ESSAY

REPRODUCTIVE NEGLIGENCE

*Dov Fox**

A pharmacist fills a prescription for birth control pills with prenatal vitamins. An in vitro lab loses a cancer survivor's eggs. A fertility clinic exposes embryos to mad cow disease. A sperm bank switches a selected sample with one from a donor of a different race. An obstetrician predicts that a healthy fetus will be born with a debilitating condition.

These errors go virtually unchecked in a profession that operates free of meaningful regulation. Private remedies meanwhile treat reproductive negligence more as trifle than tragedy. Courts do not deny that specialists are to blame for botching vasectomies or misimplanting embryos. But in the absence of property loss or physical injury, existing law provides little basis to recognize disrupted family planning as a harm worthy of protection.

This Essay sets forth a novel framework of reproductive wrongs. It distinguishes misconduct that (1) imposes unwanted pregnancy or parenthood, (2) deprives wanted pregnancy or parenthood, and (3) confounds efforts to have or avoid a child born with particular traits. It also introduces a right to recover when reproductive professionals perpetrate these wrongs.

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This new cause of action would measure the injuries of imposed, deprived, and confounded procreation as a function of their practical consequences for victims' lives and the probability that wrongdoing was responsible for having caused those harms. Damages would accordingly be reduced, for example, by the plausible role of user error in cases of defective condoms, by preexisting infertility in cases of dropped embryos, and by genetic uncertainties in cases of prenatal misdiagnosis.

INTRODUCTION

More and more Americans are turning to health care professionals to help plan their family lives.[1] Nearly two in seven women of childbearing age in the United States now rely on surgical sterilization or long-term birth contraception to prevent pregnancy.[2] Almost two percent of all babies born in this country today are conceived using reproductive technologies like in vitro fertilization (IVF).[3] And advances in genetic selection among donors and embryos afford many prospective parents increasing measures of control over offspring traits.[4]

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1. The steep cost of many reproductive interventions limits access to them. See A. Law et al., Are Women Benefiting from the Affordable Care Act? A Real-World Evaluation of the Impact of the Affordable Care Act on Out-of-Pocket Costs for Contraceptives, 93 Contraception 392, 394 (2016) (noting substantial up-front costs for the most effective methods of birth control, even as mean total out-of-pocket expenses for FDA-approved contraceptives decreased by two-thirds, after the implementation of the Affordable Care Act's mandate in 2011 requiring health plans to cover most contraceptive methods); Molly Quinn & Victor Fujimoto, Racial and Ethnic Disparities in Assisted Reproductive Technology Access and Outcomes, 105 Fertility & Sterility 1119, 1120 (2016) (calling cost of care "the greatest barrier to access to infertility care in the U.S.," where "a single IVF cycle" costs more than "50% of the average individual's annual disposable income" and "the majority of patients undergoing specialized infertility treatment" pay out of pocket due to deficient insurance coverage); Suzanne Woolley, Couples Desperate for Children Turn to Crowdfunding Fertility, Bloomberg (Oct. 20, 2016, 6:00 AM), http://www.bloomberg.com/news/articles/2016-10-20/how-to-pay-for-that-baby-crowdfund-it [http://perma.cc/R57G-NV2W] ("In America, some use credit cards, 401(k)s, and even loans to pay for in vitro fertilization . . . . Crowdfunding has become a popular mechanism for many couples who can't afford the high costs of IVF, or adoption and surrogacy.").

2. See Contraceptive Use, Nat'l Ctr. for Health Statistics, Ctrs. for Disease Control & Prevention, http://www.cdc.gov/nchs/fastats/contraceptive.htm [http://perma.cc/UXM3-RCD2] (last updated July 15, 2016) (reporting that 27.8% of women aged fifteen to forty-four in the United States use either female sterilization (15.5%), male sterilization (5.1%), or long-acting reversible birth control like an intrauterine device or contraceptive implant (7.2%)); see also Kimberly Daniels et al., Current Contraceptive Use and Variation by Selected Characteristics Among Women Aged 15–44: United States 2011–2013, Nat'l Health Stat. Rep., Nov. 10, 2015, http://www.cdc.gov/nchs/data/nhsr/nhsr086.pdf [http://perma.cc/X2RN-MK8N] (reporting that among the 61.7% of American women aged 15–44 who use birth control, the most common methods are oral contraception (25.9%), female sterilization (25.1%), the male condom (15.3%), and long-acting reversible contraception (11.6%)).

3. ART Success Rates, Ctrs. for Disease Control & Prevention, http://www.cdc.gov/art/reports/index.html [http://perma.cc/N6X4-SLGW] (last updated June 21, 2016) (finding 1.6% of all children born were conceived using assisted reproductive technology (ART) based on reporting from many but not all ART practitioners).

4. See, e.g., President's Council on Bioethics, Reproduction and Responsibility: The Regulation of New Biotechnologies 89–104 (2004) [hereinafter President's Council on Bioethics] (discussing "two new techniques for testing early-stage embryos—preimplantation genetic diagnosis (PGD) and sperm sorting").

Few of these procedures are well regulated,[5] however, and patients are ill equipped to bargain, litigate, or insure against bad outcomes.[6] Botched vasectomies, IVF mix-ups, and abortions based on erroneous information are shockingly common.[7] The most comprehensive study of U.S. fertility clinics, for example, found that more than one in five report errors in diagnosing, labeling, and handling donor samples and embryos for implantation.[8]

Stigma associated with infertility, childlessness, and premarital sex keeps many of these mistakes in the shadows.[9] Coming forward would reveal that victims had resorted to abortion, voluntary sterilization, or assisted reproduction.[10] And until recently, "most . . . were unwilling to

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5. See infra notes 80–89 and accompanying text (discussing limits on regulation).

6. See infra notes 89, 136–143 and accompanying text (examining the fragility of market forces and contract authority).

7. See, e.g., Beth Daley, Oversold and Misunderstood: Prenatal Screening Tests Prompt Abortions, Eye (Dec. 13, 2014), http://eye.necir.org/2014/12/13/prenatal-testing/ [http://perma.cc/K3U6-UNWH] ("[S]tudies show that test results indicating a fetus is at high risk for a chromosomal condition can be a false alarm half of the time."); Lost Samples, Poor Screening: Sperm Bank Industry Oversight Examined, CBS News (Oct. 3, 2016, 6:40 AM), http://www.cbsnews.com/news/advocates-sperm-bank-industry-lacks-federal-oversight/ [http://perma.cc/KKJ6-V49W] (reporting that limited government oversight of sperm banks coincides with errors such as switched donors and lost samples).

8. See Susannah Baruch, David Kaufman & Kathy L. Hudson, Genetic Testing of Embryos: Practices and Perspectives of U.S. In Vitro Fertilization Clinics, 89 Fertility & Sterility 1053, 1055 (2008) (noting "21% of IVF-PGD clinics report that they have been aware of inconsistencies between the results of genetic analysis of embryos and later genetic testing"); see also Hebert v. Ochsner Fertility Clinic, 102 So. 3d 913, 915 (La. Ct. App. 2012) (discussing "inadequate control and supervision of [fertility clinic] procedures"); Sharon T. Mortimer & David Mortimer, Quality and Risk Management in the IVF Laboratory 40–44 (2d ed. 2015) (detailing risk factors like inadequate staffing and training, equipment and power failures, and shoddy labeling, documentation, and incident reporting that make adverse reproductive outcomes more likely); J.P.W. Vermeiden, Laboratory-Related Risks in Assisted Reproductive Technologies, *in* Assisted Reproductive Technologies: Quality and Safety 127, 128–29 (Jan Gerris, Francois Olivennes & Petra De Sutter eds., 2004) (lamenting that "only very few ART laboratories . . . have implemented a quality system" to minimize errors involving lost embryos or switched samples by ensuring that "ART procedures are performed according to defined standards and that the risks for deviations will be small").

9. See, e.g., Rebecca J. Cook & Bernard M. Dickens, Reducing Stigma in Reproductive Health, 125 Int'l J. Obstetrics & Gynecology 89, 89 (2014) (noting "infertility is sometimes considered shameful or discrediting, . . . [w]omen's contraceptive sterilization was once considered their dishonorable denial of the duty and virtue of motherhood, and a man's vasectomy . . . was considered 'degrading to the man . . . [and] injurious to his wife . . . to say nothing of the way it opens to licentiousness'" (third and fourth alterations in original) (quoting Bravery v. Bravery [1954] 1 WLR 1169 (AC) at 1180 (Denning LJ. dissenting))).

10. See, e.g., Paula Abrams, The Bad Mother: Stigma, Abortion and Surrogacy, 43 J.L. Med. & Ethics 179, 179 (2015) ("Surrogacy and abortion disrupt traditional expectations regarding pregnancy by separating gestation from maternity. A pregnant woman who bears a child for another or who chooses abortion embodies the archetype of the bad mother . . . ."). The fact that relatively few victims of reproductive negligence in the

discuss such an intimate matter in public."[11] But now, a "new wave of lawsuits against sperm banks," clinics, doctors, pharmacists, and counselors pose "an array of challenges beyond . . . undetected genetic problems."[12] This grab bag of grievances for the negligent provision of reproductive care has quietly developed into a striking body of law.

The doctrinal landscape of reproductive negligence can be charted across the three wrongs that its fact patterns reflect. The first category of cases *imposes* unwanted pregnancy or parenting; the second *deprives* people of the chance for wanted pregnancy or parenting; the third *confounds* efforts to select for or against a child with particular genetic features. Recent cases illustrate each:

Case 1: "Procreation Imposed." A young single mother got a prescription for birth control pills. The pharmacist gave her prenatal vitamins instead. She became pregnant and had another child.[13]

Case 2: "Procreation Deprived." A cancer survivor stored sperm before chemotherapy left him infertile. When he and his wife wanted to use it to conceive, the clinic said it was gone.[14]

Case 3: "Procreation Confounded." A couple risked passing on a devastating X-chromosome-linked disorder to a son. They screened out male embryos. A mix-up led to the birth of an afflicted boy.[15]

Courts almost always refuse recovery in cases like these.[16] They have no trouble finding professional misconduct to blame for having imposed, deprived, or confounded procreation.[17] The problem is that our legal system does not recognize a conception of injury that accommodates the disruption of reproductive plans apart from any unwanted touching,

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United States have until recently brought legal actions for the resulting harms they suffer may also result in part from factors that are not specific to the context of reproduction. One such factor may be the broader tendency of American legal culture, exemplified by backlash to prevailing accounts of the McDonald's hot-coffee case, to demonize injury plaintiffs as oversensitive or unscrupulous opportunists out for an easy buck. See David M. Engel, The Myth of the Litigious Society: Why We Don't Sue 12–13, 121–23, 191–93 (2016); William Haltom & Michael McCann, Distorting the Law: Politics, Media, and the Litigation Crisis 183–226 (2004).

11. Tamar Lewin, Sperm Banks Accused of Losing Samples and Lying About Donors, N.Y. Times (July 21, 2016), http://www.nytimes.com/2016/07/22/us/sperm-banks-accused-of-losing-samples-and-lying-about-donors.html (on file with the *Columbia Law Review*).

12. Id.

13. Nell v. Froedtert & Cmty. Health, 829 N.W.2d 175, 176–77 (Wis. Ct. App. 2013).

14. Complaint at 2–3, Hollman v. Saadat MD, Inc., No. BC555411 (Cal. Super. Ct. Aug. 21, 2014).

15. Bergero v. Univ. of S. Cal. Keck Sch. of Med., No. B200595, 2009 WL 946874, at *1–4, *14 (Cal. Ct. App. Apr. 9, 2009).

16. For discussion of three exceptions allowing for partial recovery, see infra notes 282–297 and accompanying text.

17. See, e.g., Burke v. Rivo, 551 N.E.2d 1, 2, 4 (Mass. 1990) (noting pregnancy is the "natural and probable consequence" of "negligently performing a sterilization").

broken agreement, or damaged belongings.[18] Malpractice actions, for example, call for precisely these more tangible setbacks to the injured party's person or possessions.[19] Tort law more generally declines to remedy even the negligent infliction of emotional distress without associated physical or economic harms.[20] Contract suits are plagued by the refusal of procreation-related specialists at hospitals, clinics, and sperm banks to assure any specific results of their care.[21] And property claims misrepresent and devalue reproductive injuries to decisional autonomy and individual well-being in ill-fitting terms of the lost market or symbolic value of entities like eggs and embryos or the costly procedures required to extract or create them.[22]

Courts routinely decline to grant remedies when reproductive professionals negligently deprive, impose, or confound procreation. When pregnancy or parenthood is wrongfully deprived, the obstacle to recovery is that these injuries often do not involve physical harm or property loss.[23] When procreation is imposed, courts more often than not insist that any burdens of parenthood are offset by its inevitable "joys and benefits."[24] And when procreation is confounded in ways that frustrate plans for a child of a particular type, courts typically deny redress under the law for fear of validating "'parents' disparagement . . . of their child's life.'"[25]

Judges unwilling to dismiss such claims altogether have little success trying to shoehorn them into theories that are alternatively cramped (e.g., lost property,[26] product liability[27]), jarring (e.g., wrongful life,[28]

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18. Courts tend to deny that newborns can be harmed by conduct without which the newborns would not have existed. See infra notes 207–211 and accompanying text.

19. See infra notes 90–113 and accompanying text (discussing the application of claims for professional malpractice).

20. See infra notes 115–135 and accompanying text (discussing the application of claims for emotional distress).

21. See infra notes 136–153 and accompanying text (discussing the application of claims for contractual breach).

22. See infra notes 155–162 and accompanying text (discussing the application of claims for lost property).

23. See, e.g., Doe v. Irvine Sci. Sales Co., 7 F. Supp. 2d 737, 743 (E.D. Va. 1998) (finding plaintiffs who had their in vitro procedures contaminated could not establish a physical injury and the economic-loss rule barred their claims for recovery).

24. Emerson v. Magendantz, 689 A.2d 409, 413 (R.I. 1997).

25. Andrews v. Keltz, 838 N.Y.S.2d 363, 369 (Sup. Ct. 2007) (quoting Weintraub v. Brown, 98 A.D.2d 339, 349 (N.Y. App. Div. 1983)).

26. See, e.g., Frisina v. Women & Infants Hosp. of R.I., Nos. CIV. A. 95-4037, CIV. A. 95-4469, CIV. A. 95-5827, 2002 WL 1288784, at *10 (R.I. Super. Ct. May 30, 2002).

27. See, e.g., Donovan v. Idant Labs., 625 F. Supp. 2d 256, 262–63, 273 (E.D. Pa. 2009).

28. See, e.g., Paretta v. Med. Offices for Human Reprod., 760 N.Y.S.2d 639, 648 (Sup. Ct. 2003).

wrongful death[29]), or disingenuous (e.g., intentional infliction of distress for mere accidents,[30] breach without any warranty[31]). However egregious the "deviation from the recognized standard of acceptable professional practice" in reproductive care, the "law does not recognize disruption of family planning as either an independent cause of action or an element of damages."[32] The result is a legal system that treats heedlessly switched sperm, lost embryos, and misdiagnosed fetuses not as misconduct that it protects against and compensates victims for, but as misfortune that it tolerates and forces them to abide.

Reproductive negligence inflicts a distinct and substantial injury, however, that goes beyond any bodily intrusion or emotional distress. The harm is being robbed of the ability to determine the conditions under which to procreate. Determinations about having children tend more than most decisions in life to shape who people are, what they do, and how they want to be remembered.[33] Many people find profound meaning and fulfillment either in pregnancy and parenthood or else in the aims or attachments that freedom from those roles facilitates.[34] That is why the wrongful frustration of reproductive plans disrupts personal and professional lives in predictable and dramatic ways.[35]

This puzzle—that the thwarting of reproductive plans, however egregious or devastating, invades no "legally protected interest," violates no

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29. See, e.g., Miller v. Am. Infertility Grp. of Ill., 897 N.E.2d 837, 839–40 (Ill. App. Ct. 2008).

30. See, e.g., Unruh-Haxton v. Regents of Univ. of Cal., 76 Cal. Rptr. 3d 146, 156–57 (Ct. App. 2008).

31. See, e.g., Itskov v. N.Y. Fertility Inst., Inc., 782 N.Y.S.2d 584, 587 (Civ. Ct. 2004).

32. Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 238–39, 271–72 (Tenn. 2015).

33. See John A. Robertson, Liberalism and the Limits of Procreative Liberty: A Response to My Critics, 52 Wash. & Lee L. Rev. 233, 236 (1995) [hereinafter Robertson, Liberalism and the Limits] ("[R]eproductive decisions have such great significance for personal identity and happiness that an important area of freedom and human dignity would be lost if one lacked self-determination in procreation.").

34. See Christine Overall, Why Have Children: The Ethical Debate 20–21 (2012) ("Having children is, for many people, deeply definitive of their identity and their life's value. For others, remaining childless is equally essential."); id. at 21–22 ("Failing to have a child when one wants to be a parent can be a source of immense sorrow and regret. Becoming a parent against one's wish can be a lifelong burden."); id. at 208 (arguing that "having children" tends to occasion "less personal freedom, more responsibility, less spontaneity" and "more worries" about children's health and upbringing but also tends to "include the joy and rewards of rearing one's children, helping them, interacting with them, and learning with and from them").

35. The Centers for Disease Control and Prevention singles out "family planning" among the "ten great public health achievements" in the twentieth century. Ctrs. for Disease Control & Prevention, Ten Great Public Health Achievements—United States, 1900–1999, Morbidity & Mortality Wkly. Rep. (Apr. 2, 1999), http://www.cdc.gov/mmwr/preview/mmwrhtml/00056796.htm [http://perma.cc/9XNK-6WMB].

right[36]—has gone all but unnoticed in the case law and the literature.[37] The only scholars to have identified this oddity are two prescient law students and a recent graduate, writing over a decade ago in view of the earliest suits involving these emergent technologies.[38] And no other commentator or court has proposed treating reproductive negligence—not just in high-tech procreation, but birth control, abortion, and sterilization too—as the violation of a right.[39] Legal academics who engage with the implications of reproductive advances for private law tend to focus either on disputes *between* patients, as when couples disagree about what to do with their embryos,[40] or on complaints *against* patients, as when decisions to use a deaf donor or implant multiple embryos lead to children born with impairments.[41] Scholarly immersion in these questions about embryo disposition and offspring disability has crowded out

36. Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928).

37. Among casebooks in the field, only Judith Daar, Reproductive Technologies and the Law 366–70, 500–19 (2013), gives reproductive negligence more than a passing reference. See Susan Frelich Appleton & D. Kelly Weisberg, Adoption and Assisted Reproduction 294 (2009); Melissa Murray & Kristin Luker, Cases on Reproductive Rights and Justice 439 (2015).

38. See Ingrid H. Heide, Negligence in the Creation of Healthy Babies: Negligent Infliction of Emotional Distress in Cases of Alternative Reproductive Technology Malpractice Without Physical Injury, 9 J. Med. & L. 55, 65 (2005) ("[T]ort remedies do not provide recovery for victims of ART malpractice without physical injury."); Joshua Kleinfeld, Comment, Tort Law and In Vitro Fertilization: The Need for Legal Recognition of "Procreative Injury," 115 Yale L.J. 237, 239 (2005) ("For some aggrieved IVF patients—those who sue their doctors or clinics after sustaining injury to their procreative possibilities—no existing legal theory quite seems to fit."); Fred Norton, Note, Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages, 74 N.Y.U. L. Rev. 793, 810 (1999) (noting legal obstacles complicate "whether loss of genetic affinity through the birth of a healthy child may be considered an injury").

39. Those that address the topic at all tend to presume without elaboration or argument that if reproductive services, available now or in the future, "did not produce the promised results for relatively straightforward genetic traits, a malpractice suit would be a plausible response (although it is unclear when the parents would be entitled to any damages)." Henry T. Greely, The End of Sex and the Future of Human Reproduction 226–27 (2016).

40. See generally I. Glenn Cohen, The Constitution and the Rights Not to Procreate, 60 Stan. L. Rev. 1135 (2008) [hereinafter Cohen, The Constitution] (discussing the possible conflicts between the potential right to be a parent and the clear right not to be one); Kaiponanea T. Matsumura, Binding Future Selves, 75 La. L. Rev. 71 (2014) (examining embryo disputes in the context of contract principles).

41. See generally Michele Goodwin, A View from the Cradle: Tort Law and the Private Regulation of Assisted Reproduction, 59 Emory L.J. 1039, 1043 (2010) (exploring "the viability of tort law to address the private and costly harms resulting from negligent application of ART"); Kirsten Rabe Smolensky, Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions, 60 Hastings L.J. 299, 300 (2008) (examining "both intentional tort claims and ordinary negligence claims in the context of preimplantation genetic choices").

reflection on the professional misconduct that denies people control over reproductive life.[42]

Existing causes of action lack the narratives required to appreciate the richness of reproductive interests as well as the vocabulary with which to articulate the magnitude of reproductive injuries.[43] And constitutional law, for all its lofty pronouncements about the centrality of procreation to human life, has never gestured toward a corresponding private right against reproductive negligence or provided guidance as to what form or function such protections might command.[44] The Supreme Court long ago named "procreation" among "the basic civil rights of man" so "fundamental to the very existence and survival of the [human] race."[45] These musings are mere dicta, however, written seventy-five years ago by Justices who could hardly have imagined modern-day powers to conceive by means other than sexual intercourse, let alone to pick and choose offspring traits.[46]

Besides, abortion and birth control protections extend only as far as government mischief and so do not reach wrongdoing committed by private reproductive professionals.[47] These limitations on the rights that

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42. The exception is the 2005 student comment by (now-Professor) Joshua Kleinfeld that proposes to protect interests in "bearing and rearing one's own genetic progeny with the mate of one's choice." Kleinfeld, supra note 38, at 243.

43. See, e.g., Martha Chamallas & Jennifer B. Wriggins, The Measure of Injury: Race, Gender, and Tort Law 96 (2010) (noting that tort law does not treat procreation as an "interest[] worthy of heightened protection against privately inflicted damage").

44. Cf. Carter J. Dillard, Rethinking the Procreative Right, 10 Yale Hum. Rts. & Dev. L.J. 1, 7 (2007) ("Common formulations of the procreative right are remarkably imprecise in specifying what behavior . . . the right is protecting.").

45. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942).

