession and Confusion* § 1 (1994).

328. *See id.*; Laura K. W. Rebbe, Note, *Misrepresentation, Conversion, and Commercial Human Tissue Research,* 66 WASH. U. L.Q. 643, 665 (1988).

329. The *Moore* court did not explicitly apply this doctrine. Instead, it dealt with the changed character of the cells through reference to patent law. *See Moore*, 51 Cal. 3d at 141-42, 793 P.2d at 159-60, 271 Cal. Rptr. at 492-93. Because patents are permitted for products of "human ingenuity" but not for naturally occurring organisms, and because this cell line was patented, the court found it "factually and legally distinct" from Moore's cells and therefore not subject to his ownership. *Id.*

plaintiffs to replevin of the child.[330] The gestational parents could, however, still be liable for damages.[331]

These damages could be nominal. In accession cases, an innocent converter is not responsible for the entire enhanced value of the converted item but merely for the value of the original misappropriated item or the value of the enhanced property minus the converter's costs and labor.[332] In California, where a manifest justice rule obtains,[333] a court could decide to assess only nominal damages[334] against a couple who innocently received a misappropriated egg or embryo. Thus the concern about the innocent gestational parents need not be an obstacle to pursuing the real wrongdoer for conversion.

The concern about third party researchers is less convincing with reproductive material than it is with spleen cells. In fertility treatment, gametes are taken not for research purposes, but rather to initiate pregnancies. Although some research may be done on human reproductive material,[335] society should not approve of its delivery to researchers without the donors' consent. Allowing for conversion claims will provide a meaningful incentive for researchers to be certain they have the necessary consent before receiving eggs or embryos. If mistakes occur and researchers are truly innocent, they could be protected from large damage awards in the same way as innocent gestational parents.

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330. *See id.*; John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 393 (1991). *See also* discussion of replevin, *supra* notes 282-89 and accompanying text.

331. *See* 1 AM. JUR. 2D *Accession and Confusion* § 13 (1994).

332. *See id.*

333. *See* CAL. CIV. CODE § 3336 (West 1991); *see also Lint*, 121 Cal. App. 3d at 624-25, 177 Cal. Rptr. at 319 (awarding damages for loss of use of converted property rather than for interest where the former measure was necessary to adequately compensate the plaintiff).

334. *See* Cincinnati & Suburban Bell Tel. Co. v. Carter Constr. Co., 216 N.E.2d 885, 886 (Ohio Ct. App. 1966) (one dollar in nominal damages awarded where plaintiff could not show reasonableness of costs to repair converted telephone cable).

335. *See supra* note 147 and accompanying text.

B. Other Tort Claims Do Not Eliminate the Need for a Conversion Claim

In its holding on misappropriation of spleen cells, the California Supreme Court said that a conversion claim was not necessary because the plaintiffs had other tort claims available, such as breach of fiduciary duty and lack of informed consent,[336] which Justice Mosk referred to collectively as nondisclosure claims.[337] Depending on the facts, these claims might be available in misappropriation of egg or embryo cases. However, they have been described as "largely illusory."[338] To establish them, patients must meet a difficult burden:[339] they must show that they would not have consented to undergo the procedure and that no reasonable person would have undergone it if properly informed of the doctors' intent to transfer the reproductive material to others.[340] In light of the intense desire of fertility patients to become parents,[341] this burden would be difficult to meet. Jurors might not believe that neither this patient, nor any reasonable patient, would have undergone the fertility procedures had they received full disclosure. Moreover, in an informed consent claim the patient must show that the withheld information was known or should have been

336. *See Moore,* 51 Cal. 3d at 147, 793 P.2d at 496-97, 271 Cal. Rptr. at 163-64.

337. *See id.* at 178-79 & n.24, 793 P.2d at 518-19 & n.24, 271 Cal. Rptr. at 185-86 & n.24 (Mosk, J. dissenting). The majority also saw these as a single claim for "invading a legally protected interest" of the patient. *Id.* at 128-29, 793 P.2d at 483, 271 Cal. Rptr. at 150.

338. *Id.* at 179, 793 P.2d at 519, 271 Cal. Rptr. at 186 (Mosk, J., dissenting) (explaining that, to recover on an informed consent claim, the plaintiff must prove that neither he nor any reasonable patient would have had the procedure if completely informed). *See also* Leeds, *supra* note 193, at 586 (criticizing the court as placing undue reliance on the availability of other claims, which really are "paper tiger[s]").

339. *See id.*; *see also* K. Peter Ritter, Note, Moore v. Regents of the University of California: *A Splenetic Debate Over Ownership of Human Tissue*, 21 SW. U. L. REV. 1465, 1486 (1992) (discussing difficulty of meeting burden for informed consent claim).

340. *See Moore*, 51 Cal. 3d at 179, 793 P.2d at 519, 271 Cal. Rptr. at 186 (Mosk, J., dissenting) (citing Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (Cal. 1972)). Although Justice Mosk followed California law, he pointed out that both the subjective and the objective requirements represent the majority rule. *See id.* at 179 n.25, 180 n.26, 793 P.2d at 519 n.25, 520 n.26, 271 Cal. Rptr. at 186 n.25, 187 n.26 (Mosk, J., dissenting).