46. See id. at 536 (invalidating selectively forced sterilization as an equal protection violation).

47. Even in cases in which it is state actors like government-run clinics that perpetrate the reproductive negligence, constitutional protections are less plausible than tort ones. See, e.g., Simms v. United States, No. 15-2161, 2016 WL 5864511 (4th Cir. Oct. 7, 2016) (affirming damages under the Federal Tort Claims Act for a federally funded hospital's failure to inform a pregnant plaintiff until after state law prohibited an abortion that her child would be born with severe brain damage requiring permanent, around-the-clock care). Constitutionally protected interests in romantic intimacy may also lose some of their purchase when procreation moves from bedroom to laboratory, as might interests related to bodily integrity in the absence of physical harm or unconsented touch. Essential to the Court's reason for invalidating birth control bans in *Griswold v. Connecticut* was its reluctance to authorize "police to search the sacred precincts of marital bedrooms." 381 U.S. 479, 485 (1965). The Court later noted that "the constitutionally protected privacy" involved in practices such as "procreation . . . is not just concerned with a particular place, but with a protected intimate relationship" and that "[s]uch protected privacy extends to the doctor's office," among other locations, "as . . . required to safeguard the right to intimacy involved." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 n.13 (1973). The involvement of reproductive practitioners, donors, or surrogates might, however, give some reason to think that the interests associated with the intimacy involved are implicated differently in assisted reproduction than in sexual reproduction. See Dov Fox, Racial

equal protection and due process afford do not, however, rule out the possibility of private law protections against reproductive negligence.[48] Indeed, the constitutional privacy claims on access to abortion and birth control emerged in part from precursory rights of recovery against non-state conduct.[49]

For most of American history, our laws did not punish people for publicly exposing the secrets of others.[50] By the Industrial Revolution, newspapers that had reported principally on matters of economics, politics, and art found that, with the urban dislocation of traditional values and shared institutions, "there was more journalistic money to be made in recording gossip."[51] The invention of the telephone, telegraph, and "[i]nstantaneous photographs" at the same time made it far easier to capture people's intimate moments and conversations.[52] Writing in 1890, Harvard Law School classmates Samuel Warren and (future Supreme Court Justice) Louis Brandeis feared that "what is whispered in the closet shall be proclaimed from the house-tops."[53] They proposed a right of "retreat" from the intrusions of modern life that would protect control over "to what extent [a person's] thoughts, sentiments, and emotions shall be communicated to others."[54] Courts in most states recognized this claim by the 1930s.[55] It is this right whose vindication recently won Hulk

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Classification in Assisted Reproduction, 118 Yale L.J. 1844, 1881–83 (2009) [hereinafter Fox, Racial Classification] (describing autonomy implications of assisted reproduction's impersonal and transactional nature). For critical analysis, see generally Courtney Megan Cahill, Reproduction Reconceived, 101 Minn. L. Rev. (forthcoming 2016) (on file with the *Columbia Law Review*).

48. See infra notes 441–448 and accompanying text (discussing the potential extension of existing reproductive rights beyond Fourteenth Amendment protections for access to abortion and birth control).

49. See David J. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of *Roe v. Wade* 260–61 (1998) (calling tort rights to privacy "precursors" to the constitutional privacy rights recognized in *Griswold* and *Roe*).

50. See Neil M. Richards & Daniel J. Solove, Privacy's Other Path: Recovering the Law of Confidentiality, 96 Geo. L.J. 123, 127–45 (2007) (distinguishing the American conception of privacy based on individuals' "inviolate personality" from the British law of confidentiality).

51. Robert William Jones, Journalism in the United States 248 (1947).

52. Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 195 (1890).

53. Id.

54. Id. at 196–98.

55. See William L. Prosser, Privacy, 48 Calif. L. Rev. 383, 386–88 (1960) [hereinafter Prosser, Privacy] (describing the growth of judicial recognition of a right to privacy). For discussion of whether privacy constitutes a single cause of action or multiple different ones, see infra notes 364–369 and accompanying text.

Hogan the $140 million judgment that bankrupted *Gawker* for posting his sex tapes.[56]

A similar story can be told about reproductive negligence today. Just as incursions by the snap camera and penny press placed privacy interests in sharp relief, donor switches and embryo losses bring to fuller expression the scope and significance of interests related to reproduction. Twentieth-century antimiscegenation and sterilization mandates were designed to purge the gene pool of social ills from disease, degeneracy, and feeblemindedness to criminality, indigency, and alcoholism.[57] As the eugenic fervor faded, bans on abortion and contraception still forced people who wanted to avoid pregnancy to abstain from sex or break the law.[58] Then came limits on adoption, surrogacy, and other ways for single people and gay, lesbian, or infertile couples to become parents.[59] Now these too are going the way of same-sex marriage bans.[60] As formal restrictions on family-planning tools fall away, however, an elusive new threat to reproductive freedom has come into view.[61] For the millions of Americans who rely on medicine or technology to have or avoid having offspring, accidents such as lost embryos, switched donors, and untied tubes imperil the control individuals have over their reproductive lives.

We have long blamed randomness or fate when people did not get a child they wanted or got one they did not. It is like having an unflattering nose: A person could pay to try and have it fixed, but a good surgeon knows better than to promise that the patient will be satisfied with the outcome.[62] And without any such agreement, she will lack legal recourse

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56. Sydney Ember, Gawker, Filing for Bankruptcy After Hulk Hogan Suit, Is for Sale, N.Y. Times (June 10, 2016), http://www.nytimes.com/2016/06/11/business/media/gawker-bankruptcy-sale.html (on file with the *Columbia Law Review*).

57. See Dov Fox, The Illiberality of 'Liberal Eugenics,' 20 Ratio 1, 2 (2007).

58. See Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 282–87, 297–300 (1992) [hereinafter Siegel, Reasoning from the Body] (describing the historical evolution of anti-abortion laws and attitudes).

59. See Elaine Tyler May, Barren in the Promised Land 142 (1995) (describing adoption restrictions following World War II); Judith F. Daar, Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms, 23 Berkeley J. Gender L. & Just. 18, 35–48 (2008) [hereinafter Daar, Accessing Reproductive Technologies] (describing restrictions on access to reproductive technology).

60. See Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015) (ruling the right to marry is fundamental and same-sex couples may not be deprived of that liberty). For insightful analysis of the relation between marriage equality and parentage determinations, see Douglas NeJaime, The Nature of Parenthood, 126 Yale. L.J. (forthcoming 2017) (on file with the *Columbia Law Review*).

61. This is not to suggest that legal restrictions and refusals to insure or fund abortion, birth control, or IVF for those unable to afford them do not continue to limit family-planning options in significant ways. For discussion of these and other additional constraints on reproductive freedom, see infra notes 458–469 and accompanying text.

62. A counterexample is the "Hairy Hand" case of *Paper Chase* lore. See Hawkins v. McGee, 146 A. 641 (N.H. 1929); The Paper Chase (Twentieth Century Fox Film Corp.

if the nose does not come out how it was supposed to—for courts are reluctant to recognize any compensable claim to an attractive nose.[63] Courts tend similarly to treat interventions in the process of procreation not as needs but wants and treat the transgressions that these professional services and medical procedures risk not as tragedies but trifles for which the law affords no protection.[64] When it comes to professional misconduct that impairs reproductive plans or more attractive noses, the U.S. legal system tends to treat even avoidable injuries as acceptable byproducts of consuming these market services. "You can't always get what you want."[65]

Reproductive advances promise to deliver us from the vagaries of nature, however, in the same way that historic developments in medicine and technology have in many other contexts, this time by transferring the reins of control over procreation from chance to choice.[66] And with that transfer comes new and plausibly legitimate expectations.[67] A patient can reasonably expect, namely, that the specialists whom she pays handsomely and trusts implicitly will apply their knowledge and skills in a manner that avoids negligent mistakes that disrupt her plans about

1973). A surgeon told a boy with a scarred palm that tissue replacement would leave him with a "hundred per cent good hand." *Hawkins*, 146 A. at 643. When the surgeon grafted tissue from the boy's chest to his hand, it left his hand less functional—and growing hair. The boy sued. The court held that the surgeon broke their contract by comparing the boy's hand to "a machine . . . warranted to do certain work." Id. The court did not assess damages as it might have under tort law by reference to how much worse off the boy was after the botched surgery than before it. Awards for breach instead reflected the disappointment of his dashed expectations for how much better off he would have been with the perfect hand that "the defendant promised him." Id. at 644. Courts enforce such actions against doctors only in the exceptional case that they expressly guarantee an outcome they fall short of. See Lovely v. Percy, 826 N.E.2d 909, 913 (Ohio Ct. App. 2005) (validating breach of contract claims regarding a "satisfaction agreement" that "promised a 'new you' and guaranteed that patients [of liposuction surgery] would be happy with their results").

63. See Nardella v. Gerut, 834 N.Y.S.2d 104, 104 (App. Div. 2007) (denying pain and suffering damages when "the result of plaintiff's nasal reconstructive surgery was cosmetically not to her satisfaction"); Anne Bloom, Plastic Injuries, 42 Hofstra L. Rev. 759, 784 (2014) ("Assessment of a plastic surgeon's performance rarely involves serious consideration of the surgeon's failure to achieve the plaintiff's desired result.").

64. For a discussion of courts' tendency to view reproductive procedures as more luxury than necessity, see infra notes 148–150 and accompanying text.

65. Rolling Stones, You Can't Always Get What You Want, *on* Let It Bleed (London/Decca Records 1969).

66. See, e.g., Jennifer M. Denbow, Governed Through Choice: Autonomy, Technology, and the Politics of Reproduction 14 (2015) (noting technological advances in possibilities concerning procreation have "rendered procreation a voluntary choice in a way that has profound implications for how reproductive outcomes are evaluated").

67. See Jeanette Edwards et al., Technologies of Procreation: Kinship in the Age of Assisted Conception 1 (2d ed. 1999) (noting "increasing visibility of outside assistance throws into relief the significance of birth over other ways of creating" families and may lead "[t]hose who in the past would have suffered infertility . . . or turned to adoption" to pursue ways to bear children themselves).

whether and how to have a child. Legal protection of these legitimate expectations of competent care in matters of procreation marks the next frontier of reproductive freedom.

This Essay makes three contributions to this field of study. First, it identifies core reproductive interests in exercising control over decisions about pregnancy, parenthood, and the selection of offspring traits. Part I distinguishes the injuries that correspond to the wrongful frustration of these distinct interests. This Part also shows why existing actions for malpractice, emotional distress, contractual breach, and property loss cannot adequately remedy reproductive negligence.

Second, the Essay develops a comprehensive new way to think and talk about misconduct in matters of procreation. Part II charts this landscape of reproductive wrongs in terms of whether practices *impose* unwanted pregnancy or parenthood, *deprive* wanted pregnancy or parenthood, or *confound* plans to have not just any child but one who is born with particular genetic traits.

Third, the Essay introduces a private cause of action for reproductive negligence. This right to recover situates embryo mix-ups and defective birth control within a legal history of technological advances that have driven common law reform. Part III sets forth two factors to determine damages for violations of this right. The first is the severity of reproductive injuries as a function of their practical consequences for the lives of victims. The second factor, adapted from the loss-of-chance doctrine in medical malpractice, is the extent to which misconduct (and not some other factor) is responsible for having caused those injuries. This latter prong would reduce awards, for example, in cases in which user error compounds faulty birth control, infertility predates lost embryos, and genetic uncertainties complicate prenatal misdiagnosis. The final Part also sets forth measures to minimize the risk that the right might operate in untoward ways to penalize professionals unfairly, restrict access to the valuable services they provide, routinize selection for trivial traits, or authorize selection for debilitating ones.

I. THE PUZZLE AND ITS STAKES

The United States is rare among developed countries in its hands-off approach to assisted methods of reproduction.[68] In the United Kingdom, for example, a national agency dedicated to reproductive regulation approves all fertility clinics before they may operate and any proposed

68. See Howard W. Jones, Jr. et al., Int'l Fed'n of Fertility Societies, IFFS Surveillance 2010, at 10 (2010), http://www.infertilitynetwork.org/files/IFFS_Surveillance_2010.pdf [http://perma.cc/TW4T-24HW] (contrasting the sparse oversight of assisted reproduction in the United States, limited largely to unenforced certification guidelines, with the field's far more rigorous regulation in countries like Australia, which imposes punishment of up to ten years in prison for operating an unaccredited facility).

procedure before clinics may offer it.[69] Even under this comprehensive regime of rigorous and ongoing inspections of laboratory processes, sometimes with no notice,[70] the agency still reports that mistakes like the destruction, contamination, and switching of reproductive materials are not exceptional.[71] Such errors are almost certainly more common in the United States, where these practices go virtually unregulated.[72] However, this country's sparse reporting requirements[73]—combined with reluctance to disclose errors that out people as having sought out abortion, emergency contraception, voluntary sterilization, or infertility treatment[74]—make it impossible to know just how frequently reproductive negligence takes place.

A. *Inadequate Protections*

Existing legal remedies cannot protect the interests that reproductive negligence threatens. "Plaintiffs rarely succeed[]" in "tort actions arising out of fertility treatments."[75] This section begins by describing why

69. See All About the HFEA, Human Fertilisation & Embryology Auth., http://www.hfea.gov.uk/25.html [http://perma.cc/G6ZA-7UD7] (last visited Sept. 13, 2016).

70. See How We Regulate (Treatment and Research), Human Fertilisation & Embryology Auth., http://www.hfea.gov.uk/159.html [http://perma.cc/JW6X-BGFH] (last updated Nov. 26, 2013).

71. See, e.g. IVF Blunders Result in Child Born from Wrong Sperm, Telegraph (July 8, 2014, 7:00 AM), http://www.telegraph.co.uk/news/health/news/10952501/IVF-blunders-result-in-child-born-from-wrong-sperm.html [http://perma.cc/5XX9-AUZJ] (reporting there are adverse incidents in the United Kingdom for one in every one hundred cycles of treatments).

72. See, e.g., Rong-Gong Lin & Jessica Garrison, California Medical Board Revokes License of "Octomom" Doctor, L.A. Times (June 2, 2011), http://articles.latimes.com/2011/jun/02/local/la-me-0602-octomom-doctor-20110602 [http://perma.cc/L2BQ-WE4U] (discussing how the much-publicized case involving the doctor who implanted twelve embryos to initiate a single pregnancy has "focused national attention on what critics have called 'the Wild West' of fertility medicine").

73. Ctrs. for Disease Control & Prevention et al., 2013 Assisted Reproductive Technology National Summary Report 3–5 (2015), http://www.cdc.gov/art/pdf/2013-report/art_2013_national_summary_report.pdf [http://perma.cc/NVF8-DS4E]. Even the Society for Assisted Reproductive Technology, a private professional organization that seeks to provide "[a]ccurate and complete reporting of ART success rates," explicitly warns those who seek this information that "differences in patient selection, treatment approaches, and cycle reporting practices" may "inflate or lower pregnancy rates" reported at various clinic so significantly that the Society "strictly prohibit[s]" any "[u]se of the data in the report for comparing clinics, ranking clinics, making insurance coverage decisions, discouraging patients from seeking care at a given clinic, or for any other commercial purposes." Soc'y for Assisted Reprod. Tech., National Summary Report, All SART Member Clinics, http://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0 [http://perma.cc/3UU4-8C9X].

74. On forms of stigma that have been associated with reproductive interventions, see supra notes 9–10 and accompanying text; infra note 85 and accompanying text.

75. Lars Noah, Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation, 55 Fla. L. Rev. 603, 635 (2003); see also Lyria Bennett Moses, Understanding Legal Responses to Technological Change: The Example of In Vitro

public law does not regulate professional wrongdoing in matters of procreation. Then it exposes the deficiency of private law safeguards. Professional malpractice law protects solely against the physical or economic harms that are often missing in the reckless provision of IVF and similar procedures.[76] The same goes for negligent-infliction claims about emotional distress; mental anguish misrepresents the character of reproductive harms to decisional autonomy and individual well-being.[77] Contract claims are unavailing as well because specialists take care to avoid promising any specific result of the reproductive care they provide; they usually secure liability waivers for implied breach too.[78] Property law might be thought to apply to the fraction of reproductive-negligence cases involving material that is misplaced, damaged, or destroyed, but even under those limited circumstances, it diminishes the meaning and significance of that loss.[79] This section will explain the problems courts face in trying to apply these private law remedies under torts, contracts, and property to the problem of reproductive negligence.

1. *Regulation.* — Elected officials decline to regulate procreative conduct outside abortion and surrogacy.[80] The single federal statute that deals with reproductive technology asks practitioners to do no more than report the rates at which patients get pregnant, and even then imposes no penalty for refusal.[81] Few states regulate assisted reproduction either.[82]

Fertilization, 6 Minn. J.L. Sci. & Tech. 505, 572 (2005) (observing that the existing collection of actions available with "the tort system proves inadequate" to resolve cases of "negligently transferring an embryo into the wrong woman, negligently exposing embryos to disease, and negligently destroying embryos").

76. For discussion, see infra notes 90–114 and accompanying text.

77. See infra notes 115–135 and accompanying text (arguing that trying to squeeze reproductive misconduct into one of the rare exceptions for emotional distress is nevertheless the best hope that victims have for recovery under existing law).

78. For discussion, see infra notes 136–153 and accompanying text.

79. For discussion, see infra notes 154–162 and accompanying text.

80. See Steve P. Calandrillo & Chryssa V. Deliganis, In Vitro Fertilization and the Law: How Regulatory and Legal Neglect Compromised a Medical Breakthrough, 57 Ariz. L. Rev. 311, 335 (2015) (arguing "the current regulatory void and lack of meaningful oversight . . . breed[] conflicts of interest between clinics and patients"). But cf. Judith Daar, Federalizing Embryo Transfers: Taming the Wild West of Reproductive Medicine?, 23 Colum. J. Gender & L. 257, 273–76 (2012) (arguing the self-regulation regime in assisted reproduction bears resemblance to other medical subspecialties).

81. See Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102-493, 106 Stat. 3146 (codified as amended in scattered sections of 42 U.S.C. (2012)); cf. FDA Human Cells, Tissues, and Cellular and Tissue-Based Products, 21 C.F.R. § 1271 (2016) (mandating donor screening and testing of human sperm and eggs for communicable diseases, including chlamydia and HIV).

82. See President's Council on Bioethics, supra note 4, at 54 ("[T]here are very few state laws that bear directly on assisted reproduction. Most of these laws relate to the provision of insurance coverage for infertility treatment."). An exception is Louisiana, which makes it a crime to "intentionally destroy[]" a viable embryo and thereby effectively bars use of leftovers from IVF procedures in research. La. Rev. Stat. Ann. § 9:129 (2009).

One reason for this regulatory vacuum is that interventions in the processes of procreation invoke values about sex, family, and parenting that are often charged, complex, and even contradictory. These interventions implicate the blessings of parenthood as much as freedom from it, for example, and dreams of having children with particular traits as much as wishes for offspring without those very same features.[83] Such questions tend to divide voters not only across traditional political constituencies but also within them.[84] The "historical stigma of infertility" might also relieve what political pressure might otherwise be applied by keeping reproductive negligence "a secret between an individual and her physician."[85] Another explanation is that the multibillion-dollar fertility industry in America mounts powerful lobbying forces against occasional calls for regulation.[86] Private organizations that oversee the field do not meaningfully enforce their guidelines except by revocation of membership.[87] The absence of external surveillance or effective self-policing leaves little by way of deterrence against reproductive negligence.[88] This leaves potential victims to rely instead on nonpolitical, after-the-fact forms of protection.[89]

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83. Naomi R. Cahn, Test Tube Families: Why the Fertility Market Needs Legal Regulation 26 (2009) (explaining how "[r]eproductive technology reflects our deepest . . . desires to have a child and touches on highly politicized issues," beyond abortion and stem-cell research, about "access based on race and class and family form"); Michael Ollove, States Not Eager to Regulate Fertility Industry, Pew Charitable Trs.: Stateline (Mar. 18, 2015), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/3/18/states-not-eager-to-regulate-fertility-industry [http://perma.cc/XM54-Q6LD] (citing "incendiary politics" involved in regulating the fertility industry).

84. See Judith F. Daar, Regulating Reproductive Technologies: Panacea or Paper Tiger?, 34 Hous. L. Rev. 609, 625 (1997) (noting "[a]ny regulation that goes beyond mandating informed consent . . . could run afoul of constitutional principles" by "limiting" reproductive choice); id. at 641 ("[E]ven without a precise constitutional provision or high court edict establishing a constitutional right to procreate, Congress and the states have shown reticence in enacting laws that [might risk] violat[ing] this perceived right."); Dov Fox, Interest Creep, 82 Geo. Wash. L. Rev. 273, 352 (2014) [hereinafter Fox, Interest Creep] (noting that disputed matters of reproduction are "a site of contestation about the . . . relationship between men and women, parents and children, individuals and government, humans and nature").

85. Cahn, supra note 83, at 25. For discussion, see supra notes 9–10 and accompanying text.

86. See id. at 17 ("The economic forces supporting the current lack of regulation are strong and well entrenched.").

87. See Calandrillo & Deliganis, supra note 80, at 332 (noting the American Society for Reproductive Medicine's "guidelines have no teeth" and that "[t]he only real avenue of enforcement . . . is through a process of clinical certification").

88. See Andrea Preisler, Assisted Reproductive Technology: The Dangers of an Unregulated Market and the Need for Reform, 15 DePaul J. Health Care L. 213, 213 (2013) ("[L]awmakers have been slow to address [advances in assisted reproductive technology,] . . . [which] has left a gaping hole for a booming, unregulated market fraught with fraud and abuse . . . [and] a lawless free-for-all where the most exploitive providers reign.").

89. Legislatures and agencies decline to regulate reproductive negligence, despite their relative expertise and aptitude to find facts about costs and benefits of incremental

2. *Malpractice*. — At first blush, misconduct by reproductive specialists looks like professional malpractice. This doctrine holds specialists like doctors, lawyers, brokers, accountants, and engineers accountable if they fail to adhere to applicable standards of reasonable care.[90] After all, reproductive health providers, like all other medical practitioners, owe a duty to acquire and apply the skills and knowledge expected of any professional member in good standing.[91] A fertility patient injured by misdiagnosis or mistreatment—say, the negligent failure to screen sperm donors for some infectious disease that leads a woman to contract it—can sue her doctor for malpractice and recover damages no different from any other medical context.[92] But the malpractice tort usually affords recovery only in cases like this one, in which a plaintiff suffers physical injury. Medical malpractice actions in particular tend to require proof of

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precautions in the provision of procreation services. The effective operation of these institutions may be further limited by the extent to which primed and motivated providers crowd out patient interests. Without the involvement of legislatures and agencies, markets alone are unlikely to produce socially optimal levels of care, at least in the absence of sophisticated reporting and rating systems. See Molly Triffin, How the 'Yelp' of Fertility Treatments Got Its Start, Forbes Pers. Fin. (May 20, 2016, 4:00 AM), http://www.forbes.com/sites/learnvest/2016/05/20/how-the-yelp-of-fertility-treatments-got-its-start/#36795872385f [http://perma.cc/U5SN-5Q3P] (suggesting that a new online system that gets fertility patients to review clinics and specialists for the benefit of prospective users has had early success despite "difficulty in getting patients to craft thoughtful answers on the assessment form [given] the personal nature of the questions"). For discussion of the limited government and professional reporting, see supra note 73 and accompanying text. The high transaction costs that patients face to acquire information and form contracts likely exceed any individual's willingness to incur those costs besides additional payment required to protect themselves against the ex ante risk of bad outcomes. Courts compare favorably among these imperfect institutional candidates. Steep litigation costs are offset by plaintiffs' far greater stake in remedying their own wrongful injuries. But cf. Engel, supra note 10, at 5 (arguing that "more than nine out of ten injury victims assert no claim at all against their injurer—even in cases where it is likely that a legal duty was breached and a claim would succeed"). Admittedly, this judicial process could not directly represent the interests of all other patients, who would bear the cost of compensation in the form of higher prices for safer reproductive services. See infra notes 396–405 and accompanying text. But plaintiffs can be expected to share the interests of these unrepresented patients who are similarly situated. This equips courts to resolve such disputes reasonably well despite the informational and democratic handicaps of generalist judges and unelected juries. See Andrew B. Coan, Is There a Constitutional Right to Select the Genes of One's Offspring?, 63 Hastings L.J. 233, 260 (2011) (criticizing unsystematic comparisons among institutional competencies).

90. See Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts §§ 283–284 (2d ed. 2011).

91. See infra notes 398–408 and accompanying text (discussing professional standards of reproductive care).

92. See, e.g., Doe v. Lai-Yet Lam, 701 N.Y.S.2d 347, 348 (App. Div. 2000) (entitling a child to claim malpractice against a hospital for having failed to report a positive hepatitis test result to the mother during pregnancy, resulting in the transmission of hepatitis to the newborn during delivery).

bodily harm that is missing in many devastating cases of reproductive negligence.[93]

The physical-harm requirement looms large, for example, in actions for so-called wrongful birth, wrongful life, and wrongful pregnancy. These are, in essence, malpractice claims against health care providers who either fail to offer prenatal tests[94] or erroneously interpret[95] or communicate results.[96] When a reproductive specialist's misconduct results in the birth of a child with an anomaly, parents can bring wrongful-birth suits (allowed in most states),[97] while children may be able to bring wrongful-life suits (barred in all but three states).[98] For negligent sterilization or provision of birth control that results in the birth of a healthy child, there is also a "wrongful pregnancy" action available for parents to recover the costs associated with gestation, delivery, or (in rare cases) child-rearing.[99] And a "wrongful abortion" action involves the nonbirth

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93. For discussion about why harm to a resulting child is unlikely to qualify, see infra notes 207–211, 550 and accompanying text.

94. See, e.g., Greco v. United States, 893 P.2d 345, 349 (Nev. 1995) (providing a "legally protected right to choose whether to abort a severely deformed fetus" based on accurate prenatal testing).

95. See, e.g., Keel v. Banach, 624 So. 2d 1022, 1029 (Ala. 1993) (holding "the parents of a genetically or congenitally defective child may maintain an action for its wrongful birth if the birth was the result of the negligent failure of the attending prenatal physician to discover and inform them of the existence of fetal defects").

96. See, e.g., Flanagan v. Williams, 623 N.E.2d 185, 190 (Ohio Ct. App. 1993) ("Failure to diagnose and/or disclose information which is crucial to the exercise of this [abortion] right is actionable as medical malpractice under traditional tort principles."). See generally Kate Wevers, Note, Prenatal Torts and Pre-Implantation Genetic Diagnosis, 24 Harv. J.L. & Tech. 257, 267 (2010) ("Claims of [pre-implantation], pre-conception, and post-pregnancy negligence all share the same essential allegation that the negligence of the medical provider caused the parents to give birth to a child with severe disabilities.").

97. See Deborah Pergament & Katie Ilijic, The Legal Past, Present and Future of Prenatal Genetic Testing: Professional Liability and Other Legal Challenges Affecting Patient Access to Services, 3 J. Clinical Med. 1437, 1447–49 (2014) (reviewing statutory and case law concerning wrongful-birth and wrongful-life actions).

98. The only states that allow wrongful-life actions are California, New Jersey, and Washington. Id.; see also Turpin v. Sortini, 643 P.2d 954, 966 (Cal. 1982) (holding that "a plaintiff-child in a wrongful life action . . . may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment"); Procanik v. Cillo, 478 A.2d 755, 762 (N.J. 1984) (holding that "a child or his parents may recover special damages for extraordinary medical expenses incurred during infancy, and that the infant may recover those expenses during his majority"); Stewart-Graves v. Vaughn, 170 P.3d 1151, 1160 (Wash. 2007) ("In recognizing a wrongful life claim, this court reasoned that it would be anomalous to permit recovery by parents alone.").

99. E.g., Univ. of Ariz. Health Scis. Ctr. v. Superior Court, 667 P.2d 1294, 1299 (Ariz. 1983) (rejecting the "claim that the cost of rearing and educating the child can never be compensable elements of damage" in the case of a negligent vasectomy); Stills v. Gratton, 127 Cal. Rptr. 652, 653–55 (Ct. App. 1976) (regarding negligent abortion); Yasar v. Cohen, 483 So. 2d 1099, 1099–100 (La. Ct. App. 1986) (allowing plaintiff to "recover for her own injuries, expenses, etc." resulting from an "unplanned, but healthy child" due to a "negligently inserted intrauterine device"); C.S. v. Nielson, 767 P.2d 504, 506–07 (Utah 1988)

of a wanted child due to a false positive about the risks associated with continuing a pregnancy.[100] These malpractice actions cannot redress reproductive negligence because they address only tangible harms sustained to bodies or bank accounts.[101] These material injuries of course matter too.[102] But physical and economic setbacks fail to capture another important kind of injury to both autonomy and well-being that the disruption of reproductive plans inflicts when it robs people of their legitimate expectations of control over whether, when, and how to undertake the life roles of pregnancy and parenthood.[103]

The wrongful-birth cause of action comes closest to recognizing this injury.[104] On closer look, however, it does not vindicate lost opportunity to make meaningful decisions about whether to continue a pregnancy.[105] Even if wrongful birth recognizes this injury to autonomy and well-being

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(stating that "if the physician has negligently performed a sterilization operation, he or she has breached a duty to the patient and, from a proximate cause standpoint, it is foreseeable that a child will be born and the parents will incur damages as a result of this negligence"); see also Kathryn C. Vikingstad, The Use and Abuse of the Tort Benefit Rule in Wrongful Parentage Cases, 82 Chi.-Kent L. Rev. 1063, 1069–70 (2007) (finding forty-two states recognize a wrongful-pregnancy action); infra note 251 (citing cases demonstrating most courts deny relief for the cost of raising a child).

100. See Ronen Perry & Yehuda Adar, Wrongful Abortion: A Wrong in Search of a Remedy, 5 Yale J. Health Pol'y L. & Ethics 507, 512–14 (2005); Brandy Zadrozny, Parents Sue Doctors over 'Wrongful Abortion,' Daily Beast (Jan. 29, 2015, 5:55 AM), http://www.thedailybeast.com/articles/2015/01/29/parents-sue-over-wrongful-abortion.html [http://perma.cc/JJR7-KZB8]; infra notes 272–273, 288–290 (discussing cases in which plaintiffs had abortions due to incorrect medical advice).

101. See Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc., 770 P.2d 278, 283 (Cal. 1989) (finding plaintiffs stated a cause of action for the "negligent infliction of emotional distress against the therapist who molested their sons in the course of a professional relationship"); Cauman v. George Washington Univ., 630 A.2d 1104, 1109 (D.C. 1993) ("District of Columbia law does not recognize a claim for negligent infliction of emotional distress resulting from a wrongful birth."); Smith v. Cote, 513 A.2d 341, 350–51 (N.H. 1986) (holding "damages for emotional distress are not recoverable in wrongful-birth actions"); Becker v. Schwartz, 386 N.E.2d 807, 814 (N.Y. 1978) (denying recovery for emotional distress).

102. See Nicolette Priaulx, Rethinking Reproductive Injury, 39 Fam. L. 1161, 1161 (2009) (observing that "harms occasioned in the reproductive domain tend to evade simple categorisation" within "existing categories of negligence").

103. See supra notes 33–35 and accompanying text (discussing the distinctive importance of these reproductive injuries to individuals); infra notes 449–453 and accompanying text (same).

104. See Ochs v. Borrelli, 445 A.2d 883, 885 (Conn. 1982) (linking wrongful-birth action to a "constitutionally protected interest . . . to employ contraceptive techniques to limit the size of their family"); Kathy Seward Northern, Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy, 1998 U. Ill. L. Rev. 489, 529 (arguing "there is a nascent body of tort law that might vindicate a woman's interest in procreative autonomy").

105. See Viccaro v. Milunsky, 551 N.E.2d 8, 9 n.3 (Mass. 1990) ("The harm, if any, is not the birth itself but the effect of the defendant's negligence on the [fertility patients] . . . resulting from the denial to the parents of their right . . . to decide whether to bear a child with a genetic or other defect.").

in theory, it fails to in practice.[106] To fit tort law's conventional focus on tangible harms, courts fasten damages for wrongful-birth actions to the costs of raising a child.[107] This computation of damages that requires a woman to prove that she would have ended her pregnancy had she not been deprived of material information about it misses the distinct injury to her reasonable expectation of control over procreation—whatever its outcome.[108] Reckoning damages in terms of child-rearing expenses also risks implying that parents do not want the child they now have or that they would have been better off had that child not been born.[109] That plausible and caustic (if misleading and intended) message explains why so many courts have rejected such suits outright, whether to avoid casting children as "emotional bastard[s]"[110] or to avoid forcing doctors to subsidize

106. See Sanda Rodgers, A Mother's Loss Is the Price of Parenthood: The Failure of Tort Law to Recognize Birth as Compensable Reproductive Injury, *in* Critical Torts 161, 175 (Sanda Rodgers et al. eds., 2009) (observing "[c]ourts have had difficulty in characterizing the damages that arise from the parents' claim" which results from the negligent failure to "honour [their] entitlement to reproductive choice").

107. See Dobbs, Hayden & Bublick, supra note 90, § 369, at 487–88 (observing that in order to recover damages under the wrongful-birth doctrine "[i]t has been held enough . . . [to prove] that, given appropriate testing and information, [the wrongful-birth plaintiff] would have terminated the pregnancy").

108. See Bader v. Johnson, 675 N.E.2d 1119, 1124 (Ind. Ct. App. 1997) (holding that "the parents' claim for wrongful birth can be resolved through a traditional torts analysis"); Eisbrenner v. Stanley, 308 N.W.2d 209, 213 (Mich. Ct. App. 1981) (holding that the parents could "seek damages for both medical expenses and mental distress"); Greco v. United States, 893 P.2d 345, 349–51 (Nev. 1995) (holding that the plaintiff could seek damages "in the form of emotional or mental distress"); Smith v. Cote, 513 A.2d 341, 347–50 (N.H. 1986) (holding that "damages for emotional distress are not recoverable in wrongful birth actions"); cf. Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979) (holding the award of damages would constitute a "windfall").

109. See Cockrum v. Baumgartner, 447 N.E.2d 385, 388 (Ill. 1983) (affirming "unwillingness to hold that the birth of a normal healthy child can be judged to be an injury to the parents" because such a notion "offends fundamental values attached to human life"). Courts do not usually allow recovery in switched-baby cases, in which hospitals send newborns home with the wrong parents. See generally Marc D. Ginsberg, How Much Anguish is Enough? Baby Switching and Negligent Infliction of Emotional Distress, 13 DePaul J. Health Care L. 255 (2010). Nor do courts usually allow recovery in adoption misrepresentation cases in which adoption agencies withhold information—like drug or alcohol use during pregnancy or biological parents' medical history, nationality, education, religion, or occupation—from adopting parents. See Jennifer Emmaneel, Note, Beyond Wrongful Adoption: Expanding Adoption Agency Liability to Include a Duty to Investigate and a Duty to Warn, 29 Golden Gate U. L. Rev. 181, 183–84 (1999). Neither parent nor child in such cases suffers the tangible kind of harm usually required to support negligent-infliction claims. But see Larsen v. Banner Health Sys., 81 P.3d 196, 206 (Wyo. 2003) (holding a "contractual relationship . . . for services that carry with them deeply emotional responses in the event of breach" imposes a "duty to exercise ordinary care to avoid causing emotional harm"). For doubts about adapting this emotional-distress approach to reproductive negligence, see infra notes 115–134 and accompanying text.

110. Wilbur v. Kerr, 628 S.W.2d 568, 570 (Ark. 1982); see also Atl. Obstetrics & Gynecology Grp. v. Abelson, 398 S.E.2d 557, 561 (Ga. 1990) (holding that "we are unwilling to say that life, even life with severe [impairments], may ever amount to a legal

the "invaluable 'benefits' of parenthood."[111] Accordingly, twenty states refuse to consider the merits of such professional-malpractice actions against forced procreation.[112] These barriers to recovery make it important how courts characterize the harms borne of reproductive negligence, over and above how they assess damages for those harms.[113] Wrongful-birth actions fail to fully consider the separate and serious harm that victims of reproductive negligence suffer. Their complaint is not that the child they received is undesired or undesirable; it is that they have been denied the chance to decide whether to gestate or parent.[114]

3. *Emotional Distress.* — A similar problem besets the tort action for negligent infliction of emotional distress.[115] Courts hardly ever let plaintiffs recover for standalone emotional harm. A rare exception is when an undertaker mishandles a loved one's remains by, for example, cremating a body intended for burial.[116] The harm to those mourning family members is not material but sentimental.[117] Yet this type of harm is not the kind that our law expects people to steel themselves against. Instead, torts hold liable the specialists who "are in a better position than the plaintiffs both to try to prevent" misconduct "and to pay for [its] consequences."[118] Barring relief for family members would leave "no one to hold defendants accountable for their negligent handling of dead

injury" (internal quotation marks omitted) (quoting Azzolino v. Dingfelder, 337 S.E.2d 528, 534 (N.C. 1985))).

111. Pub. Health Tr. v. Brown, 388 So. 3d 1084, 1085 (Fla. Dist. Ct. App. 1980).

112. See Catherine Palo, Cause of Action for Wrongful Birth or Wrongful Life, 23 Causes of Action 2d 55, §§ 4, 11 (2016).

113. See Valérie Harrant & Nicolas Vaillant, Compensation and Wrongful Life: A Positive Economic Perspective, J. Legal Econ., Apr. 2006, at 1, 9–14 (discussing an economic model for compensation in wrongful life claims). But see Clark v. Children's Mem'l Hosp., 955 N.E.2d 1065, 1088 (Ill. 2011) (overruling earlier applications of the zone-of-danger rule in wrongful-birth actions and thus allowing plaintiff claims for emotional distress).

114. See Wendy F. Hensel, The Disabling Impact of Wrongful Birth and Wrongful Life Actions, 40 Harv. C.R.-C.L. L. Rev. 141, 166–67 (2005) (observing that "courts [that] require a mother to testify that she would have had an abortion or . . . prevented conception if properly informed of her child's defect" paint the actionable harm as "not lost choice in the abstract" but "lost opportunity to [prevent conception or] abort the impaired child").

115. See, e.g., Chizmar v. Mackie, 896 P.2d 196, 203–05 (Alaska 1995) (discussing negligent misdiagnosis of AIDS); Young v. W. Union Tel. Co., 11 S.E. 1044, 1045 (N.C. 1890) (discussing negligent mistransmission of death telegrams).

116. See Guth v. Freeland, 28 P.3d 982, 990 (Haw. 2001); Dobbs, Hayden & Bublick, supra note 90, § 383.

117. Cf. Metro-North Commuter R.R. v. Buckley, 521 U.S. 424, 429–30 (1997) ("[T]he common law of torts does not permit recovery for negligently inflicted emotional distress unless the distress . . . accompanies a physical injury . . . .").

118. *Guth*, 28 P.3d at 988.

bodies," as they owe no "duty of care to the decedent, who is not himself actually harmed by the defendant's actions."[119]

The three features that courts emphasize to justify recovery for freestanding emotional harm in "dead body" cases—(1) the gravity of the valued social practice, (2) the trust delegated to professionals to carry it out competently, and (3) the lack of better-positioned plaintiffs or other legal deterrents to misconduct—are no less salient in the context of reproductive negligence.[120] As to the gravity of family planning, efforts to have or avoid having children often occupy as central a place in a person's life as those to honor departed loved ones.[121] As to the delegation of trust, fertility doctors and surrogacy brokers, much like coroners and cremation technicians, "undertake[] a special task, sometimes perilous," from which they "expect[] to profit" and "must therefore carry it out with a high degree of diligence and deliberation in order to avoid harm to participants in the undertaking."[122] And as to absence of alternative protections, few born or unborn children who result from reproductive negligence are injured in ways that would justify their bringing suits for such conduct themselves if their (prospective) parents were prevented from doing so.[123]

Those who object that wrongful-birth actions treat the creation of life as an injury might not resist a parent-centered focus on emotional distress in matters of reproductive negligence.[124] Dead-body doctrine resembles cases in which people are wrongfully denied the offspring they wanted.[125] A few outlier courts have indeed allowed recovery for standalone emotional harm when lost eggs, misimplanted embryos, and fetal false-positives deprive procreation.[126] In addition, the most recent *Restatement of Torts* advises that courts might, in an unidentified cluster of negligent-infliction contexts, forego a physical manifestation require-

119. Id. at 989.

120. See Heide, supra note 38, at 72–82 (developing this doctrinal analogy).

121. See Gregory C. Keating, Is Negligent Infliction of Emotional Distress a Freestanding Tort?, 44 Wake Forest L. Rev. 1131, 1173–74 (2009). Bringing a new member into one's family can be as fraught with guilt, isolation, and heartache as sending off an old one. And prospective parents are often as anxious or desperate to achieve the family they want as bereaved relatives are to discharge perceived obligations to give a loved one a fitting farewell and resting place. Id.

122. Stiver v. Parker, 975 F.2d 261, 268, 270 (6th Cir. 1992).

123. See infra notes 200–204, 231 and accompanying text (discussing nonidentity problem of preconception harm).

124. See supra text accompanying notes 110–112 (discussing courts that resisted recovery on just these grounds).

125. See infra text accompanying note 159 (discussing a similar appeal to the analogy adopted in the embryo destruction case of Frisina v. Women and Infants Hospital of Rhode Island, Nos. CIV. A. 95-4037, CIV. A. 95-4469, CIV. A. 95-5827, 2002 WL 1288784, at *9 (R.I. Super. Ct. May 30, 2002)).

126. See infra text accompanying notes 282–297 (discussing three such negligently deprived procreation cases).

ment in favor of a "credible evidence" showing that the plaintiff did (and a reasonable person would) suffer "serious harm."[127] Accordingly, lawyers who represent victims of reproductive negligence would do well to present evidence of emotional distress and argue that disrupted family plans fit squarely within those exemptions for this action.[128] Although this action may be available, it should not mask the deficiencies discussed below.[129] Most critical is that mental forms of harm cannot speak to the enduringly disrupted life plans and transformed life experiences, especially when procreation is imposed or confounded.[130] Cramped appraisal of these injuries in subjective terms of emotional distress misconstrues their objective harm that robs negligence victims of the capacity "to determine [their] life's course."[131]

Emotional-distress torts also saddle plaintiffs with evidentiary requirements to verify their psychological suffering in ways that, in this context, are gratuitous at best and prohibitive at worst. Wrongfully imposing or depriving offspring can reasonably be expected to impair a person's well-being enough that compensation should not be conditioned on a doctor's note.[132] The ordinary limits on recovery for mental harm respond to concerns that it is too easy to fake, too hard to measure, or too slight to justify penalizing defendants on that basis.[133] These con-

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127. Restatement (Third) of Torts: Physical & Emotional Harm § 47 (Am. Law Inst. 2012). The commentary reserves this exception for contexts in which injury occurs "when an actor undertakes to perform specified obligations, engages in specified activities, or is in a specified relationship fraught with the risk of emotional harm." Id. cmt. b. Courts have so far applied it sparingly, mostly within the context of legal malpractice, to emotional distress "resulting from the loss of custody or visitation rights, or wrongful incarceration," lawyers "[d]rafting a living will, contested child custody or visitation disputes, [or] criminal defense work." Miranda v. Said, 836 N.W.2d 8, 27–28 (Iowa 2013) (internal quotation marks omitted) (quoting Kohn v. Schiappa, 656 A.2d 1322, 1324 (N.J. Super. Ct. Law Div. 1995)).

128. Cf. Chamberland v. Physicians for Women's Health, No. CV010164040S, 2006 WL 437553, at *2–5 (Conn. Super. Ct. Feb. 8, 2006) (affirming damages for emotional distress in a wrongful-birth action for negligent failure to diagnose a neural-tube defect).

129. See Andrews v. Keltz, 38 N.Y.S.2d 363, 368 (Sup. Ct. 2007) (asserting "by extension of the principle[] . . . that even parents of a child with a serious disease cannot recover for emotional injury for the birth of that child, plaintiffs in this case cannot recover for mental distress arising from having a child who is not [a parent's] biological offspring").

130. See supra notes 33–35 and accompanying text (discussing why reproductive interests matter); infra notes 449–453 and accompanying text (same).

131. Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting); see also Nicolette Priaulx, The Harm Paradox, Tort Law and the Unwanted Child in the Era of Choice 32–33, 64–68, 144–48, 161–64 (2007) (discussing autonomy in relation to bodily choice).

132. See supra notes 33–35 and accompanying text (expounding on the nature and significance of reproductive harm).

133. See Dov Fox & Alex Stein, Dualism and Doctrine, 90 Ind. L.J. 975, 985–92 (2015) [hereinafter Fox & Stein, Dualism and Doctrine] (explaining limits on recovery for mental harm).

cerns are overstated or misplaced, however, when it comes to reproductive negligence: The disruption of family planning disrupts people's core attachments and aspirations in predictable ways that are impractical to distort or falsify.[134] This is not to suggest that every claim of reproductive wrongdoing is legitimate or should be compensated. Part II details several less worthy grievances and makes clear how courts ought to identify them and limit remedies accordingly.[135] Negligent-infliction torts cannot, however, sort deserving claims from undeserving ones because reducing reproductive injuries to emotional harm simply confuses the injury at stake.

4. *Breach of Contract.* — It is tempting to think that courts could resolve these disputes between procreation patients and providers as broken agreements about the performance of medical services or procedures.[136] The problem with applying the logic of contract law to wrongdoing in this context is that the action for breach requires a "[p]romise[] to effect a specific result or cure"[137] that reproductive specialists seldom make.[138] Most insist that patients sign liability waivers for even implied breach and courts usually enforce these agreements.[139] This tendency is illustrated by *Frisina v. Women and Infants Hospital of Rhode Island*, in which a hospital lost three couples' embryos.[140] Each couple signed a consent form stipulating "that despite the Hospital . . . proceeding with due care, it is possible that a laboratory accident . . . may result in loss or damage to one or more of said frozen embryos."[141] The court found that this particular language was too vague to distinguish acts of man from acts of God.[142] Except for this technicality, however, the

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134. Cf. id. at 992 (noting that physical symptoms of emotional trauma like "excessive sleeping or insomnia, extreme weight loss or gain, crying spells, [and] angry outbursts . . . demonstrably impede [a] person's ability to work, to maintain fulfilling relationships, and to enjoy life" in ways she cannot meaningfully control or readily contrive).

135. See infra notes 242, 310–312, 349–360 and accompanying text (providing examples from cases in which procreation is imposed, deprived, and confounded).

136. Disputes over whether to implant frozen embryos often involve agreements between exes whose enforcement or lack of enforcement protects one party's interest in procreating against the other's interest in not procreating. See Cohen, The Constitution, supra note 40, at 1139–41.

137. Wilczynski v. Goodman, 391 N.E.2d 479, 488 (Ill. App. Ct. 1979).

138. See Cahn, supra note 83, at 52–65. But cf. Thomas H. Murray, Money-Back Guarantees for IVF: An Ethical Critique, 25 J.L. Med. & Ethics 292, 292 (1997) (critiquing the proposal for money-back guarantees for IVF).

139. See Katherine Drabiak-Syed, Waiving Informed Consent to Prenatal Screening and Diagnosis?, 39 J.L. Med. & Ethics 559, 562–63 (2011) (discussing state laws concerning informed-consent waivers in the surrogacy context).

140. Nos. CIV. A. 95-4037, CIV. A. 95-4469, CIV. A. 95-5827, 2002 WL 1288784, at *1–2 (R.I. Super. Ct. May 30, 2002).

141. Id. at *11.

142. See id. at *11–13 (conveying the court's reluctance to attribute liability to the hospital).

court made clear that it would have upheld the sweeping "exculpatory clauses" that appear in the vast majority of "agreements between IVF clinics and progenitors."[143] This reluctance to void such liability waivers is surprising given judicial concern about unaccountability in the medical profession.[144]

The leading case on liability waivers in health care explains that a patient "does not really acquiesce voluntarily in the contractual shifting of the risk" because medical services are a "crucial necessity" that the patient "is in no [real] position to reject" or negotiate.[145] In other words, patients' vulnerability and ignorance about relevant medical facts so limit their bargaining power relative to providers that agreements about their own care do not carry the robustly voluntary quality that contract law assumes on conventional theories in order to justify enforcement.[146] One reason that courts tend to tolerate liability waivers in the reproductive context might be that the greater wealth and education assumed to typify fertility patients lessen the informational and power disparities between patients and providers, making the circumstances they contract under less one sided.[147] Or perhaps judges suppose that reproductive therapy blurs the line between health care and mere "cosmetics"[148] that are less essential and worthy of protection than traditional medical procedures.[149] American law's tendency to treat reproductive procedures as more luxury than necessity makes it difficult to imagine a U.S. Supreme

143. Id. at *12. These agreements (or liability waivers) do more than simply cap damages. See, e.g., Cal. Cryobank, Donor Semen Services Agreement http://cryobank.com/uploadedFiles/Cryobankcom/_forms/pdf/documents/PurchaseStorageAgreement.pdf [http://perma.cc/6Q3R-N4CV] (last visited Sept. 14, 2016) ("Client agrees to indemnify, defend and hold harmless Cryobank . . . and assigns from and against any claims, losses, damages, liabilities, demands, offsets, causes of action and expenses, including attorneys' and experts' fees, arising out of or related to any third party action, proceeding or dispute . . . ."). Nor does Cryobank make any guarantees about the quality or viability of specimens.