341. *See supra* notes 31-41 and accompanying text.

known to the physician at the time of the procedure.[342] But the misappropriation may not be planned, occurring instead as a result of later decisions or sloppy practices. In such instances, the wrongdoer could escape liability under this theory, which would fail to vindicate the patients' rights.[343]

Restricting recovery to the nondisclosure claims also omits some potential defendants who ought to be held responsible. Standing outside the fiduciary relationship would be defendants such as third party physicians or researchers who receive eggs or embryos from the original physicians.[344] These third parties ought to be encouraged to obtain valid consent before they accept reproductive material from another source, and the presence of potential conversion liability would provide such encouragement.

Emotional distress claims are also proposed as alternatives to conversion, but either intentional or negligent emotional distress claims will fail in many jurisdictions on these facts, since many states require actual physical harm or impact for these claims.[345]

Restricting aggrieved couples to these other claims would divert attention from their real injury, which is the taking of their eggs or embryos. A conversion claim is the most direct way to acknowledge and redress this taking. The existence of other less direct claims is no reason for disallowing the direct and analytically sound claim of conversion.

342. *See* Arato v. Avedon, 5 Cal. 4th 1172, 1186, 858 P.2d 598, 607, 23 Cal. Rptr. 2d 131, 140 (1993); Bloskas v. Murray, 646 P.2d 907, 912-13 (Colo. 1982); Cummings v. Fondak, 474 N.Y.S. 2d 356, 361-62 (N.Y. App. Term 1983). A physician's economic interest that might effect his judgment has been held to be information that must be disclosed. *See Moore,* 51 Cal. 3d at 129-30, 793 P.2d at 483-84, 271 Cal. Rptr. at 150-51.

343. *See* Ritter, *supra* note 339, at 1486.

344. *See Moore,* 51 Cal. 3d at 181, 793 P.2d at 521, 271 Cal. Rptr. at 188 (Mosk, J., dissenting).

345. *See* Andrews, *My Body, My Property, supra* note 229, at 30 (stating that at the time of her article, only nine states would allow a negligent infliction of emotional distress claim, and twelve would not even allow an intentional infliction of emotional distress for misappropriation of reproductive material).

V. CONCLUSION: A CONVERSION CLAIM SHOULD BE AVAILABLE FOR MISAPPROPRIATION OF HUMAN EGGS OR EMBRYOS

Misappropriation of human eggs and embryos is occurring with disturbing frequency. Against the background of the *Moore* case, which held that there was no conversion claim for misappropriation of human spleen cells, questions have arisen about the applicability of conversion claims to misappropriation of human eggs and embryos. A relational analysis of this issue focuses on enhancing the personhood of the affected individuals. Under this analysis, recognizing that reproductive material partakes of enough incidents of property to support a conversion claim will accord appropriate weight to the couples' sense of violation and betrayal and allow for redress. Requiring couples to rely on other less direct or even illusory claims devalues the real and substantial injury to their personhood when their reproductive material is taken from them and misused.

The elasticity of the common law has historically allowed it to accommodate to changing times and circumstances. Conversion is an analytically sound and fitting claim where eggs or embryos are misappropriated. Courts need not shrink from applying this established claim merely because new technological developments are involved.

APPENDIX

DEFINITIONS OF SCIENTIFIC TERMS

These terms are used in this article with the following meanings:

EGG means the unfertilized female reproductive cell.[346]

EMBRYO means the developing human organism from conception to the second month.[347]

FERTILIZATION means the initial union of the egg and sperm.[348]

GAMETE means a mature germ cell (either sperm or ovum) possessing a haploid chromosome set and capable of initiating formation of a new individual by fusion with another gamete.[349]

IN VITRO (literally, "in glass") means a laboratory procedure performed in an artificial environment outside of the women's body.[350]

OVUM means a female gamete.[351]

PREEMBRYO means the fertilized egg in the initial phase of human development, beginning with the first cell division, and continuing for about fourteen days until it takes on the characteristics of a true embryo.[352]

SPERM means a male gamete.[353]

ZYGOTE means the diploid cell resulting from the union of sperm and ovum.[354]

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346. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 726 (3d ed. 1986) [hereinafter WEBSTER'S].

347. *See id.* at 559.

348. *See* J. E. SCHMIDT, ATTORNEY'S DICTIONARY OF MEDICINE, Vol. 2, F-56 (1993).

349. *See* WEBSTER'S, *supra* note 346, at 933.

350. *See* Elizabeth Ann Pitrolo, *The Birds, The Bees, and the Deep Freeze: Is There International Consensus in the Debate Over Assisted Reproductive Technologies?*, 19 HOUS. J. INT'L L. 147, 152 (1996).

351. *See* WEBSTER'S, *supra* note 346, at 1613.

352. *See* CLIFFORD GROBSTEIN, SCIENCE AND THE UNBORN 58-59 (1988). Scientists now view the term *preembryo* as more accurate than the term *embryo* for the first stages of development of the fertilized egg. *See id.* at 58-62. Because many lay writers, including courts, do not distinguish between an embryo and a preembryo, this article uses the term "embryo" to refer to both except where there is a specific reason to distinguish between the two concepts.

353. *See* WEBSTER'S, *supra* note 346, at 2191.

354. *See* PHYSICIANS DESK REFERENCE MEDICAL DICTIONARY: MEDICAL ECONOMICS 1976 (1995).