144. See Olson v. Molzen, 558 S.W.2d 429, 432 (Tenn. 1977) ("A [doctor] should not be permitted to hide behind the protective shield of an exculpatory contract and insist that he or she is not answerable for his or her own negligence."). See generally Mark A. Hall, Mary Anne Bobinski & David Orentlicher, Medical Liability and Treatment Relationships 123–25, 428–34 (3d ed. 2013) (discussing the medical malpractice waiver doctrine).

145. Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441, 446–47 (Cal. 1963).

146. See, e.g., Randy E. Barnett, A Consent Theory of Contract, 86 Colum. L. Rev. 269, 272–74 (1986).

147. Cf. Jim Hawkins, Doctors as Bankers: Evidence from Fertility Markets, 84 Tul. L. Rev. 841, 873 (2010) (noting infertility patients are "a vulnerable consumer group" despite possessing the "superficial[] . . . attributes of sophisticated consumers").

148. See Ob-Gyn Assocs. of N. Ind. v. Ransbottom, 885 N.E.2d 734, 739 (Ind. Ct. App. 2008) (characterizing laser hair removal). For discussion of this comparison, see supra notes 62–64.

149. See Dov Fox, Safety, Efficacy, and Authenticity: The Gap Between Ethics and Law in FDA Decisionmaking, 2005 Mich. St. L. Rev. 1135, 1137–46 [hereinafter Fox, FDA Decisionmaking] (distinguishing medical and social interventions by reference to therapies that improve skin, breasts, memory, and height).

Court Justice calling fertility treatment, in the way an Australian High Court Justice recently did, "a legitimate medical treatment for a legitimate medical condition . . . necessary to enable people to live dignified and productive lives, unencumbered by the effects of disease or impairment."[150]

Another contracts problem arises in "switch" cases involving the mistaken use of gametes or embryos that differ from those the providers agreed to fertilize or implant in ways other than the number or health of any resulting offspring. Courts sometimes excuse a breaching party if its failure to perform causes little material harm. In the classic "Reading Pipes" case, for example, a property holder refused to pay the builders with whom he contracted to build an upscale house on the grounds that they had used a different brand of pipes than the one specified in their agreement.[151] Because the generic pipe brand they installed comprised the same wrought iron quality, however, Judge Cardozo held that contract law afforded him no protection against the "transgressor whose default is unintentional and trivial."[152]

Children are not pipes. But recovery for a wrongful switch might likewise require that the genetic traits of any resulting offspring differ from what parents had intended in ways that are not merely incidental to the contract they signed but that go to its very purpose. Accordingly, patients might have to prove that a breach implicated a critical part of the agreement itself when they got material from, for instance, a sick embryo rather than the healthy one they selected, or a short donor instead of a tall one, or a blonde not a brunette. The material-breach doctrine could bar recovery for such cases involving negligently switched donors, so long as they got any child at all, and especially one who is born healthy, even if the mix-up led that child to depart from their expectations in any number of other ways that matter a great deal to them.[153]

5. *Loss of Property.* — Property law is no better equipped than contract law is to resolve disputes about reproductive negligence. The problem is not that the law cannot treat sperm, eggs, or embryos as property subject to being owned. "Property" and "ownership" are just legal terms of art that designate the ways in which people exercise

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150. Castles v Sec'y to the Dep't of Justice [2010] VSC 310, ¶ 123. The only U.S. judgment to have held, for a time, that infertility treatment is "essential for . . . necessary care and treatment" was vacated and then reversed. See Ralston v. Conn. Gen. Life Ins., 617 So. 2d 1379, 1382 (La. Ct. App. 1993), rev'd and remanded, 625 So. 2d 156, 157 (La. 1993).

151. See Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 890 (N.Y. 1921).

152. Id. at 891 (explaining that the line "between the important and the trivial" is a case-by-case matter "of degree").

153. For a discussion of liability and damages in such cases, see infra notes 327–364, 517–539 and accompanying text.

control over the disposition of entities.[154] A person "owns" her kidneys, for example, and might consider them her "property" in that she is free to donate one, even as federal law forbids her from selling it.[155] Courts have similarly held that people's "interest in the nature of ownership" over embryos lies in "decision-making authority concerning [their] disposition."[156] It is easy to think that the harm of lost embryos amounts to something like the misappropriation of property.[157] But this theory would not apply to the majority of reproductive-negligence cases—from failed sterilizations to misdiagnosed prenatal tests—that feature no loss of genetic material.

Even in negligence disputes that do involve the loss of eggs, sperm, or embryos, damages awards would be unduly constrained by treating embryos as the "property of [the] progenitors."[158] In *Frisina*, the court allowed plaintiffs to recover for their missing embryos "based on the loss of irreplaceable property."[159] But what could such property damages be? The price of replacing them would be relatively paltry—a few dollars for sperm, a few thousand for eggs, another couple for medicines needed to obtain them, and a few more for procedures to create new embryos.[160] And if not the cost of replacement, how would the court determine the value of the "interest in the nature of ownership" that plaintiffs enjoyed in the embryos?[161] The *Frisina* court treated the damages of embryo loss in terms of the "discomforts[] and annoyance" of being denied use of one's home after a basement flooding.[162] Yet the loss of one's embryos is a distinct and far weightier kind of injury. Plaintiffs have reason to care more about their reproductive prospects than the conveniences that a roof enables or the symbolism it evokes. Consigning this denial of control over procreation to the nuisance of lost property distorts and devalues the discrete and serious injuries that reproductive negligence

154. See John A. Robertson, In the Beginning: The Legal Status of Early Embryos, 76 Va. L. Rev. 437, 454–55 & n.48 (1990).

155. See National Organ Transplant Act, 42 U.S.C. § 274e (2012) (barring organ sales).

156. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

157. The law compensates lost property that lacks market value if its worth transcends the sentimental. Judith D. Fischer, Misappropriation of Human Eggs and Embryos and the Tort of Conversion: A Relational View, 32 Loy. L.A. L. Rev. 381, 418–25 (1999).

158. Frisina v. Women & Infants Hosp. of R.I., Nos. CIV. A. 95-4037, CIV. A. 95-4469, CIV. A. 95-4827, 2002 WL 1288784, at *9 (R.I. Super. Ct. May 30, 2002).

159. Id. at *10 (internal quotation marks omitted) (quoting David and Carol Frisina's complaint).

160. See Alex Wu et al., Out-of-Pocket Fertility Patient Expense: Data from a Multicenter Prospective Infertility Cohort, 191 J. Urology 427, 431 (2014) (finding $19,234 to be the median cost for each cycle of IVF).

161. *Frisina*, 2002 WL 1288784, at *4 (internal quotation marks omitted) (quoting *Davis*, 842 S.W.2d at 597).

162. Id. at *9 (citing Hawkins v. Scituate Oil, 723 A.2d 771 (R.I. 1999)).

inflicts. The next section spells out the meaning and significance of such setbacks.

B. *Procreation Interests*

Reproductive negligence implicates control over the multiple dimensions of procreation: conception, gestation, childbirth, as well as child-rearing, a characteristic and meaningful extension of the reproductive experience.[163] Advances like surrogacy, gamete donation, IVF, and embryo selection enable people to separate out the pursuit or avoidance of procreation into any of its components related to pregnancy (gestating a fetus), parenthood (raising a child), and particulars (selecting offspring traits).[164] These severable interests in pregnancy, parenthood, and particulars are implicated together when people are either forced to have a child[165] or kept from having one they wanted.[166] These interests can also come apart, as in cases in which one woman's embryos get implanted into a second woman who then gestates and gives birth before returning the resulting child to the first woman.[167] Such mix-ups deprive the first woman of pregnancy (but not parenthood), while imposing pregnancy (but not parenthood) on the second.[168] This section will also discuss a third reproductive interest in the prenatal selection of offspring

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163. For constitutional constructions that cohere with this approach, see infra notes 436–457 and accompanying text.

164. See John A. Robertson, Children of Choice: Freedom and the New Reproductive Technologies 108–09 (1994) [hereinafter Robertson, Children of Choice] (distinguishing between bodily integrity interests at stake in abortion and genetic affinity interests at stake in IVF); see also Ruth F. Chadwick, Having Children, *in* Ethics, Reproduction and Genetic Control 3, 6–11, 30–40 (Ruth F. Chadwick rev. ed. 1992) (distinguishing begetting, bearing, and rearing children); Cohen, The Constitution, supra note 40, at 1135 (distinguishing genetic, gestational, and legal parenthood); Kimberly M. Mutcherson, Procreative Pluralism, 30 Berkeley J. Gender L. & Just. 22, 39 (2015) ("Assisted reproduction challenges the law to disentangle procreation from sex, parenting, and pregnancy."); Mary Ziegler, Abortion and the Constitutional Right (Not) to Procreate, 48 U. Rich. L. Rev. 1263, 1314 (2014) ("[T]he reasons to recognize such a right [to seek or avoid parenthood] in the context of genetic, gestational, or functional parenthood will be quite different.").

165. See, e.g., Provencio v. Wenrich, 261 P.3d 1089, 1090 (N.M. 2011) (discussing a failed tubal ligation that resulted in a unplanned child).

166. See e.g., In re Dunjee, 57 So. 3d 541, 552 (La. Ct. App. 2011) (discussing obstetric malpractice that a woman claimed left her sterile).

167. See Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 24 (App. Div. 2000) (describing such a situation); see also Woman in Embryo Mix-up Gives Birth to Boy, CNN (Sept. 26, 2009), http://www.cnn.com/2009/HEALTH/09/25/wrong.embryo.birth/ [http://perma.cc/R9PG-P2KP] (reporting on a couple who decided "to carry the baby and relinquish him to his DNA parents after birth"); cf. Mary Ann Ostrom, Board Revokes Doctor's License, San Jose Mercury News, Mar. 30, 2005, at B (reporting on a doctor who failed to inform his patient that he had implanted the wrong embryo in her).

168. See John A. Robertson, The Case of the Switched Embryos, Hastings Ctr. Rep., Nov.–Dec. 1995, at 13, 17 (discussing the effect of being "wrongfully deprive[d]" of one's embryos).

particulars. A person's interests in making these decisions about pregnancy, parenthood, and offspring particulars vindicate not just decisional autonomy (how freely she chooses), but also individual well-being (how well such outcomes help her live).[169] Whatever satisfaction a person gets from knowing that the reproductive experiences she prizes are of her own making, it matters at least as much the ways in which those experiences help her to live well, for example, by leading a life that is more valuable to her or by fulfilling her informed desires about what would make her happy.[170]

1. *Pregnancy.* — The average American woman spends five years pregnant (or trying to be) and thirty years trying not to get pregnant by avoiding sex or using birth control.[171] Women have varied reasons to pursue or avoid gestation, an undertaking that they may experience and understand in complex and even contradictory ways.[172] Pregnancy characteristically constrains a woman's freedom and comfort, but it can also affirm or even empower her: People "may treat [a pregnant woman] with love and respect," Professor Reva Siegel explains, or "abuse her as a

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169. What makes a person's life go well, in matters of family planning and more generally, is notoriously difficult to define. Two broad accounts of well-being are most prominent. First are those that emphasize subjective measures like the experience of pleasure or fulfillment of preferences. See James Griffin, Well-Being: Its Meaning, Measurement and Moral Importance 7–39 (1986). Second are those that emphasize objective measures like valuable activities or states of being that are said to make a person's life go well, independent of her particular experiences or desires. See id. at 40–75.

170. See id. at 11–40. The objective account of well-being loses justificatory force insofar as the very same state that is good for one person (for example, having a child, at this time or with that partner or at all, or having a child with certain specific traits) can appear so clearly bad for another person who holds different values or faces different circumstances. The subjective account of well-being better respects people's individuality by accommodating the diversity among them. But this account is importantly limited by the extent to which misinformation or cognitive bias can distort what people think and say they want for their own lives at any particular moment. The subjective understanding might withstand these limitations, however, by constraining what desires count as valuable or by reining in the psychological limitations that can lead people to mispredict one's own quality of life. See John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, Happiness and the Law 118–32 (2014) (discussing affective forecasting and adaptation biases). This practical subjectivism account of what it is to live well is what I mean by well-being. See generally Daniel M. Haybron & Valerie Tiberius, Well-Being Policy: What Standard of Well-Being?, 1 J. Am. Phil. Ass'n 712 (2015).

171. See R. Alta Charo, The Supreme Court Decision in the Hobby Lobby Case: Conscience, Complicity, and Contraception, 174 JAMA Internal Med. 1537, 1538 (2014) (comparing cost, convenience, and failure rates among birth control methods such as condoms, diaphragms, oral contraceptives, and intrauterine devices).

172. See generally Maybe Baby: 28 Writers Tell the Truth About Skepticism, Infertility, Baby Lust, Childlessness, Ambivalence, and How They Made the Biggest Decision of Their Lives (Lori Leibovich ed., 2006) (telling first-person stories about how and why women have decided whether to become or stay pregnant, what those decisions about pregnancy have meant to them, and how the process of deciding has changed their self-understandings over time).

burden, scorn her as unwed, or judge her as unfit for employment."[173] On the one hand, courts credit the claim that "being pregnant" affords those who long for it a valuable "bond" that makes "the ability to have a biological child and/or be pregnant a distinct experience from adoption."[174] And yet unwanted pregnancy subjects women to a distinct form of distress that exposes them to fetal-protective restrictions including forced Cesarean surgeries, hospital deliveries, drug testing, and life support.[175] Pregnancy accordingly occasions a diverse array of responses and aftermaths ranging from elation, social esteem, and fetal bonding to panic, bitterness, contempt, and utter ambivalence in between.[176]

The exercise of control over decisions about whether or not to carry a child matters a great deal to women, and to a lesser extent to their partners. This control matters not only because pregnancy carries, as one U.S. court noted, "a litany of physical, emotional, economic, and social consequences" associated with unwanted or risky miscarriage, abortion, adoption, childbirth, and prenatal or postpartum care,[177] but also because pregnancy or its absence can, as one Canadian judge elaborated, "deeply reflect[] the way the woman thinks about herself and her relationship to others and to society at large."[178] Professor Khiara Bridges describes this injury as "the fact that the woman thinks of herself differently," in a disorientating transformation "from 'woman' to 'pregnant woman.'"[179] Denying a woman's ability to construct the experience of pregnancy for herself separates her from her reproductive capacity and at the same time reduces her to it.[180] This is why negligent contraceptive or infertility treatment can create and enforce a "perceived identity" for a woman by depriving her of authority over this part of her life in ways

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173. Siegel, Reasoning from the Body, supra note 58, at 374 (footnotes omitted).

174. Reber v. Reiss, 42 A.3d 1131, 1138 (Pa. Super. Ct. 2012).

175. See Lisa C. Ikemoto, The Code of the Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of the Law, 53 Ohio St. L.J. 1205, 1236–48 (1992).

176. See Catriona Mackenzie, Abortion and Embodiment, *in* Troubled Bodies 38, 53 (Paul A. Komesaroff ed., 1995) (arguing the ascriptive significance of pregnancy is "mediated by the cultural meanings . . . , by the woman's personal and social context, and by the way she constitutes herself in response to these factors through the decisions she makes").

177. Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1273 (W.D. Wash. 2001).

178. R. v. Morgentaler, [1988] 1 S.C.R. 30, 171 (Wilson, J., concurring).

179. Khiara M. Bridges, When Pregnancy Is an Injury: Rape, Law, and Culture, 65 Stan. L. Rev. 457, 488 (2013); see also Eileen L. McDonagh, Breaking the Abortion Deadlock: From Choice to Consent 89–91 (1996) (arguing that medically normal unwanted pregnancy injures a woman by "forcing pregnancy on her against her will").

180. See Julia E. Hanigsberg, Homologizing Pregnancy and Motherhood: A Consideration of Abortion, 94 Mich. L. Rev. 371, 372 (1995) (noting that unwanted gestation "divides women from their wombs and uses their wombs for a purpose unrelated to women's own aspirations").

that can "forcefully reshape and redirect" it "in the minutest detail."[181] These serious and gendered harms to the interest in controlling decisions about pregnancy warrant protection.[182]

2. *Parenthood.* — What most victims of reproductive negligence care about even more than being pregnant or not is whether they have a child to raise as their own.[183] Among the most "important and commonly given reasons" for having children are people's expectations that the experience of sharing "specially intimate [parent–child] relationships of mutual knowledge, care, and dependence" will be "interesting, rewarding, challenging, and fulfilling."[184] The decision about whether to be a parent is similarly important to justify a right to recover when professionals wrongfully frustrate a person's interest in making that decision. When such errors result in the birth of a child, victims undertake the "demanding task of bringing up [the] child or arranging for its upbringing to at least that level which will minimally fit the child for independent adult life in its society."[185] *Roe v. Wade* explained the abortion right in part by reference to just these kinds of consequences that unwanted parenthood foists upon the pregnant woman and her family: "[B]ringing a child into a family already unable, psychologically and otherwise, to care for it" could "force upon the woman a distressful life and future."[186]

While pregnancy by itself can limit social, educational, and professional prospects for nine months and beyond, raising a child can constrain such opportunities for eighteen years or more.[187] Childcare responsibilities may entail losing sleep with a fussy baby, passing on travel

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181. See Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 788–90 (1989) (discussing the injury of unwanted pregnancy in the abortion context).

182. See Reva B. Siegel, Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression, 56 Emory L.J. 815, 818 (2007) [hereinafter Siegel, Sex Equality Arguments] ("[T]he sex equality approach to reproductive rights views control over the timing of motherhood as crucial to the status and welfare of women, individually and as a class.").

183. See Bonnie Steinbock, Reproductive Rights and Responsibilities, Hastings Ctr. Rep., May–June 1994, at 15, 15 (arguing that "[p]rocreation is an important interest of individuals primarily because it is the usual way of . . . creating children that one will rear").

184. Kenneth Alpern, Genetic Puzzles and Stork Stories, *in* The Ethics of Reproductive Technology 147, 151–52, 157 (1992).

185. Onora O'Neill, Begetting, Bearing, and Rearing, *in* Having Children: Philosophical and Legal Reflections on Parenthood 25, 26 (Onora O'Neill & William Ruddick eds., 1979); see id. at 30 (denying that parents are entitled "to cause grave harm [to offspring] by their procreation").

186. 410 U.S. 113, 153 (1973).

187. See Barbara Stark, The Women's Convention, Reproductive Rights, and the Reproduction of Gender, 18 Duke J. Gender L. & Pol'y 261, 279 (2011) ("[S]ocially-constructed responsibilities for taking care of their children, as well as feeding, clothing, and nurturing . . . reproduce gender by perpetuating the stereotype of women as caregivers.").

opportunities while breastfeeding, and keeping the child in one's immediate sight at all times. The England and Wales Court of Appeal expounded on the responsibilities of parenthood "to provide or make acceptable and safe arrangements for the child's care and supervision lasts for 24 hours a day, 7 days a week, all year round, until the child becomes old enough to take care of himself."[188] Violations of this interest implicate the wrongful loss of one's reasonable expectations to realize decisions about whether or not to assume the consuming and enduring role as a parent. Courts err in overlooking these far-reaching consequences to personal identity and well-being when unwanted parenthood is imposed or wanted parenthood is deprived.[189] The loss of control over whether to become a parent is an injury that extends beyond any other associated physical, financial, or emotional consequences.

3. *Particulars*. — The parenthood interest paradigmatically protects people's decisions about whether to have a child at all. But sometimes it also matters whether the child they have is likely to be born with certain traits. Reproductive technology lets people choose among embryos or donors.[190] Those who create embryos using IVF can, for an additional fee, test the embryos before deciding which to implant based on traits from disease to eye color.[191] Prospective parents typically screen out anomalies, but in rare instances "select an embryo for the presence of a disability" like deafness or dwarfism that parents share.[192] Sperm banks and egg vendors offer choices among donors based on height, physical appearance (even celebrity likeness), SAT scores, educational back-

188. Parkinson v. St. James & Seacroft Univ. Hosp. NHS Tr. [2001] EWCA (Civ) 530 [71], [2002] QB 266 [283].

189. See infra notes 232–236 and accompanying text (discussing common objections to recovery along these lines).

190. See Rene Almeling, Sex Cells: The Medical Market for Eggs and Sperm 64 (2011) (explaining the process of donor selection); see also Dov Fox, Retracing Liberalism and Remaking Nature: Designer Children, Research Embryos, and Featherless Chickens, 24 Bioethics 170, 174 (2010) (noting that couples can choose among donors and embryos).

191. Allen Goldberg, Opinion, Select a Baby's Health Not Eye Color, L.A. Times (Feb. 17, 2009), http://www.latimes.com/opinion/la-oe-mgoldberg17-2009feb17-story.html [http://perma.cc/LTM2-UH6G]; Rob Stein, "Embryo Bank" Stirs Ethics Fears, Wash. Post (Jan. 6, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/01/05/AR2007010501953.html [http://perma.cc/D38R-V2GL].

192. Baruch, Kaufman & Hudson, supra note 8, at 1055; see also Merle Spriggs, Lesbian Couple Create a Child Who Is Deaf like Them, 28 J. Med. Ethics 283, 283 (2002); Faye Flam, Designing the Family Tree a Road to Eugenics?, Buff. News, June 25, 1995, at F7; Lindsey Tanner, Some Ponder "Designer" Babies with Mom or Dad's Defective Genes, USA Today (Dec. 21, 2006), http://www.usatoday.com/tech/science/genetics/2006-12-21-designer-disability_x.htm [http://perma.cc/H2SF-UJKP]; Sarah-Kate Templeton, Deaf Demand Right to Designer Deaf Children, Sunday Times (Dec. 23, 2007), http://www.timesonline.co.uk/tol/news/uk/health/article3087367.ece [http://perma.cc/6X6H-HD5L].

ground, and race or religion.[193] It must be emphasized that countless traits that parents may care about—intelligence, personality, behavior—have causes that are too complex to infer much from embryos, gametes, and especially donors in seeing how such attributes might develop in a resulting child.[194] Yet traits like facial features, stature, and skin color are significantly heritable.[195] Prenatal testing can reliably reveal susceptibility to many diseases or biological sex.[196] Preconception sex selection even enables screening within a genetic sample for sperm to yield either boys or girls.[197]

Why should the law care when professionals thwart efforts to select particular traits in offspring? For certain genetic trait preferences—for a child related by blood, for instance, or one who is born free of disease—it is easy to appreciate the practical significance of their wrongful frustration. Consider the biological relationship of children to parents. This kind of heredity carries great social importance.[198] For many, a "blood"

193. See Fox, Racial Classification, supra note 47, at 1850 (detailing how sperm bank catalogs include donor "height, weight, education, occupation, religion, ethnic origin, facial features, eye and hair color, hair texture, skin tone, and race"); Nick Allen, Ben Affleck Tops Celebrity Look-a-Like Sperm Donors List, Telegraph (Dec. 25, 2009), http://www.telegraph.co.uk/news/celebritynews/6884489/Ben-Affleck-tops-celebrity-look-a-like-sperm-donorslist.html (on file with the *Columbia Law Review*). "London Sperm Bank, the UK's largest with over 10,000 vials of sperm" has even "released a Tinder-esque mobile app that lets women filter potential sperm donors based on traits like ethnicity, occupation, personality type, eye color, and more." Ananya Bhattacharya, Tinder for Dads: Swipe Right for a Sperm Donor, Quartz (Sept. 27, 2016), http://qz.com/793067/the-london-sperm-bank-created-a-tinder-esque-app-to-help-women-find-donors/ [http://perma.cc/B4A8-KDKM].

194. See Andrew Solomon, Far from the Tree: Parents, Children, and the Search for Identity 1 (2012) ("Our children are not us: they carry throwback genes and recessive traits and are subject right from the start to environmental stimuli beyond our control."); Gene Robinson, Beyond Nature and Nurture, 304 Science 397, 397 (2004) (explaining how complex traits develop through "an interplay between inherited and environmental influences").

195. See Hannah Pulker et al., Finding Genes that Underlie Physical Traits of Forensic Interest Using Genetic Tools, 1 Forensic Sci. Int'l: Genetics 100, 102–03 (2007). Another company uses DNA from potential donors and recipients to screen "virtual" embryos for "genetic conditions in hypothetical offspring." Informed Consent for GenePeeks, GenePeeks, http://www.genepeeks.com/consent [http://perma.cc/U5L3-VPNR] (last visited Sept. 14, 2016) (describing the heritability of facial features, stature, and skin color).

196. See Jaime King, Predicting Probability: Regulating the Future of Preimplantation Genetic Screening, 8 Yale J. Health Pol'y L. & Ethics 283, 285–86, 293–96 (2008) ("The use of [preimplantation genetic screening] to screen for chromosomal structure can also detect which embryos will develop significant disorders.").

197. See Fox, FDA Decisionmaking, supra note 149, at 1142–43 (describing preconception methods of sex selection). For discussion of recovery for the negligent thwarting of such selection, see infra notes 352–363 and accompanying text.

198. See June Carbone, Negating the Genetic Tie: Does the Law Encourage Unnecessary Risks?, 79 UMKC L. Rev. 333, 333–34 (2010) (noting that "genetic mothers are presumed to form a bond with the child they carry whereas gestational 'carriers' are presumed to be able to separate from the child").

relationship manifests an emotional bond through physical resemblance of offspring.[199] These parents value a shared biological identity that they anticipate being able to witness in the appearance or temperament of their children, whom they presume will take after various genetic relatives.[200] Others seek to share with their children ostensibly inherited traits invested with symbolic meaning because they identify parent and child as members of the same group or prevent a loss of genetic continuity between a people's past and future.[201] The father in the *Baby M* surrogacy case,[202] for example, as the last Holocaust survivor in his family sought to "maintain[] the genetic line" as "a chance to ward off existential loneliness."[203] Likewise, certain communities credit biological connection to future generations as an important source of religious or cultural belonging.[204]

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199. See Dov Fox, Paying for Particulars in People-to-Be: Commercialisation, Commodification and Commensurability in Human Reproduction, 34 J. Med. Ethics 162, 165 (2008) ("Genetic relation within families might also facilitate emotional bonding between parents and children who recognise shared hereditary features in one another."); 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, 389 (1991) ("It is beyond dispute that an important aspect of parenthood is the experience of creating another in one's 'own likeness.' Part of what makes parenthood meaningful is the parent's ability to see the child grow and develop and see oneself in the process of this growth.").

200. See Janet L. Dolgin, Biological Evaluations: Blood, Genes, and Family, 41 Akron L. Rev. 347, 366–67 (2008).

201. See Kaja Finkler, Experiencing the New Genetics: Family and Kinship on the Medical Frontier 10 (2000) ("DNA binds a person's past and future into a single family narrative . . . , connecting people to their ancestors and reinforcing continuity with them . . . [and] acting as a repository of memory for an individual's past, which may have been otherwise forgotten."); David M. Schneider, American Kinship 23–25 (2d ed. 1980) (defining the "American cultural conception" of family relationships in "biogenetic" terms of "common identity, expressed as 'being of the same flesh and blood'").

202. In re Baby M, 537 A.2d 1227, 1235 (N.J. 1988).

203. Michelle Harrison, Social Construction of Mary Beth Whitehead, 1 Gender & Soc'y 300, 302 (1987).

204. See Aviad E. Raz, Community Genetics and Genetic Alliances 53–54, 62 (2010) (discussing how Orthodox Jewish people prioritize factors like family and genealogy in the matchmaking context). Different individuals, cultures, and countries value the genetic tie to varying degrees. Heredity tends to matter more in the United States than in Denmark, for example, and less than in Israel. See Doron Dorfman, The Inaccessible Road to Motherhood—The Tragic Consequence of Not Having Reproductive Policies for Israelis with Disabilities, 30 Colum. J. Gender & L. 49, 54–55 (2015) (noting Jewish-Israelis have many more children than Jewish counterparts in the United States and Western Europe). Professor Dorothy Roberts has argued that heredity assumes less significance in African American families. Dorothy E. Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209, 214 (1995). For discussion of concerns that protecting genetic parenthood via right of recovery risks devaluing functional parenthood, see infra notes 515–516 and accompanying text.

For some people in other contexts, the genetic connection to offspring is something to avoid, independent of pregnancy or parenthood. Professor I. Glenn Cohen discusses cases involving stolen or saved sperm and postdivorce embryo disputes, in which men object to the use of their genetic material to reproduce. I. Glenn Cohen, The Right

Would-be parents also have an interest in selecting for offspring health. The birth of a child with a genetic disease will predictably inform the sorts of experiences that raising him will involve, perhaps even for how long.[205] At the extreme is a debilitating untreatable disease like Tay-Sachs, which destroys a child's central nervous system before recurrent seizures and loss of muscle and mental function leave her nonresponsive until an early death.[206] Diseases this devastating make clear the impact of raising a child with limited ability to move about or participate in family life. These effects are correspondingly less severe for conditions whose effects tend to be milder or come about only later, bearing in mind their inevitably variable expressions. For example, conditions like spina bifida, cystic fibrosis, and Down syndrome will usually shorten life or impair basic activities to a greater extent than those like ambiguous genitalia, Tourette syndrome, or Huntington's disease.[207] And any of these disorders disrupt well-being more than conditions like colorblindness that scarcely disturb life in the developed world, short stature that falls within population norms, or near-sightedness whose hardships can be readily repaired.[208]

Not to Be a Genetic Parent?, 81 S. Cal. L. Rev. 1115, 1117–18, 1124–25 (2008). Even though these men cannot become pregnant and would not have to pay child support, they might nevertheless object to the use of their biological material to have children in order to escape the risk of thinking of themselves or being regarded by others as parents based on heredity alone. Unwanted heredity "is not merely the existence of someone who carries my genetic code," Cohen argues, but "the attribution of parenthood" that can come from perceiving oneself or being perceived as a parent, even if "the legal system has declared him or her a nonparent." Id. at 1125, 1137; see also Niko Kolodny, Which Relationships Justify Partiality? The Case of Parents and Children, 38 Phil. & Pub. Aff. 37, 66 (2010) (arguing people "have reason to feel certain things about their genetic children" even if they had not known they existed and "may have responsibilities to do other things for their genetic children, besides raising them" like "agreeing to meet with them and answer potentially intimate and painful questions").

205. See John A. Robertson, Procreative Liberty in the Era of Genomics, 29 Am. J.L. & Med. 439, 450 (2003) (noting "elaborate neonatal intensive care units that go to great expense to save all newborns, and norms for treating all newborns no matter the cost or scope of their handicaps" is evidence of society's "strong commitment" to the value of "[g]ood health in offspring").

206. Classic Infantile Tay-Sachs, Nat'l Tay-Sachs & Allied Diseases Ass'n, http://www.ntsad.org/index.php/tay-sachs/classic-infantile-form [http://perma.cc/X299-VPFD] (last updated Mar. 13, 2015, 9:18 AM).

207. See Jeffrey R. Botkin, Fetal Privacy and Confidentiality, Hastings Ctr. Rep., Sept.–Oct. 1995, at 32, 37 (assessing the impact of genetic disability on family life in terms of likely manifestation, severity, age of onset, and treatability).

208. See Dov Fox & Christopher L. Griffin, Jr., Disability-Selective Abortion and the Americans with Disabilities Act, 2009 Utah L. Rev. 845, 881–82 (distinguishing parental attitudes about the prospect of children with mental disabilities from parental attitudes about the prospect of children with physical disabilities). For a discussion of policy objections to recovering for thwarted selection against offspring disability, see infra notes 540–544 and accompanying text. For an account of the conceptual and normative distinction between medical and nonmedical conditions and what makes incapacitating or shame-inducing traits different, see Dov Fox, Parental Attention Deficit Disorder, 25 J.

Parents might try to explain selection efforts as serving the best interests of the child to be. But failing to select a healthy embryo or donor can be said to harm the resulting child, in the usual sense of harm, only if that child's life is worse for her than never having been born at all.[209] The child herself could not have been born without that genetic condition, and any healthy child who might otherwise have existed in her place would have been a different person altogether.[210] Even for prenatal misconduct that *can* be said to have harmed a specific, individual child—when, say, a doctor's failure to respond to fetal distress causes abnormality at birth—there remains a separate interest, over and above concern for a resulting child, that adults have in shaping their families.[211]

II. MAPPING REPRODUCTIVE WRONGS

Reproductive wrongdoing—whether by governments, professionals, or intimates—can be divided into three categories that vary according to the interests that it frustrates. The first *imposes* pregnancy or parenthood on people seeking to avoid those dimensions of procreation. The second *deprives* those pursuing these reproductive goals of the chance to be pregnant or have a child. And the third *confounds* efforts to have or avoid having a child of a particular type (say, a girl, not a boy) and for a particular reason—to prevent sex-linked disease, for example, or balance offspring gender. In the first category the imposition of procreation violates interests in avoiding unwanted pregnancy or parenthood. The

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Applied Phil. 246, 253–54 (2008) [hereinafter Fox, Parental Attention]; see also Jonathan Glover, Choosing Children: Genes, Disability, and Design 13 (2006) ("The relevant concept of normality is a messy one. It is partly socially constructed. It is partly context dependent. And it combines elements of the numerical [predominance of a characteristic within a population] and the normative [conditions that people have a strong rational preference not to be in].").

209. See I. Glenn Cohen, Regulating Reproduction: The Problem with Best Interests, 96 Minn. L. Rev. 423, 471–74 (2011) (discussing the category of "lives not worth living").

210. See Robertson, Children of Choice, supra note 164, at 75–76 ("[I]n many cases of concern the alleged harm to offspring occurs from the birth itself . . . . Preventing harm would mean preventing the birth of the child whose interests one is trying to protect."); Dov Fox, Luck, Genes, and Equality, 35 J.L. Med. & Ethics 712, 713 (2007) ("[I]t makes little sense . . . to consider whether the person resulting from genetic selection from among multiple potential lives is better or worse off on account of any pre-natal interventions taken on her behalf."). Thwarted efforts to select traits in the reproductive context have an importantly different consequence compared to similar errors in selective adoption. Wrongful misrepresentations in adoption alone risks depriving existing children of the stable family and permanent home they need. Similarly negligent errors in selective procreation cannot ordinarily be said to harm existing children in the same material and sweeping way.

211. See Roe v. Wade, 410 U.S. 113, 153 (1973) (grounding the abortion right within broader substantive due process guarantees of parental freedom to form "family relationships" by making choices about "child rearing and education").

deprivation of procreation, by contrast, impairs the pursuit of wanted pregnancy or parenthood. And when specialists confound procreation, the injury is to reasonable expectations of control over the selection of offspring particulars that people project would make the parenting experience more worthwhile for them. This Part considers these three reproductive wrongs in turn.

A. *Procreation Imposed*

Reproductive negligence that imposes unwanted pregnancy or parenthood violates interests in decisions to decline these roles. Interference in the diagnosis of pregnancy, in the dispensation of birth control, and in the performance of abortion or sterilization foists these consuming statuses on people who enlisted reproductive medicine and technology to avoid them. The injury in these cases is the wrongful deprivation of control over decisions *not* to become pregnant or not to become a parent, whether on a particular occasion or at all. In a straightforward example, people undergo voluntary sterilization so that having sex would no longer risk conception. The negligent performance of a vasectomy or tubal ligation results in the conception they had sought to prevent.[212] In a variant on these cases, a woman told the surgeon who would be removing her ovarian cyst that she and her husband were relying on an intrauterine device to prevent pregnancy.[213] The doctor assured her that if the procedure required removal of the device, he would replace it.[214] He forgot and failed to inform her, and she became pregnant with a (healthy) child that the couple could not afford.[215]

This class of cases also includes negligently failed abortions or misdiagnosed pregnancies that force a woman to gestate or deliver a child.[216] Other instances of imposed procreation involve procedures that are less invasive than a botched abortion. Procreation is also wrongfully imposed when a clinic transfers a greater number of embryos than the

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212. See Bertrand v. Kudla, 139 So. 3d 1233, 1242–44 (La. Ct. App. 2014) (discussing the emotional toll of a failed tubal-ligation procedure and judicial remedies available); Provencio v. Wenrich, 261 P.3d 1089, 1090 (N.M. 2011) (noting judicial remedies available to recipients of a failed tubal-ligation procedure); Michigan Mother Files Lawsuit Against Doctor over Unplanned Pregnancy, KTLA (June 27, 2016, 12:26 PM), http://ktla.com/2016/06/27/michigan-woman-sues-for-wrongful-conception-after-doctor-said-she-couldnt-get-pregnant/ [http://perma.cc/FN63-SW3W].

213. Jackson v. Bumgardner, 347 S.E.2d 743, 744–45 (1986).

214. See id. at 745–46.

215. See id. In another case, a clinic did not secure a man's consent before transferring the embryos that he helped to create but assumed had been destroyed. The clinic implanted them into his estranged wife from whom he had filed for divorce. Gladu v. Bos. IVF Inc., No. 98-4189, 1000 WL 177798, at *1–2 (Unknown Mass. State Ct. Jan. 30, 2004) (verdict and settlement summary).

216. See Miceli v. Ansell, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998) (regarding defective condom that led to unwanted pregnancy).

would-be parents agreed to have implanted.[217] For instance, in one Australian case, a couple wanting just one child asked that only a single embryo be implanted, while the unknown use of two resulted in their having twins.[218] Similar cases arise when doctors prescribe fertility drugs without informing patients that their use increases the chances of producing high-order pregnancies that place resulting children at a higher risk of premature birth and associated complications.[219]

A recent U.S. case involved a clinic's failure to inform a man before using semen obtained from his appropriated condom, thereby turning him into an unwitting sperm donor.[220] The Texas Court of Appeals summarized the facts:

> [Joseph] Pressil and Anetria Burnette were involved in a sexual relationship. The couple used condoms for birth control. Pressil later learned that Burnette had surreptitiously collected samples of his sperm and taken them to the Clinic. Burnette apparently told the Clinic that she was Pressil's wife and that the couple needed help conceiving a child. The Clinic successfully inseminated Burnette, and Burnette eventually gave birth to healthy twin boys.[221]

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217. See Judith Mair, Damages Claim for Wrongful Birth Due to a Systems Failure, 41 Health Info. Mgmt. J. 36, 36 (2012) (providing commentary on a case that involved the transfer of two embryos during an IVF procedure resulting in the unwanted birth of two children).

218. See G. & M. v Armellin [2009] ACTCA 6, ¶ 4 (regarding negligent implantation of extra embryos). In another case, a couple that made clear no more than two embryos should be implanted eventually gave birth to triplets due to the unrequested use of three embryos. Clare Dyer, Payout to Triplet Parents in Landmark IVF Case, Guardian (Nov. 17, 2000), http://www.theguardian.com/uk/2000/nov/17/claredyer [http://perma.cc/2Q72-MU9E] (relaying trial decision for plaintiffs on breach of contract claims).

219. See Morgan v. Christman, No. 88–3211–O, 1990 WL 137405, at *1–2 (D. Kan. July 20, 1990) (discussing parents who sued a physician for not warning them about the side effects of a drug that was known to heighten the risk of multiple pregnancy); Assoc. Press, Clinic Settles Malpractice Lawsuit by Parents Who Had Septuplets, N.Y. Times (July 12, 1990), http://www.nytimes.com/1990/07/12/us/clinic-settles-malpractice-lawsuit-by-parents-who-had-septuplets.html (on file with the *Columbia Law Review*). See generally Laura A. Schieve et al., Estimation of the Contribution of Non-Assisted Reproductive Technology Ovulation Stimulation Fertility Treatments to US Singleton and Multiple Births, 170 Am. J. Epidemiology 1396 (2009) (estimating the number of U.S. multiple and singleton live births in 2005 conceived by using ovulation medication as opposed to ART methods); Victoria Clay Wright et al., Div. of Reprod. Health, Nat'l Ctr. for Chronic Disease Prevention & Health Promotion, Assisted Reproductive Technology Surveillance—United States, 2005, Morbidity & Mortality Wkly. Rep. (June 20, 2008), https://www.cdc.gov/mmwr/preview/mmwrhtml/ss5705a1.htm [http://perma.cc/VTC3-3YPQ] (noting that over forty percent of ART procedures result in twins and about five percent result in triplets or higher-order multiples).

220. Pressil v. Gibson, 477 S.W.3d 402, 405 (Tex. Ct. App. 2015).

221. Id.

Pressil, now a father twice over against his will, sued the clinic for "failing to investigate and obtain [his] consent."[222] The court refused recovery for lack of physical harm or otherwise cognizable injury. It explained that "no medical procedure was performed on him," while "the medical procedure performed on Burnette was apparently a rousing success, resulting in the birth of healthy twin boys."[223] And the court held a "plaintiff cannot recover damages related to the support and maintenance of a healthy child born as a result of the medical provider's negligence . . . because the intangible benefits of parenthood far outweigh the monetary burdens involved."[224] Pressil therefore had no legal recourse or source of recovery against the fertility clinic. This is indeed a common outcome when professionals wrongfully impose procreation.

1. *Illuminating the Harm.* — The prominent feature that botched vasectomies, defective condoms, failed abortions, and unconsented embryo transfers share is their negligent imposition of pregnancy and/or parenthood. Courts have long denied recovery for this injury under available tort remedies.[225] Wrongful-birth actions focus narrowly on discrete bodily or economic harms, ignoring the weighty repercussions such misconduct wreaks on the well-being of victims whose procreative lives it turns upside down. Nor would it be enough to try cramming recovery for this distinct injury into the tort for negligent infliction of emotional distress.[226] One court sought to adopt this approach over twenty years ago, characterizing a doctor's failure to inform the mother that sonograms showed "the possibility of giving birth to a child with severe multiple congenital abnormalities" as having "deprived her and, derivatively, her husband, of the option to accept or reject a parental relationship."[227] By misstating their injury as the "mental and emotional anguish upon their realization that they had given birth to a child [thus] afflicted,"[228] the court demanded precisely the demonstration of emotional distress that is an at-best gratuitous and at-worst misleading expression of so plain and radical a setback to individual well-being.

The lack of protection for interests against imposed pregnancy or parenthood leads courts to misconstrue the harm that such negligence

222. Id. at 409.

223. Id. at 410.

224. Id. at 409.

225. See supra notes 110–112 and accompanying text (discussing judicial reluctance to award damages in wrongful-birth suits).

226. See supra notes 115–134 and accompanying text (discussing the limitations in applying emotional-distress logic).

227. Keel v. Banach, 624 So. 2d 1022, 1030 (Ala. 1993).

228. Id. at 1030–31.

inflicts.[229] The wrongful denial of control over decisions about whether to assume those roles is a serious injury that does not depend on whether forced reproduction ends in live childbirth.[230] Recognizing this injury does not require courts to pretend that a child was herself harmed by an act without which she would not otherwise have existed.[231] It need not imply anything objectionable about the meaning of pregnancy, the worth of children, or the dignity of parenthood. Nor need it force negligent doctors "to pay for the fun, joy and affection" that their patients get to enjoy in "rearing and educating" their own children.[232] Acknowledging the injury for lost control over reproductive plans would not force courts to "plac[e] a value on a [child's] smile"[233] or weigh "the costs of rearing" her relative to the benefits "conferred by" that experience, when the child "may turn out to be loving, obedient and attentive, or hostile, unruly and callous."[234] The futility of such determinations is the reason courts give for refusing relief under torts that compensate for tangible harms alone.[235] These actions offer victims of defective birth control or

229. This harm is distinct from a failure to inform or receive consent from patients mentioned later in this Essay. See infra note 440 and accompanying text. Informed consent for prenatal diagnosis generally involves providing pregnant women with information about the risks and benefits among available methods of genetic screening and testing such as timing, invasiveness, the likelihood of false positives or negatives, and each method's predictive capacity for particular conditions (with explanations about their varied effects and treatments). See Neil F. Sharpe & Ronald F. Carter, Genetic Testing: Care, Consent, and Liability 209 (2006).

230. See Catlin v. Hamburg, 56 A.3d 914, 917, 924–25 (Pa. Super. Ct. 2012) (holding that a surgeon's negligence in performing a sterilization procedure made the patient eligible to recover damages after she aborted her pregnancy upon discovery that the fetus had congenital abnormalities).

231. See Galvez v. Frields, 107 Cal. Rptr. 2d 50, 57–58 (Ct. App. 2001) (holding that a wrongful-life action is "one form of a medical malpractice action" and an "impaired child may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment from which he or she suffers"); Moscatello v. Univ. of Med. & Dentistry of N.J., 776 A.2d 874, 879 (N.J. Super. Ct. App. Div. 2001) (recognizing a factual basis for a wrongful-life claim under circumstances in which a mother relied on a doctor's statement that she was not at risk to bear genetically disabled children and carried her pregnancy to term); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496 (Wash. 1983) (en banc) (holding that recognition of wrongful-life claims encourages due care in genetic counseling and prenatal testing and neither undermines the sanctity of life nor disparages people with disabilities).

232. Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45–46 (C.P. Lycoming Cty. 1957).

233. Johnson v. Univ. Hosps. of Cleveland, 540 N.E.2d 1370, 1378 (Ohio 1989); see also Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973) ("Who can place a price tag on a child's smile or the parental pride in a child's achievement?").

234. Girdley v. Coats, 825 S.W.2d 295, 298 (Mo. 1992) (en banc); see also Miller v. Johnson, 343 S.E.2d 301, 307 (Va. 1986) ("Who, indeed, can strike a pecuniary balance between the triumphs, the failures, the ambitions, the disappointments, the joys, the sorrows, the pride, the shame, the redeeming hope that the child may bring to those who love him?").

235. See supra notes 90–114 and accompanying text (discussing medical-malpractice and wrongful-birth actions).

misimplantation of extra embryos scarce consolation for the wrongful disruption of such important life plans.[236]

The harms incurred by imposed procreation go beyond out-of-pocket expenses associated with the failed procedure, medical costs of childbirth, wages lost while pregnant/nursing, and care of a resulting child.[237] A critical and discrete injury is the negligently inflicted denial of interests in avoiding unwanted pregnancy and/or parenthood.[238] Forced pregnancy, for example, not only foists upon a woman the unwelcome identity as pregnant. It also renders her unable to be pregnant in a way that she *does* desire—at a different time, for example, or with a different partner—at least until that compelled pregnancy is over.[239] How serious that injury is might depend on whether reproductive misconduct imposed many years of parenthood atop nine months of pregnancy. It might also matter the extent to which thwarted efforts to use more effective or permanent contraceptive measures reflect the strength of victims' "intent to prevent pregnancy."[240] Likewise, imposed procreation that results in a child when none was intended might be a more serious injury than when parents already want one child and the transfer of a greater-than-agreed-to number of embryos results in twins or triplets.[241] And the reproductive harm may be too slight even to recognize if, say, the negligent provision of emergency contraception does not ultimately result in pregnancy at all.[242]

2. *Causation Complications.* — In certain cases, professional misconduct makes unwanted pregnancy or parenthood more likely, but cannot be shown by itself to have imposed procreation on those who sought to avoid it. This does not refer to the negligently faulty sterilization, birth control, abortions, or embryo transfers that, by virtue of familiar

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236. See supra notes 104–112 and accompanying text (distinguishing tangible from intangible reproductive injuries).

237. On recovery for child-rearing costs under "wrongful pregnancy," see infra notes 251–257 and accompanying text.

238. For discussion of how pro-life views would bear on the wrongful denial of reproductive interests, see infra notes 288–297 and accompanying text.

239. See Leah A. Plunkett, Contraceptive Sabotage, 28 Colum. J. Gender & L. 97, 117–18 (2014) (discussing how sexual assault that results in pregnancy prevents a woman from undertaking a pregnancy that is wanted).

240. Nell v. Froedtert & Cmty. Health, 829 N.W.2d 175, 181 (Wis. Ct. App. 2013); see also Troppi v. Scarf, 187 N.W.2d 511, 513 (Mich. Ct. App. 1971) (holding a pharmacist who allegedly filled a prescription for oral contraceptives with tranquilizer pills to a high standard of care).

241. Cf. Dan W. Brock, Shaping Future Children: Parental Rights and Societal Interests, 13 J. Pol. Phil. 377, 380 (2005) (positing that choices about "whether to procreate at all has more moral importance than . . . how many children to have").

242. See Brownfield v. Daniel Freeman Marina Hosp., 256 Cal. Rptr. 240, 244 (Ct. App. 1989) (discussing a rape victim who did not become pregnant after the hospital denied her emergency birth control and declined to inform her about the time-sensitive window for effective use).

uncertainties in the reproductive process, could not guarantee that sperm would fertilize, that an embryo would implant, or that a fetus would develop to birth. The real complications with causation lie in cases like the class action suit recently brought by 113 women in twenty-six states who got pregnant after their birth-control packs switched the placement of active pills with the placebos to be taken only when not ovulating.[243] Even though the defendant pharmaceutical manufacturer admitted the mistake in a product recall of 500,000 mislabeled packages, the plaintiffs will find it difficult to prove with sufficient certainty that it was the transgression, not user error or the small chance of pregnancy even when the packaging is free of defects and pills are taken as directed, that led them to become pregnant.[244] For these cases to be actionable, it should be enough that wrongdoing made the unintended pregnancies that ensued far more likely to happen. This kind of causation would require non-insignificant probabilities that professional misconduct was to blame for imposing procreation.[245]

Consider the following fact pattern: Two days after unprotected sex, a woman goes to the drugstore for the morning-after pill (Plan B), a time-sensitive treatment whose delayed administration after intercourse reduces its chances of preventing pregnancy.[246] A pharmacist accidently waits another two days to provide the Plan B, now beyond the seventy-two-hour window in which it is effective.[247] The woman becomes pregnant and gives birth to a healthy child. (The next section explains why her entitlement to sue is unaffected by any decision she makes to decline abortion or adoption.[248]) The delay in dispensation of the morning-after pill made the unwanted procreation more likely. But she may have gotten pregnant even if she had been given the drug right after she asked for it, still two days after intercourse. Timely supply of the drug would have made it more likely she would have been able to avoid pregnancy, but it would not have guaranteed her that more favorable result.

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243. More than 100 Women Say Birth Control Mix-up Led to Unplanned Pregnancies, CBS News (Nov. 12, 2015, 7:19 AM), http://www.cbsnews.com/news/women-sue-drug-company-claiming-defective-birth-controls-led-to-unplanned-pregnancies/ [http://perma.cc/N9A3-E4SF] (last updated Nov. 12, 2015, 6:53 PM).

244. Qualitest Pharmaceuticals Issues a Nationwide Voluntary Recall of Oral Contraceptives, U.S. Food & Drug Admin. (Sept. 15, 2011) http://www.fda.gov/Safety/Recalls/ucm272199.htm [http://perma.cc/EUM5-4FCM] (last updated Feb. 11, 2014).

245. See infra notes 483–494 and accompanying text (discussing loss-of-chance doctrine).

246. See Stormans Inc. v. Selecky, 844 F. Supp. 2d 1172, 1175–76 & n.5 (W.D. Wash. 2012) (discussing Plan B's efficacy).

247. Plan B One-Step, Plan B Prescribing Information (2009), http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf [http://perma.cc/44MS-AMN7].

248. See infra notes 260–266 and accompanying text (discussing duty mitigation doctrine).

Suppose the competent provision of the drug would have given the patient a sixty-percent chance to avoid pregnancy, while delayed access reduced that probability to fifteen percent. Applying proportional recovery would warrant reducing whatever damages correspond to the absolute injury incurred by that seventy-five-percent loss of chance. To give a sense of possible compensation, the U.K. Supreme Court in a 2004 negligent sterilization case awarded £15,000 (about $18,000 U.S today) that, one Lord elaborated, applied "not for the birth of the child, but for the denial of an important aspect of their personal autonomy, *viz* the right to limit the size of their family."[249] Taking the emergency contraception case above might call for awards of one quarter that total, or $4,500. This proportional-recovery approach would deny recovery outright, notwithstanding patent negligence, only if defendants could prove that a plaintiff had herself used the birth control improperly anyway or if she did not seek morning-after pills until it was too late for their use to have offered any chance of preventing her from getting pregnant. Wrongdoing cannot in these cases be blamed for having caused any cognizable harm to interests in avoiding unwanted pregnancy or parenthood. This fact does not, however, make those weighty interests any less worthy of protection more generally.[250]

3. *Abortion/Adoption Option.* — Whatever other sources of recovery patients might be entitled to in these cases should not obscure the separate injury they pose to control over decisions not to have children. Courts have adopted three positions as to recovery for the costs of raising a child. Most deny relief;[251] others limit awards against offsetting benefits of parenthood;[252] just a few redress child-rearing expenses, including those for special needs.[253] Recovery for costs associated with raising a child should depend in these cases on the extent to which those costs are "the natural and probable result of the negligent act or omission."[254] This is the approach that an Illinois court recently adopted to resolve the case of a couple that discovered they carried the sickle-cell trait after a child

249. Rees v. Darlington Mem'l Hosp. NHS [2004] 1 AC 309, 317, 356, ¶ 123 (Millet, LJ).

250. See supra notes 177–189 and accompanying text (discussing pregnancy and parenthood interests).

251. See M.A. v. United States, 951 P.2d 851, 856 (Alaska 1998); Rouse v. Wesley, 494 N.W.2d 7, 10 (Mich. Ct. App. 1992); Hitzemann v. Adam, 518 N.W.2d 102, 107 (Neb. 1994); Emerson v. Magendantz, 689 A.2d 409, 413 (R.I. 1997).

252. See Ochs v. Borrelli, 445 A.2d 883, 886 (Conn. 1982); Jones v. Malinowski, 473 A.2d 429, 435 (Md. 1984); Burke v. Rivo, 551 N.E.2d 1, 6 (Mass. 1990); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977).

253. See Custodio v. Bauer, 59 Cal. Rptr. 463, 477 (Ct. App. 1967); Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 612 (N.M. 1991); Zehr v. Haugen, 871 P.2d 1006, 1013 (Or. 1994); Marciniak v. Lundborg, 450 N.W.2d 243, 248 (Wis. 1990).

254. Williams v. Rosner, 7 N.E.3d 57, 67 (Ill. App. Ct. 2014) (internal quotation marks omitted) (quoting Williams v. Univ. of Chi. Hosps., 688 N.E.2d 130, 134 (Ill. 1997)).

was born with the disorder.[255] The wife underwent surgery to close her Fallopian tubes, but the doctor left one of her tubes open, leading to the birth of a second affected child.[256] The court held the "parents may assert a claim for the extraordinary costs that they will incur in raising their child," if his birth was "a foreseeable consequence of a negligently performed sterilization," as when the "desire to avoid contraception precisely for that reason has been communicated to the doctor performing the procedure."[257]

Some might wonder at this point whether the law might require plaintiffs to minimize any harms of unwanted pregnancy and parenthood that reproductive negligence imposes on them. Courts have indeed asked whether "parents who seek to recover for the birth of an unwanted child"[258] must first seek to "avoid[] the consequences of a negligently performed surgical sterilization" by, for example, "avoid[ing] the resultant parenthood [through] abortion . . . or [by] plac[ing] the child for adoption."[259] The tort doctrine that applies this duty to mitigate insists that victims undertake reasonable efforts to limit damages, limiting compensation to those harms they could not thereby have avoided.[260] One might suppose that abortion or adoption constitutes a reasonable requirement for recovery, for example, if she believed that a woman's legal ability to prevent a child's birth or relinquish responsibility for the child's care offsets her singular exposure to unwanted gestation.[261] The idea here is that the woman's power to end her pregnancy or put a child up for adoption effectively counteracts whatever harm imposed procreation might exact.[262] That idea is unconvincing.

The invocation of duty mitigation in these cases misses the mark. First, when it comes to child-rearing expenses recoverable under alternative torts, victims have no duty to mitigate. That duty requires only that they act reasonably. Most courts have held that abortion and adoption "are so extreme as to be unreasonable" requisites to qualify for any relief that is otherwise due.[263] (Nor have courts treated decisions either to

255. See id. at 60.

256. See id. at 60–61.

257. Id. at 69.

258. Troppi v. Scarf, 187 N.W.2d 511, 519 (Mich. Ct. App. 1971).

259. Flowers v. District of Columbia, 478 A.2d 1073, 1077 (D.C. 1984).

260. See Dobbs, Hayden & Bublick, supra note 90, §§ 370–371.

261. See Shari Motro, The Price of Pleasure, 104 Nw. U. L. Rev. 917, 933–34 (2010) (noting that many people believe that women bear responsibility for the consequences of unwanted pregnancy because women have reproductive choice and arguing that this view "belittles the harms that come along with all of women's reproductive choices").

262. See, e.g., Girdley v. Coats, 825 S.W.2d 295, 297 (Mo. 1992) (en banc) (declining to "apply[] strict tort principles" when "adoption or abortion would clearly mitigate the expense of raising the child" resulting from "negligent sterilization").

263. Smith v. Gore, 728 S.W.2d 738, 752 (Tenn. 1987); see also Greco v. United States, 893 P.2d 345, 350 (Nev. 1995).

continue an initially unintended pregnancy or to keep a resulting child as breaking the causal chain between the negligence and the imposed procreation or as rendering harm to pregnancy or parenthood interests harmless.[264]) Why is it unreasonable to expect a woman, as a condition of recovery for wrongfully imposed procreation, either to extinguish the fetus growing inside her or to relinquish legal responsibility for the child to which she gave birth? Expectations of abortion or adoption ignore emotional bonds and risk an "invasion of privacy of the grossest and most pernicious kind."[265] And requiring parents to "choose between the child and the cause of action" offers choice only among morally wrenching options.[266] Insisting that victims terminate either their pregnancy or parental rights as a condition of recovery utterly neglects the injury to interests in reproductive autonomy. Forcing their hand yet again only exacerbates the loss of that measure of control over such a meaningful part of their lives that specialists had previously given them legitimate reason to expect. This imposition of unwanted pregnancy or parenthood is the first category of reproductive wrong. The second, involving the deprivation of wanted pregnancy or parenthood, again opens with a case that exemplifies the human stakes and the legal puzzle of reproductive negligence.

B. *Procreation Deprived*

The second category of professional wrongdoing in matters of procreation denies patients the chance to be pregnant or have children. In these cases, clinics, laboratories, or sperm banks negligently contaminate, destroy, lose, or otherwise render reproductive materials or capacities unusable or inoperative. Typical cases involve mishandled sperm,[267] eggs,[268] or embryos[269] that infertile patients froze for the purpose of later

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264. See Rieck v. Med. Protective Co., 219 N.W.2d 242, 244 (Wis. 1974).

265. Rivera v. State, 404 N.Y.S.2d 950, 954 (Ct. Cl. 1978). This is not to imply that abortion and adoption are the same in these respects or any other aside from their consequence of avoiding functional parenthood after a pregnancy.

266. Marciniak v. Lundborg, 450 N.W.2d 243, 247 (Wis. 1990); see also Overall, supra note 34, at 9 ("Even if [a pregnant woman] has an abortion [or puts a child up for adoption] . . . and hence decides against motherhood, she must bear the moral, pragmatic, and medical weight of making that decision."); id. at 150 ("[F]or some women, having an abortion can be like the end of a relationship, a relationship that the woman may have chosen to initiate and value very highly: the relationship to her fetus and to the child that it may become.").

267. See Hollman v. Saadat MD, Inc., No. BC555411, at 3 (Cal. Super. Ct. Aug. 21, 2014); Kurchner v. State Farm Fire & Cas. Co., 858 So. 2d 1220, 1220 (Fla. Dist. Ct. App. 2003); Baskette v. Atlanta Ctr. for Reprod. Med., LLC, 648 S.E.2d 100, 102 (Ga. Ct. App. 2007); Doe v. Nw. Mem'l Hosp., No. 2014L000869, at 2 (Ill. Cir. Ct. Aug. 20, 2013); Complaint at 3, Robertson v. Saadat, No. BC621038 (Cal. Super. Ct. May 26, 2016).

268. See Saleh v. Hollinger, 335 S.W.3d 368, 371 (Tex. Ct. App. 2011).

269. See Kazmeirczak v. Reprod. Genetic Inst., Inc., No. 10 C 05253, 2012 WL 4482753, at *1 (N.D. Ill. Sept. 26, 2012); Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1258

using to have children. In others, specialists fertilize eggs with strangers' sperm or implant embryos into the wrong person;[270] or negligently performed medical procedures leave patients permanently unable to conceive.[271] Other cases do not involve harm to reproductive materials or capacities: Reproductive health specialists sometimes misadvise women based on erroneous information that failure to terminate a pregnancy would carry medical risks.[272] Such negligent counseling prompts many women to opt for abortions, thus depriving them of continued pregnancy and parenthood.[273] In one recent case, a woman alleged that

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(Ariz. Ct. App. 2005); Miller v. Am. Infertility Grp. of Ill., 897 N.E.2d 837, 839 (Ill. App. Ct. 2008); Frisina v. Women & Infants Hosp. of R.I., Nos. CIV. A. 95-4037, CIV. A. 95-4469, CIV. A. 95-5827, 2002 WL 1288784, at *1 (R.I. Super. Ct. May 30, 2002); Inst. for Women's Health, P.L.L.C. v. Imad, No. 04-05-00555-CV, 2006 WL 334013, at *1 (Tex. Ct. App. Feb. 15, 2006); Kate Briquelet, Aspiring Mom: Fertility Clinic Destroyed My Embryos and My Chance at Motherhood, Daily Beast (Mar. 30, 2016, 1:00 AM), http://www.thedailybeast.com/articles/2016/03/30/fertility-clinic-destroyed-her-embryos.html [http://perma.cc/E9MV-NPGN]; Jose Martinez, Lesbian Pair Sues for 3M After Sperm Bank Loses Embryos, N.Y. Daily News (Mar. 6, 2007, 4:00 AM), http://www.nydailynews.com/news/lesbian-pair-sues-3m-sperm-bank-loses-embryos-article-1.214041 (on file with the *Columbia Law Review*); SoCal Patch (Patch Staff), Couple Accuses Pasadena Reproductive Center of Losing Embryos, Pasadena Patch (Aug. 11, 2016, 3:05 PM), http://patch.com/california/pasadena-ca/couple-accuses-pasadena-reproductive-center-losing-embryos [http://perma.cc/3N9A-V698].

270. See Creed v. United Hosp., 600 N.Y.S.2d 151, 151–52 (App. Div. 1993); Complaint at 4–5, Walterspiel v. Jain, No. BC467123 (Cal. Super. Ct. Aug. 17, 2011); Mike Celizic, Genetic Parents of Embryo Felt 'Powerless,' Today (Sept. 23, 2009, 9:00 AM), http://today.msnbc.msn.com/id/32980984 [http://perma.cc/8UEV-NCJ6]; Woman Awarded $1 Million in Embryo Mix-Up, NBC News (Aug. 4, 2004), http://www.nbcnews.com/id/5603277/ns/health-womens_health/t/woman-awarded-million-embryo-mix-up/#.V9sl2JMrJE4 [http://perma.cc/P4S9-7M6Z].

271. See Cohen v. Cabrini Med. Ctr., 730 N.E.2d 949, 950 (N.Y. 2000) (explaining a procedure allegedly caused the patient's "sperm count [to] drop[] because [the physician] improperly removed a section of artery as well as vein during the surgery"); Chen v. Genetics & IVF Inst., Inc., No. L-153343, 1996 WL 1065627, at *1 (Va. Cir. Ct. Oct. 21, 1996) (alleging negligence in the performance of an IVF procedure that resulted in patient's loss of ability to "conceive a natural child"); Terrie Morgan-Besecker, Judge Refuses To Seal $4.25 Million Settlement in Baby Death Case, Times-Trib. (Aug. 23, 2016), http://thetimes-tribune.com/news/judge-refuses-to-seal-4-25-million-settlement-in-baby-death-case-1.2081805 [http://perma.cc/ZF2P-7VB6] (involving doctor's alleged failure to properly monitor pregnant patient for preeclampsia, leading to seizure that caused still births).

272. See Johnson v. United States, 735 F. Supp. 1, 2 (D.D.C. 1990) (detailing negligent misdiagnosis of AIDS that would supposedly be passed on to fetus); Baker v. Gordon, 759 S.W.2d 87, 89–90 (Mo. Ct. App. 1988) (discussing a doctor who negligently diagnosed a woman with severe dysplasia, which required immediate treatment that could be performed only if she terminated her pregnancy); see also Whole Woman's Health v. Hellerstedt, No. 15-274, 2016 WL 3461560, at *23 (2016) ("Nationwide, childbirth is 14 times more likely than abortion to result in death.").

273. Other cases involve fetal misdiagnoses. See Breyne v. Potter, 574 S.E.2d 916, 919 (Ga. Ct. App. 2002) (detailing a case of Down syndrome misdiagnosis); Martinez v. Long Island Jewish Hillside Med. Ctr., 512 N.E.2d 538, 539 (N.Y. 1987) (detailing a misdiagnosis

her doctor performed an abortion without her consent after realizing that he had implanted another couple's embryos inside her.[274]

A representative example from this category of wrongs involved a fertility clinic's exposure of a couple's embryos to a devastating disease.[275] The clinic stored a couple's three remaining IVF embryos in a contaminated product whose manufacturer sent a withdrawal notice to the clinic "advising that they 'immediately discontinue its use.'"[276] The court reviewed evidence that the clinic "knew, or should have known that certain lots of" the embryo storage product could "cause a fatal neurological disorder" that is "the human equivalent of . . . '[m]ad [c]ow [d]isease.'"[277] But it dismissed their negligent-infliction claims for lack of physical injury: "With all due respect to their situation, it appears to the Court that Plaintiffs can prove no set of facts that would entitle them to relief. Their Complaint does not allege a physical injury from which a claim for emotional distress can be traced."[278]

The court explained that "the implantation procedure [itself] is not an injury caused by Defendants' actions, but is an elective process [that] Jane Doe chose to undergo for fertility treatment" and would have undergone just the same even had the clinic not contaminated the resulting embryos.[279] Tort claims for negligently deprived procreation almost always fail because plaintiffs manifest no physical harm.

1. *Intangible Losses.* — Courts have accordingly been swift to dismiss not just when IVF embryos are infected with disease but when they are implanted into the wrong person. In one such case, the court held that "the initial intrusion into the wife's body to extract her ova" necessary to create the embryos "was not a cause of the subsequent improper implanting of the wife's fertilized ova into the other woman . . . ."[280] And yet it is

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of microcephaly or anencephaly); Alger v. Univ. of Rochester Med. Ctr., 980 N.Y.S.2d 200, 200–01 (App. Div. 2014) (noting an abortion sought due to fetal misdiagnosis).

274. Kacey Montoya, Lawsuit: Torrance Doctor Terminated Woman's Pregnancy Without Consent After Embryo Mix-up, KTLA (Nov. 24, 2015, 2:10 AM), http://ktla.com/2015/11/24/lawsuit-torrance-doctor-terminated-womans-pregnancy-without-consent-after-embryo-mix-up/ [http://perma.cc/8GJM-E3DW].

275. Doe v. Irvine Sci. Sales Co., 7 F. Supp. 2d 737 (E.D. Va. 1998).

276. Id. at 739.

277. Id.

278. Id. at 741.

279. Id. A similar case is Lubowitz v. Albert Einstein Medical Center, Northern Division, 623 A.2d 3, 4–5 (Pa. Super. Ct. 1993) (dismissing a suit over alleged contamination of embryos with AIDS through positive-tested placental blood used in IVF procedure).

280. Creed v. United Hosp., 600 N.Y.S.2d 151, 153 (App. Div. 1993). Intentional-infliction actions do not carry a physical manifestation requirement, but deliberate misconduct like this is rare. For examples of intentional misconduct, see Del Zio v. Presbyterian Hosp., No. 74 Civ. 3588 (CES), 1978 U.S. Dist. LEXIS 14450, at *3–4 (S.D.N.Y. Nov. 9, 1978) (discussing deliberate embryo destruction); Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509, 511 (Ct. App. 2002) (discussing egg theft); Ken Kusmer, Donald Cline,

hard to deny the meaning or magnitude of the harm that deprived procreation imposes on people who desperately want children. The expensive and often painful efforts that many undertake to carry a pregnancy or raise a biological child "provide ample evidence of the weight, depth, and sincerity of the interest in genetic affinity" that this class of reproductive negligence wrongfully frustrates.[281]

Three courts have let patients recover for intangible harms inflicted by negligently deprived procreation. In *Witt v. Yale-New Haven Hospital*, a cancer patient, having learned that the chemotherapy she needed would leave her infertile, had reproductive tissue removed and "frozen and stored" so that she would still be able to have a genetically related child.[282] The hospital "unilaterally discarded" that tissue, however, "without consulting or even notifying" the couple, thus "foreclos[ing] the potential for the plaintiffs to ever conceive a child together."[283] The court said the hospital could be held liable for having "creat[ed] an unreasonable risk of causing emotional distress."[284] Next, in *Perry-Rogers v. Obasaju*, a doctor implanted a couple's embryos into another woman, who gave birth to their biological child.[285] The court held against the doctor. His breach of care, it explained, led the couple to fear "that the child that they wanted so desperately . . . might be born to someone else and that they might never know his or her fate."[286] The court ordered redress for the "emotional harm caused by their having been deprived of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their child" but again, only when medical affidavits so substantiated.[287]

Finally, in *Martinez v. Long Island Jewish Hillside Medical Center*, misinformation led a woman to abort despite "deep-seated convictions" that abortion is a sin "except under exceptional circumstances."[288] Indeed, she badly wanted the child and terminated the pregnancy only based on bad advice from her genetic counselor that, due to a medication she had taken, "her baby would be born with the congenital birth defect of microcephaly (small brain) or anencephaly (no brain)."[289] The

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Indianapolis Fertility Doctor, Used Own Sperm to Impregnate Women: Affidavit, Wash. Times (Sept. 12, 2016), http://www.washingtontimes.com/news/2016/sep/12/donald-cline-indianapolis-fertility-doctor-used-ow/ [http://perma.cc/A2UG-ENME].

281. Norton, supra note 38, at 842–43.

282. 977 A.2d 779, 781–82 (Conn. Super. Ct. 2008).

283. Id. at 788, 795.

284. Id. at 788.

285. 723 N.Y.S.2d 28, 28–29 (App. Div. 2001).

286. Id. at 29–30.

287. Id. at 29; see also Fasano v. Nash, No. 107068/99, 2000 WL 35534976, at *7 (N.Y. Sup. Ct. Mar. 2, 2000) (denying defendant's motion to dismiss claims stemming from negligence that resulted in putting another woman's eggs in the plaintiff).

288. 512 N.E.2d 538, 538 (N.Y. 1987).

289. Id.

court here allowed her to recover for the "psychological injury" that the breach of duty foreseeably caused by leading her to submit to an abortion "contrary to her firmly held beliefs."[290] There is no need to belabor the inadequacies of this negligent-infliction approach.[291] Suffice it to say that recovery for wrongfully deprived procreation should not require attestation of emotional distress.

The Supreme Court waxed eloquent about the consequential injury of forced sterilization: "There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."[292] This injury of deprived procreation is especially bad when the government inflicts it, deliberately no less, and by intruding on a person's body in ways that leave him unable ever to conceive at all. But that deprivation is also serious when a doctor negligently thwarts a single pregnancy or when a clinic recklessly destroys frozen sperm or eggs.[293] Courts should worry less about whether deprived procreation is actionable than about award size, depending on facts that distinguish more serious expression of this injury from less serious ones.[294] One court distinguished severity in this way as justification for denying class certification to 240 patients whose embryos a clinic lost.[295] The court held that putative class members lacked the required commonality due to the disparate severity of injuries among those with active and immediate plans to use the embryos, as opposed to those who had gotten divorced, since had children, or grown too old to do so.[296] The harm of deprived procreation is also worse if the misconduct, in a case like *Martinez*, violated a patient's deeply held religious belief—provided that defendants had reason to foresee such violation.[297]

2. *Preexisting Infertility.* — There is one other glaring difference between the contexts of compulsory sterilization and reproductive negligence. In that same pre–World War II case, the state of Oklahoma sought

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290. Id. at 539.

291. See supra notes 115–134, 226–228 and accompanying text (discussing the shortcomings of emotional-distress claims for reproductive negligence).

292. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942).

293. See supra notes 47–49, 57–66 and accompanying text (comparing state to private reproductive wrongdoing).

294. See infra notes 501–512 and accompanying text (discussing strategies to help juries distinguish gradations in severity of reproductive injuries).

295. See Hebert v. Ochsner Fertility Clinic, 102 So. 3d 913, 920 (La. Ct. App. 2012); see also Habiba Nosheen, La. Fertility Clinic Loses Embryos, Couples Sue, NPR (Oct. 24, 2009, 7:00 AM), http://www.npr.org/templates/story/story.php?storyId=113568886 (on file with the *Columbia Law Review*) (discussing facts giving rise to litigation against Ochsner Clinic).

296. *Hebert*, 102 So. 3d at 920–21.

297. See Martinez v. Long Island Jewish Hillside Med. Ctr., 512 N.E.2d 538, 538–39 (N.Y. 1987).

to sterilize a one-footed chicken thief named Jack Skinner.[298] In 1935, the state passed a law allowing it to sterilize a "habitual criminal," defined as one thrice convicted of crimes "involving moral turpitude."[299] Skinner challenged the three strikes law to the Supreme Court even though the Court had just a few years earlier upheld a similarly eugenic Virginia law to sterilize the "feeble-minded."[300] This is the case in which Justice Holmes infamously pronounced: "Three generations of imbeciles are enough."[301] The problem with the Oklahoma law, Skinner argued, was not that it authorized sterilization at all but that its reliance on the vague idea of "moral turpitude" singled out blue-collar crimes like his, while exempting white-collar crimes like tax evasion or embezzlement.[302] The state could not use such arbitrary distinctions, Justice Douglas held, to "forever deprive[]" Skinner "of a basic liberty."[303] Skinner was a healthy man in his twenties,[304] which meant sterilizing him would have robbed him of the expectation that he would otherwise have been able to conceive.[305]

It is different for most fertility patients who are deprived of procreation by professional negligence. Even when fertility treatment goes just right, these patients usually have no more than modest prospects for a successful pregnancy or childbirth.[306] Their low chances of procreation owe to preexisting fertility problems ranging from low

298. See Victoria F. Nourse, In Reckless Hands: *Skinner v. Oklahoma* and the Near Triumph of American Eugenics 91 (2008).

299. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 536 (1942).

300. Buck v. Bell, 274 U.S. 200, 205, 208 (1927). For elaboration on eugenic laws, see supra note 57 and accompanying text.

301. *Buck*, 274 U.S. at 207 ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

302. See *Skinner*, 316 U.S. at 538–39.

303. Id. at 541.

304. See Nourse, supra note 298, at 91.

305. See id. at 106 (quoting Skinner as testifying during his trial that "I hope when I have served the judgment of the court to be released and become an honest citizen and marry and settle down and raise possibly a child or maybe two" (internal quotation marks omitted)).

306. See Comm. on Gynecologic Practice, Am. Coll. of Obstetricians & Gynecologists & Practice Comm., Am. Soc'y for Reprod. Med., Female Age-Related Fertility Decline, 123 Obstetrics & Gynecology 719, 720 (2014) (noting women older than thirty-five experience "age-related decline in fertility, the increased incidence of disorders that impair fertility, and an increased risk of pregnancy loss," which increase the difficulty of a successful pregnancy); Siladitya Bhattacharya et al., Factors Associated with Failed Treatment: An Analysis of 121,744 Women Embarking on Their First IVF Cycles, 8 PLOS One, no.1, 2013, at 1, 12, http://journals.plos.org/plosone/article/asset?id=10.1371/journal.pone.0082249.PDF [http://perma.cc/9PP5-5USU] ("Female age is a key predictor of failure to have a livebirth following IVF.").

sperm count to aging eggs.[307] For women thirty-two and younger, for example, just forty percent of IVF cycles result in babies, and by age forty, the live birth rate drops to under twenty percent.[308] This means that when misconduct renders reproductive materials or capacities unusable, it deprives fertility patients of what aging, cancer treatment, or accidents had already left an uncertain chance to procreate.[309] Specialists should be held responsible only to the extent that their negligence—as opposed to these other factors—is what plausibly deprived chances for procreation. Their fault should be discounted accordingly by the extent that preexisting infertility left patients' chances of reproducing unlikely, negligence aside.

Probabilistic recovery can help in cases like *Witt* or *Perry-Rogers* involving the negligent destruction or misplacement of gametes or embryos.[310] Suppose, for example, that a couple's age and other circumstances would have given them a thirty-percent chance of achieving a pregnancy and live birth had a clinic not lost their materials; the loss dropped the probability to three percent. Damages would accordingly be one-tenth of whatever damages would have been for the absolute deprivation of procreation had competent care all but guaranteed it. So if a jury were to calculate their wrongfully deprived pregnancy and parenthood at, say, $20,000, then probabilistic recovery would reduce the total to $18,000 for the ninety-percent loss of what chance they had to procreate. Plaintiffs in a case like this would have to show that the lost chance was not insignificant and that there is a reasonable possibility competent treatment would have enabled them to reproduce. For some, such as women over forty-four or men who have no working sperm count, their potential to have biological children is already so low that even the most egregious transgression would not itself thwart possibilities they otherwise could have expected, provided they were not misled into thinking that their chances of reproducing were better.[311] If a botched procedure "had no chance of [reproductive]

307. See Nat'l Ctr. for Chronic Disease Prevention & Health Promotion, Ctrs. for Disease Control & Prevention, Assisted Reproductive Technology: Fertility Clinic Success Rates Report 23 (2014), http://www.cdc.gov/art/pdf/2012-report/art-2012-fertility-clinic-report.pdf [http://perma.cc/J7XN-LL5V] (noting women's ability to conceive declines during child-bearing years as eggs become more fragile over time).

308. See id. (noting IVF of fresh embryos from nondonor eggs result in pregnancy in forty-six percent of cycles for women under the age of thirty-five and twenty percent of cycles for women ages forty to forty-one). Hard data like these, supplemented by case-specific evidence, facilitate such jury estimates of probability.

309. Cf. I. Glenn Cohen & Eli Y. Adashi, Embryo Disposition Disputes: Controversies and Case Law, Hastings Ctr. Rep., July–Aug. 2016, at 13, 17–18 (distinguishing infertility caused by aging, cancer treatment, and accidents).

310. For discussion of these cases, see supra notes 282–287, and for the loss-of-chance doctrine, see infra notes 483–494.

311. See Ian Sample, Chances of IVF Success 'Futile' for Women over 44, Says Study, Guardian (June 16, 2015, 7:46 PM), http://www.theguardian.com/society/2015/jun/

success and this was known and understood by the plaintiffs," the *Witt* court noted, "the plaintiffs might not be entitled to recover."[312]

A Louisiana Court of Appeals recently adopted this loss-of-chance approach in considering damages owed for clearly negligent obstetric care that deprived the patient, a middle-aged diabetic woman with fibroid problems, "of an admittedly less-than-even chance of becoming pregnant."[313] While misconduct dashed her sincere "hopes to triumph over [infertility] by successfully bearing a child," the court found no "facts to support the conjecture that even if [the obstetrician] had not deviated below the standard of care [the patient] would have been able to conceive."[314] That loss owed less to malpractice than to her age and preexisting health for which the doctor was not to blame. He might have kept her reproductive hopes more grounded by better advising her, as another doctor had, that she "needed a hysterectomy [and that] without a uterus, conception is impossible."[315] But since she "had no real chance of becoming pregnant" anyway, whether her obstetrician had treated her negligently or not, the court refused compensation "for a speculative loss of a [small] chance to become pregnant" beyond any "damages award for the [proven] injuries and their [physical or emotional] effects" on her.[316] This would-be deprivation of procreation is different from cases in which professionals negligently confound people's efforts to select prenatally for offspring with or without more particular traits.

C. *Procreation Confounded*

The last category of cases involves plaintiffs who received the child they wanted, except that the child was born with different genetic traits than those they used reproductive medicine to select for. The reasons that people might have for choosing a child of one sort or another—to

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17/women-ivf-birth-donor-eggs [http://perma.cc/D8GL-M7TY] ("Researchers . . . found that the chances of women having a baby through IVF was only 1.3% in those aged 44 and above . . . .").

312. Witt v. Yale-New Haven Hosp., 977 A.2d 779, 787–88 (Conn. Super. Ct. 2008) (internal quotation marks omitted) (quoting Del Zio v. Presbyterian Hosp., No. 74 Civ. 3588 (CES), 1978 U.S. Dist. LEXIS 14450, at *14 (S.D.N.Y. Nov. 9, 1978)).

313. In re Dunjee, 57 So. 3d 541, 551 (La. Ct. App. 2011).

314. Id. at 552.

315. Id. at 551. This kind of professional enabling or promotion of unrealistic expectations about reproductive outcomes is not unusual. Cf. Jane E. Brody, I.V.F.'s Misleading Promise to Those over 40, N.Y. Times (Oct. 17, 2016) http://www.nytimes.com/2016/10/18/well/the-misleading-promise-of-ivf-for-women-over-40.html (on file with the Columbia Law Review) ("'[Fertility programs] will brag that they are the best, with extraordinarily high rates of pregnancy even in women over 40 . . . . There's a lot of massaging of the data, often combining data from several years to make the results look better.'" (quoting Dr. Mark V. Sauer, former director of the I.V.F. clinic at Columbia Presbyterian Medical Center)).

316. *Dunjee*, 57 So. 3d at 551–52.

continue a bloodline or enact a cultural custom, to avoid social stigma, achieve family balance, or share valued experiences or identities—can influence parental well-being in more or less acute ways that correspond to the severity of injuries this final category of reproductive negligence includes. Procreation is negligently *confounded* when reproductive professionals fertilize patients with the wrong sperm,[317] implant another couple's embryos,[318] misrepresent donor information,[319] or misdiagnose fetuses,[320] leading patients to initiate, continue, or terminate pregnancies in ways that frustrate their preferences for their offspring's health or other genetic traits.[321]

A paradigmatic case involves Nancy and Thomas Andrews, light-skinned IVF patients whose goal to "have a child who would be biologically their own" was dashed when the clinic "negligently used someone else's sperm to fertilize [her] eggs."[322] The couple noticed that baby Jessica was much "'darker skinned'" than either of them, with "'facial and hair characteristics more typical of African, or African American descent.'"[323] Unassuaged by their doctor's assurance that Jessica would "'get lighter over time,'"[324] the couple pursued DNA tests, whose results confirmed that Mr. Andrews was not Jessica's biological father, and thus the couple had "to raise a child that is not . . . the same race, nationality, [or] color" as they are.[325] State precedent nevertheless left the court "unable to hold that the birth of an unwanted but otherwise healthy and normal child constitutes an injury to the child's parents" and unwilling "to adopt a rule, the primary effect of which is to encourage, indeed reward, the parents' disparagement or outright denial of the value of their child's life."[326] This is a common fate for claims alleging confounded procreation.

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317. See infra notes 338–342, 517–523, 529–531 and accompanying text (citing cases).

318. See supra notes 167–168 and accompanying text (discussing instances of embryo-implantation mix-ups).

319. See infra notes 353–355 and accompanying text (citing a recent lawsuit).

320. See supra notes 94–96, 100–101, 315–316 and accompanying text (discussing examples of fetal misdiagnosis); see also infra notes 543, 562 and accompanying text (same).

321. See Leslie Bender, "To Err Is Human" ART Mix-ups: A Labor-Based, Relational Proposal, 9 J. Gender Race & Just. 443, 446 (2006) (discussing the "frequent rate at which these errors are reported"); see also Sharon Kirkey, Switched Embryos and Wrong Sperm: IVF Mix-ups Lead to Babies Born with 'Unintended Parentage,' Nat'l Post (July 30, 2016), http://news.nationalpost.com/health/ivf-mix-ups-lead-to-babies-born-with-unintended-parentage?__lsa=f977-14ba [http://perma.cc/36LH-88WE] (last updated July 31, 2016, 9:42 AM) (discussing IVF mix-ups in the United States and elsewhere).

322. Andrews v. Keltz, 838 N.Y.S.2d 363, 365 (Sup. Ct. 2007).

323. Id. (quoting Andrews' affidavit, ¶ 11).

324. Id. at 366 (quoting Andrews' affidavit, ¶ 11).

325. Id. at 368 (internal quotation marks omitted) (quoting Bill of Particulars for Acosta, ¶ 11).

326. Id. at 367 (quoting Weintraub v. Brown, 470 N.Y.S.2d 634, 641 (Sup. Ct. 2007)).

1. *Reasons and Repercussions.* — Wrongfully frustrated attempts to select offspring traits can yield more or less serious injuries depending on parents' reasons for wanting to choose or avoid particular attributes. This injury tends to be most serious, warranting correspondingly greater damages, for misconduct that thwarts efforts to select for heredity and especially health.[327] For wrongdoing that confounds efforts to choose for offspring health, the acuteness of this reproductive injury varies with the projected impact that thwarted decision has on parental well-being.[328] The typical case involves the negligent failure to identify a disease for which a couple knew they were at risk.[329] That injury is more severe when misconduct results in the birth of a child with disorders that are usually life threatening and debilitating—like a severe anemia requiring regular blood transfusions[330]—than for many others whose effects tend not to incapacitate so acutely. The injury is less severe still when a child is born with cancer susceptibilities whose manifestation is less certain, or with Huntington's or Alzheimer's whose effects will not manifest until later in life.[331] In contrast to all these, parents will incur less serious injuries when equally wrongful misconduct frustrates efforts to have a child born with behavioral associations for traits like intelligence, strength, and artistic or

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327. For related social implications, see supra notes 186–198 and accompanying text (discussing the emotional, symbolic, cultural, religious, or practical factors at play in would-be parents' selection of blood-related or disease-free offspring). For policy implications, see infra notes 558–562 (discussing judges' concerns that authorizing recovery for reproductive negligence might erode parental norms of unconditional love, or worse).

328. See, e.g., D.D. v. Idant Labs., 374 F. App'x 319, 320 (3d Cir. 2010) (discussing the negligent provision of sperm from a donor with Fragile X syndrome); Paretta v. Med. Offices for Human Reprod., 760 N.Y.S.2d 639, 641 (Sup. Ct. 2003) (discussing the failure to inform plaintiffs that the donor used to conceive the child carried cystic fibrosis); Fruiterman v. Granata, 668 S.E.2d 127, 129 (Va. 2008) (discussing a wrongful-birth case in which "the [d]octors breached the standard of care by failing to provide [plaintiff] with information about first trimester testing"); Wuth v. Lab. Corp. of Am., 359 P.3d 841, 846 (Wash. Ct. App. 2015) (discussing damages resulting from a doctor's failure to diagnose chromosomal translocation in IVF embryos).

329. See, e.g., Grossbaum v. Genesis Genetics Inst., LLC, No. 07-1359 (GEB), 2011 WL 2462279, at *1–2 (D.N.J. June 10, 2011) (affirming dismissal of plaintiff-parents' claims against doctors "for . . . negligent provision of embryo-screening services and in vitro fertilization services" resulting in a child with cystic fibrosis); Doolan v. IVF Am. (MA), Inc., No. 993476, 2000 WL 33170944, at *1 (Mass. Super. Ct. Nov. 20, 2000) (barring infant-plaintiff suffering from cystic fibrosis from recovering for negligent embryo screening).

330. See, e.g., Khadim v. Lab. Corp. of Am., 838 F. Supp. 2d 448, 453–54 (W.D. Va. 2011) (discussing a misdiagnosis that resulted in the birth of a child with Cooley's anemia); Verdict and Settlement Summary, Sharad v. Sanghavi, No. 478265, 2006 WL 5346981 (N.J. Super. Ct. 2006) (same).

331. Cf. Estrada v. Univ. of S. Fla. Bd. of Trs., 06-CA-000625, 2007 WL 4643824 (Fla. Cir. Ct. 2009) (verdict and settlement summary) (discussing damages resulting from negligent failure to diagnose Smith-Lemli Opitz Syndrome); Scalisi v. N.Y. Univ. Med. Ctr., 805 N.Y.S.2d 62, 63 (App. Div. 2005) (discussing negligent genetic screening for autism that resulted in the birth of a child with that condition).

musical ability, or nonmedical traits like dimples or male-pattern baldness.[332]

Even among efforts to select an ostensibly nonmedical trait—sex is the most common—the injury of thwarted selection can vary based on whether the reasons parents wanted a boy or girl in fact relate to the child's health.[333] Some enlist professional assistance to avoid a sex-linked disorder they risk passing along only if they were to have either a girl or, more often, a boy.[334] Others seek to even out the representation of sexes among the other children they already have.[335] For others still, cultural or religious norms prize boys over girls.[336] Frustrated efforts to select offspring sex injure the at-risk couple more than the couple that sought to balance the genders among their children. Similar rankings of severity apply to wrongfully stymied efforts to select for offspring height: It incurs greater harm to substitute a donor who has a stature-stunting genetic disorder than it does, with equal negligence, to swap in an otherwise healthy donor who is just as short.[337]

The injury of confounded procreation is by the same token more serious when it denies genetic kinship beyond just physical resemblance. A common instance of confounded procreation involves fertilizing a woman's egg with sperm from a stranger rather than her husband.[338] The

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332. See supra notes 206–208 and accompanying text (distinguishing offspring selection for conditions whose practical impact on family life might plausibly be regarded as more or less "serious").

333. For examples, see supra notes 15, 197 and accompanying text (describing methods of preconception sex selection).

334. See Bergero v. Univ. of S. Cal. Keck Sch. of Med., No. B200595, 2009 WL 946874, at *1–4 (Cal. Ct. App. Apr. 9, 2009) (discussing a wrongful-birth suit against IVF doctors after an at-risk couple gave birth to a male child born with a potentially deadly disease).

335. See Family Balancing: Boy or Girl?, Genetics & IVF Inst., http://www.givf.com/familybalancing/ [http://perma.cc/SJ3Q-K3Y4] (last visited Sept. 15, 2016) ("Family Balancing is the term for gender selection done for the purposes of achieving a more balanced representation of both genders in a family.").

336. See Douglas Almond & Lena Edlund, Son-Biased Sex Ratios in the 2000 United States Census, 105 Proc. Nat'l Acad. Sci. 5681, 5681–82 (2008) (finding that a fraction of Indian, Chinese, and Korean Americans (together less than two percent of the U.S. population) whose first child was a daughter have sons as later children at significantly higher rates); see also, e.g., Joseph G. Schenker, Gender Selection: Cultural and Religious Perspectives, 19 J. Assisted Reprod. & Genetics 400, 401–05 (2002) (arguing that a strand of Jewish orthodoxy requires that men "procreate by having a minimum of two children—a boy and a girl").

337. For elaboration, see Dov Fox, Human Growth Hormone and the Measure of Man, 1 New Atlantis 75, 75–76 (2004) (distinguishing between "short but otherwise healthy children" and children with "stature-stunting" diseases); see also supra note 208 (discussing the freighted distinctions between health and disease and normality and abnormality).

338. See, e.g., Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 21–22 (App. Div. 2000) (discussing a case in which "embryos consisting entirely of the [plaintiff's] genetic material were mistakenly implanted into the uterus of defendant"); Complaint at 6, Aschero v. Kao, No. CGC-09-492527, 2009 WL 2980676 (Cal. Super. Ct. Dec. 15, 2009);

mix-up in many of these cases is apparent only because the stranger has racially or ethnically different features, potentially complicating the resulting injury in ways that the next Part will explore in detail.[339] The point for now is that these switches deny the biological connection the partner would otherwise have shared with the child.[340] The prominent place that genetic relatedness holds in social mores and legal culture[341] suggests that heredity-robbing mix-ups cause a more serious injury than a switch from an unrelated donor who resembles a spouse to a different donor who does not.[342] Victims of the latter type of switch could rebut this presumption of lesser injury and lower damages by substantiating the unusual strength of the reasons why they selected for resemblance and the unusually substantial harm that this mix-up has wreaked on their lives.[343] Precisely because the genetic tie is prized, the parent–child resemblance that a similar-looking donor makes more likely can help to "legitimize[] the child as part of the family and is part of the process of constructing the child's identity within the family."[344]

Persisting stigma against infertility drives some different-sex couples to seek out a sperm or egg donor who shares an infertile partner's

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Ann Davis, High-Tech Births Spawn Legal Riddles, Wall St. J., Jan. 26, 1998, at B1 (on file with the *Columbia Law Review*); Matthew Piper, Report: Utah Kidnapper Is Woman's Father Due to Semen Switch, Salt Lake Trib. (Jan. 10, 2014), http://archive.sltrib.com/story.php?ref=/sltrib/news/57372964-78/lippert-says-family-daughter.html.csp [http://perma.cc/89DN-GHTH]; Deborah Sharp, Fla. Suit Highlights In Vitro Industry's Controversies, USA Today, Nov. 15, 1996, at 3A (on file with the *Columbia Law Review*); Ronald Sullivan, Sperm Mix-up Lawsuit Is Settled, N.Y. Times (Aug. 1, 1991), http://www.nytimes.com/1991/08/01/nyregion/sperm-mix-up-lawsuit-is-settled.html (on file with the *Columbia Law Review*).

339. See infra notes 524–539 and accompanying text (discussing public policy concerns about recovery for thwarted selection for offspring race).

340. For similar such cases of confounded procreation abroad, see, e.g., A & B v. A Health & Soc. Servs. Tr. [2010] NIQB 108 (Ir.); ACB v. Thomson Med. Pte Ltd. [2014] SGHC 36 (Sing.); Sophie Arie, Italian IVF Blunder Fuels Fertility Law Row: White Couple Seeks Damages After Alleged Egg Mix-up, Guardian (Sept. 6, 2004), http://www.theguardian.com/world/2004/sep/07/italy.sophiearie [http://perma.cc/ TZ9B-Z2X2].

341. See supra notes 198–204 and accompanying text (discussing the culturally contingent value of perceived heredity).

342. See Maher v. Vaughn, Silverberg & Assocs., 95 F. Supp. 3d 999, 1003–04 (W.D. Tex. 2015) (describing background and allegations in a suit brought against an IVF facility for failing to fertilize an egg with the correct donor's sperm).

343. For discussion of policy objections to this approach and of race-based mix-ups, see infra notes 517–539 and accompanying text (discussing the value of physical resemblance, especially in terms of race).

344. Gay Becker et al., Resemblance Talk: A Challenge for Parents Whose Children Were Conceived with Donor Gametes in the U.S., 61 Soc. Sci. & Med. 1300, 1301 (2005); see also Astrid Indekeu, Parents' Expectations and Experiences of Resemblance Through Donor Conception, 34 New Genetics & Soc'y 398, 410 (2015) (discussing the importance of physical resemblance in sibling and extended-family relationships).

coloring or build.[345] These couples may seek to improve the chances that any resulting child will be able to "pass" as related by blood, whether to avoid conspicuous confrontation with their inability to conceive on their own or to forestall the perceived or prompted need to explain to those they meet why their child does not look like they do.[346] Others, including same-sex couples that face different expectations about biological affinity, might choose a donor who looks like a nongenetic parent in hopes that resemblance might help enrich parent–child bonds or depart less strikingly from norms of traditional family formation.[347] One gay parent, reflecting on his experience raising a child in a racially mixed home, warns queer couples looking to have children

> to be very aware of how race and gender play into things, at the playground, at the store, on the bus. Our family is a transracial family. I'm Asian, my son is black, and my partner is white. People make assumptions based on race and gender, even in our own LGBT community. Race shouldn't matter, but it does.[348]

Among the harms that victims of negligent donor switches or embryo mix-ups might claim is the stigmatizing impact of an unwanted status as a racially diverse or otherwise nontraditional family. On the other hand, defendants could argue that any injury their misconduct

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345. Compare Fox, Racial Classification, supra note 47, at 1861–62 (noting stigma against infertility and nontraditional families is why some do "not want the world—or the child—to know they used a sperm bank to conceive"), with id. at 1862 n.87 (explaining that, unlike different-sex couples, "[s]ingle mothers and lesbian couples are less likely to seek a donor of a particular race for purposes of matching the physical resemblance of one or both parents").

346. The Sperm Bank of California provides a first-hand account of a donor-conceived child who did not look like her parents.

> [S]ince I grew up in [state], it's very white and my parents are both white . . . so the rest of my family is white and my donor was [of color]. I look very different from my family and I look different from most people in my community growing up. So more than being ostracized or feeling judged, I feel like I was just treated differently, because people always asked, and they always knew. They were always curious and very accepting, but . . . there were a lot of questions asked, a lot of people were confused . . . . I was constantly reminded that I looked really different than the rest of them.

Donor Ethnicity, Your Family and Your Future Child, Sperm Bank of Cal., http://www.thespermbankofca.org/tsbcfile/choosing-ethnicity-my-donor [http://perma.cc/8YY2-VKY9] (last visited Sept. 15, 2016) (second alteration in original) (citing J.E. Scheib, Interviews with Adults Who Have Donors in the Sperm Bank of California's Identity-Release Program (2016) (unpublished manuscript)).

347. Guido Pennings, The Right to Choose Your Donor: A Step Towards Commercialization or a Step Towards Empowering the Patient?, 15 Hum. Reprod. 508, 508–09 (2000) (noting a "reason for desiring a resembling donor is that the likeness can enhance and facilitate attachment and bonding between social parent and child").

348. Donor Ethnicity, supra note 346 (quoting Glenn D. Magpantay, the executive director of the National Queer Asian Pacific Islander Alliance).

caused is so slight that its infliction warrants nothing more than token or symbolic damages. For example, if a clinic negligently used the wrong gametes or embryos, but the only apparent difference between those materials and the right ones is that they carry genes for left-handedness or red curly hair,[349] the resulting harm may be too minor to merit much, if any, compensation.[350]

2. *Prenatal Genetic Uncertainties.* — Sometimes reproductive negligence confounds procreation in ways that are indeterminate. Uncertainty pervades prenatal testing and donor selection wherein doctors or clinics convey or act on imperfect genetic information about what kinds of traits might materialize in future offspring. Prenatal testing of gametes, embryos, or fetuses can pose uncertainty as to whether or in what ways even perfectly testable genetic conditions might manifest at birth.[351] That uncertainty is far greater for frustrated attempts to choose from among multiple embryos one to implant that will be less susceptible to some cancer that cannot be reliably diagnosed before birth. And some cases of thwarted selection will have targeted traits like appearance or intelligence whose expression in offspring cannot be reliably predicted at all.[352] There is of course no guarantee that traits like looks or smarts or dispositions to disease that come about from scores of genes working in concert with other factors will actually show up in children.

A recent case in point: A number of couples alleged that a sperm bank negligently misrepresented the characteristics of a donor whose sperm was so popular that it was rarely available.[353] Touted as an acclaimed drummer and neuroscience engineering PhD candidate with an IQ of 160, the couples chose him for the chance their child would inherit his purported intellect and musicality.[354] The sperm bank reassured them of the rigorous screening procedures it used to verify such information before making donor profiles available on its website.[355]

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349. Cf. Paretta v. Med. Offices for Human Reprod., 760 N.Y.S.2d 639, 648 (Sup. Ct. 2003) (noting that parents had expressed "concern[] about whether the egg donor had freckles and with the size of her eyes and ears").

350. Cf. supra notes 242, 310–312 and accompanying text (discussing other reproductive injuries warranting de minimus awards).

351. See King, supra note 196, at 287–88 (discussing misdiagnosis risks from "[u]ncertainties inherent in the genetic testing process, such as inaccurate genetic tests, embryo mosaicism, and low gene penetrance" (footnotes omitted)).

352. See supra note 194 and accompanying text (noting the relative influence genetics tends to have on human traits).

353. See Notice of Removal at exh. A, Doe v. Xytex Corp., No. C 16-02935 WHA, 2016 WL 3902577 (N.D. Cal. July 19, 2016); Ashifa Kassam, Sperm Bank Sued as Case of Mentally Ill Donor's History Unfolds, Guardian (Apr. 14, 2016, 3:18 PM), http://www.theguardian.com/world/2016/apr/14/sperm-donor-canada-families-file-lawsuit [http://perma.cc/HP74-ZN88].

354. Complaint at 10–16, *Xytex*, 2016 WL 3902577 (No. C 16-02935 WHA).

355. See id.

It turned out the donor was actually a convicted felon with no college degrees who had been diagnosed with schizophrenia among a number of other mental disorders.[356]

Were a court to compensate for the negligent frustration of the couples' interests in offspring particulars, considerable uncertainty would complicate any damages as to either mental health or relative intelligence. Awards related to thwarted selection against genetic susceptibility to schizophrenia should account for the probability, for example, that a child with a parent who either has or is a genetic carrier for the disease has a twelve percent chance of developing schizophrenia.[357] This risk would cut back the absolute injury severity that accounts for such factors as schizophrenia's chronic effects, in addition to its average age of onset (sixteen for men and twenty-five for women) and shorter life span (by eighteen years for men, by sixteen for women).[358] As for the donor's lower-than-promised IQ, the notoriously indeterminate genetics of high intelligence[359] make sound estimates of probabilistic loss of the chance to select offspring for that trait all but impossible.[360]

Mix-up claims should not be dismissed outright, however, simply because the features that distinguish the misidentified donor, gamete, or embryo from the intended one cannot be "reliably predicted."[361] Less-than-certain chances that competent care could have satisfied people's interests in offspring particulars is no good reason to deny them a cause of action altogether.[362] That is instead reason to reduce awards in proportion to the causal role of factors other than professional wrongdo-

356. See Kassam, supra note 353; Diana Mehta, Sperm Donor at Heart of Canadian Lawsuits Admits He Lied to Company Xytex, Police Say, CBC News (Aug. 30, 2016, 2:06 PM), http://www.cbc.ca/news/canada/toronto/american-sperm-donor-admission-1.3741470 [http://perma.cc/ZU4N-WAPF].

357. See Tim B. Bigdeli et al., Genome-wide Association Study Reveals Greater Polygenic Loading for Schizophrenia in Cases with a Family History of Illness, 171 Neuropsychiatric Genetics 276, 278–79 (2016); Elliot Rees, et al., Genetics of Schizophrenia, 2 Current Opinion Behav. Sci. 8, 9 (2015).

358. See Thomas M. Laursen, Life Expectancy Among Persons with Schizophrenia or Bipolar Affective Disorder, 131 Schizophrenia Res. 101, 103 (2011).

359. See Nicholas G. Shakeshaft et al., Thinking Positively: The Genetics of High Intelligence, 48 Intelligence 123, 130 (2015) ("High intelligence appears to be nothing more than the quantitative extreme of the same genetic factors responsible for normal variation.").

360. For discussion of public policy objections to compensating negligently thwarted efforts to choose offspring intelligence, see infra notes 561–568 and accompanying text.

361. Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67, 72 (Utah 1998). For discussion of public policy implications in the *Harnicher* case, see infra notes 517–529 and accompanying text.

362. Cf. Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 689 (Ky. 2003) (denying recovery for deficient prenatal screening on the ground that the resulting condition was caused by "genetic[s] and not the result of any injury negligently inflicted").

ing.[363] This is a natural extension of loss-of-chance principles that decline to immunize broad swaths of professional practice from liability just because misconduct cannot be the proven but-for cause of adverse effects.[364] It is enough, on this account, for reproductive patients to show that negligently confounded procreation made their thwarted selection of offspring traits substantially more likely. Compensation for that loss should then be adjusted to the estimated contribution of negligent care.

Further uncertainty accompanies frustrated efforts to choose traits ranging from offspring height to intelligence. These would not show up until later due to genetic complexities and postbirth contributions besides delayed onset. In such cases, courts should likewise reject an all-or-nothing approach, whether it would allow full recovery or deny it on the traditional view that the threat of not-yet-realized future harm is not acute enough to establish liability.[365] Better than these is the partial-recovery approach courts have begun to allow under the doctrine of increased risk for a "reasonable" fear that the unwanted condition will (or the wanted condition will not) develop in the future, even if plaintiffs cannot prove a greater-than-even likelihood that a worse outcome will ensue.[366] To instead refuse "compensation unless a plaintiff proves that a future consequence is more likely to occur than not" would deny damages "for consequences that later ensue from risks not rising to the level of probability" and award them "for future consequences that never occur"—a result at odds with the goal of redressing "tort victims fairly for all the consequences of the injuries they have sustained, while avoiding, so far as possible, windfall awards for consequences that never happen."[367] Although it is possible that an affected child may not ultimately develop a condition, this should not bar recovery when a negligent mix-up or misdiagnosis causes some vulnerability.[368] The level of damages should reflect the proportionate role of professional

363. See supra notes sections II.A–.B (discussing procreation imposed and procreation deprived).

364. See infra notes 484–493 and accompanying text (discussing metes and bounds of loss-of-chance doctrine).

365. See generally W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 30, at 165 (5th ed. 1984) (discussing the historical requirement that an action for negligence must include proof of actually realized damage).

366. See Petriello v. Kalman, 576 A.2d 474, 481 (Conn. 1990) (enabling recovery for fear-based distress after a negligently performed surgical procedure leading to an eight- to sixteen-percent risk of bowel obstruction).

367. Id. at 482–83.

368. Many courts have adopted this principle in cases regarding delayed diagnosis of potentially fatal cancers. See United States v. Anderson, 669 A.2d 73, 78–79 (Del. 1995) (testicular cancer); DeBurkarte v. Louvar, 393 N.W.2d 131, 137 (Iowa 1986) (breast cancer); In re Englert, 605 So. 2d 1349, 1351 (La. 1992) (brain tumor).

wrongdoing as a percentage of total awards had the condition materialized.[369]

III. PROCREATION RIGHTS AND REMEDIES

What is needed is a new cause of action against reproductive negligence. This right, while no panacea, is an important and necessary part of the solution. It is true that vigorous safety standards, procedure testing, facility accreditation, and compliance monitoring would be better at preventing reproductive injuries from happening in the first place; tort law gets triggered only after a claim gets brought for an injury that has already taken place. But the American political climate and the economics of the reproductive field make the prospect of robust regulation by the government, industry, or professional associations a long shot.[370] Even less probable in the United States is a government-administered accident-compensation scheme like New Zealand's.[371] Besides, regulators can hardly be expected to anticipate or avert every avoidable injury to which new and risky products and services give rise. Amidst rapid technological changes, individual injury plaintiffs are agile and motivated enough to bring neglected social harms "to the attention of the legal system through private claims for damages."[372] Yet the U.S. doctrinal landscape offers only a mixed bag of ill-fitting theories unequipped for the work that this growing challenge demands. Accordingly, it is time for a private right of procreation.

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369. Cf. Edward A. Marshall, Medical Malpractice in the New Eugenics: Relying on Innovative Tort Doctrine to Provide Relief When Gene Therapy Fails, 35 Ga. L. Rev. 1277, 1317–21 (2001) ("The alternative doctrine of increased risk, adopted by a growing minority of courts that recognize the shortcomings of the 'all or nothing' approach, is much more apt to dealing with the problems inherent in a claim for gene therapy malpractice." (footnote omitted)).

370. See supra notes 80–89 and accompanying text (discussing the refusal by elected officials and private organizations to regulate reproductive negligence); see also Anne Drapkin Lyerly, Marking the Fine Line: Ethics and the Regulation of Innovative Technologies in Human Reproduction, 11 Minn. J.L. Sci. & Tech. 685, 695–96 (2010) (discussing forces in U.S. politics that have led to a relative dearth of regulation for human-reproductive technologies).

371. See generally Peter H. Schuck, Tort Reform, Kiwi-Style, 27 Yale L. & Pol'y Rev. 187 (2008). That the types and severity of injury among reproductive-negligence victims vary so dramatically complicate potential insurance mechanisms that have in others areas grouped together large numbers of claims and average out settlement awards in a single mass negotiation. See Samuel Issacharoff & John Fabian Witt, The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law, 57 Vand. L. Rev. 1571, 1614 (2004).

372. Engel, supra note 10, at 179.

U.S. courts have long recognized "[t]ort law's ability to accommodate new technologies" by filling "the regulatory gap"[373] and warning of neglected risks when technological innovation transforms "the nature of injuries."[374] "[T]he law of torts," Professor William Prosser noted in his classic treatise, is a "battleground of social theory."[375] For example, mass transport by boat and rail gave rise to fare disputes between passengers and vessel operators, out of which developed the tort for intentional infliction of emotional distress.[376] Strict products liability emerged from the defects that novel goods from power tools to soft drinks unleashed on unsuspecting consumers.[377] And then of course there is the right to privacy that arose in response to prying cameras and gossip mongering.[378] Today, professional assistance in matters of procreation has reached a similar flashpoint.[379] The negligent performance of reproductive services and procedures from test tubes to tube ties generates harms that have outpaced the law's ability or willingness to police them.[380] A tort is needed to protect against the grave repercussions for victims whose family planning is disrupted when procreation is wrongfully imposed, deprived, or confounded.

A. *The Private Right of Procreation*

Should a right to recover for reproductive negligence be understood as one general tort or multiple specific ones? Each approach has strengths and weaknesses.[381] Making the right monolithic underscores the central animating principle that it serves to protect people's legitimate expectations to exercise a reasonable measure of control over

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373. Michael L. Rustad & Thomas H. Koenig, Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory, 68 Brook. L. Rev. 1, 96 (2002).

374. Id. at 6.

375. William L. Prosser, Handbook of the Law of Torts § 3, at 14 (3d ed. 1964).

376. See William L. Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874, 881 & n.38 (1939) (noting the prominent role of common carriers in early cases recognizing liability for emotional distress).

377. See William L. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1100 (1960) ("[T]he seller of a chattel owed to any one who might be expected to use it a duty of reasonable care to make it safe . . . .").

378. See supra notes 49–56 and accompanying text (charting the rise of privacy torts).

379. See supra notes 57–67 and accompanying text (scanning the evolution of reproductive freedom in America).

380. See Calandrillo & Deliganis, supra note 80, at 340 ("ART has evolved at such a break-neck pace that it has far outgrown the [existing] system of voluntary self-regulation and reporting . . . ."); supra notes 80–89 and accompanying text (discussing limited U.S. regulation of assisted reproduction).

381. See Paul Schwartz & Karl-Nikolaus Pfeifer, Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept?, 98 Calif. L. Rev. 1925, 1937–47, 1981–84 (2010).

decisions about having children.[382] A unitary tort strategy offers the convenience of a single place for citizens to locate their rights when they sense a violation of their interests in procreation. Its core also streamlines the sources of authority that lawyers and judges need reference to resolve such disputes. Most crucially, this high-level common law appeal facilitates adaption to changing conditions and norms within such a rapidly evolving context. A danger of this approach, however, is that reliance on such a dynamic principle could dissolve into disarray if its protections are too nebulous to implement.[383]

By contrast, differentiating this tort into bundles of sticks sharpens its conceptual focus. Thwarted interests in pregnancy, parenthood, and particulars, while all plausibly designated as "reproductive," resist consolidation into any one identical injury or claim of the kind that characterize class action suits.[384] The circumstances and stakes of these interests appear at least as diverse as those comprising other multidimensional torts like the privacy right that Professor Prosser split into "a complex of four" separate rights of disclosure, intrusion, false light, and likeness appropriation.[385] The comparative precision of a partitioned tort lends transparency to specific applications. Yet piecemeal protections risk purchasing such "order and legitimacy" at the price of making them too "rigid and ossifying" to accommodate the full range of fact patterns that implicate similar interests.[386] The complementarity of these approaches commends an overarching right of procreation that protects related but distinct interests in pregnancy, parenthood, and particulars. The cohesive nature of this action preserves its central focus on the centrality of family planning to many people's lives. And the right's discrete components enable it to craft remedies that are sensitive to the more specific injuries that arise in individual cases.[387]

1. *Why: Values, Compensation, Deterrence.* — This private cause of action would serve not one but three goals: to affirm shared values, to compensate victims, and to deter professional misconduct.[388] First, the

382. See supra notes 33–35 and accompanying text (discussing the distinctive and significant nature of reproductive harms generally); see also infra notes 441–457 and accompanying text (noting that the reproductive right to avoid procreation also embraces the interest in seeking out procreation).

383. See Edward J. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. Rev. 962, 963 (1964).

384. See generally Arthur R. Miller, The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative, 64 Emory L.J. 293 (2014).

385. Prosser, Privacy, supra note 55, at 389.

386. Neil M. Richards & Daniel J. Solove, Prosser's Privacy Law: A Mixed Legacy, 98 Calif. L. Rev. 1887, 1887, 1924 (2010).

387. See Ronald J. Krotoszynski, Jr., The Polysemy of Privacy, 88 Ind. L.J. 881, 883 (2013).

388. See Dobbs, Hayden & Bublick, supra note 90, §§ 10–16 (discussing the policy goals underpinning tort law).

right to recover against reproductive negligence would confer social recognition on the special importance of control over decisions about procreation—for the sake of not just autonomy but also equality and especially well-being.[389] Affording legal protections against professional misconduct in the provision of reproductive care would thereby reflect and promote norms about the centrality of procreation in people's lives.[390] This new right, by marking out the wrongful frustration of reproductive interests as harms worthy of remedy, would tell fertility patients what is reasonable for them to expect and, at the same time, tell providers how it is reasonable for them to act when they assume care of reproductive interests.

Second, the procreation right would compensate victims of negligently imposed, deprived, or confounded procreation. The point of damages for such injuries is not to make victims whole, as if money could somehow restore what they lost when a clinic destroyed their only embryos or when a failed sterilization left them with an unplanned child to raise.[391] Compensation under this cause of action would seek not to return victims to their pre-injury state but to approximate how much better off competent reproductive care would have made them.[392] Damages awards under the right would thereby operate as a function of: (1) the severity of injury to interests in the legitimate expectation of exercising control of pregnancy, parenthood, or selection of offspring particulars;[393] and (2) the probability that such injuries were caused by deficient care rather than other factors.[394]

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389. See supra notes 33–35, infra notes 449–456 and accompanying text (discussing the concrete injury that results from reproductive negligence and the great value that people place on the ability to have children).

390. See Benjamin N. Cardozo, The Paradoxes of Legal Science 37 (1928) ("Law accepts as the pattern of its justice the morality of the community whose conduct it assumes to regulate.").

391. See Cahn, supra note 83, at 70.

392. See Robert L. Rabin, Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss, 55 DePaul L. Rev. 359, 367 (2006) (applying interpretive history of accidental tort law to reject the idea that "the damages recoverable in . . . intangible-loss cases reflected any intention to make the victim whole, rather than to roughly match the severity of the harm to the character of the misconduct from a bi-party perspective").

393. See supra notes 237–242 and accompanying text (discussing the severity of injuries related to imposed procreation); supra notes 292–297 and accompanying text (describing injury severity and causation in the context of deprived procreation); supra notes 327–350 and accompanying text (examining the severity of harm in confounded procreation).

394. See supra section II.A.2 (discussing probabilistic recovery in cases in which procreation is imposed); supra notes 306–312 and accompanying text (discussing probabilistic recovery in cases of procreation deprived); supra section II.C.2 (discussing probabilistic recovery in procreation confounded).

Finally, the right should discourage negligence by hospitals, clinics, and sperm banks that agree to help patients have or avoid having children or that allow patients to make the decision to have children on the basis of particular traits. The *New York Times* aptly brands the lightly regulated enterprise as "buyer-beware—for people banking their own sperm for personal use after cancer treatment, and for those relying on a sperm bank's description of an anonymous donor."[395] The new tort aims in this part to discipline fertility providers to adopt precautions that cost less than the harms those measures would have averted.[396] One straightforward idea is labeling sperm, eggs, and embryos with barcodes to prevent mix-ups.[397] Others include quality-control systems in fertility laboratories and reproductive medical practice.[398] The deterrent promise of this new action, however, is undermined if victims can recover too much or too easily. Requiring unduly expensive or onerous liability-protective safeguards would unfairly burden providers and could also chill the availability of valuable reproductive services.[399]

Fear of frivolous or fraudulent litigation could price providers out of reproductive care or drive would-be entrants from the field.[400] Liability threats could even prompt defensive deviations from sound practice in the form of incentivizing tests or procedures that confer marginal clinical

395. Lewin, supra note 11.

396. See William Landes & Richard Posner, The Economic Structure of Tort Law 228–29 (1987) (arguing that tort law should "promote an efficient allocation of resources to safety and care" and impose liability when the injurer is the "lowest-cost avoider" of the harm); see also Saul Levmore, Probabilistic Recoveries, Restitution, and Recurring Wrongs, 19 J. Legal Stud. 691, 706 (1990) (highlighting that existing tort law may systematically miss cases involving "cost-justified medical or other precautionary procedure[s] [that] might have been taken" but were not).

397. See generally Sergi Novo et al., Barcode Tagging of Human Oocytes and Embryos to Prevent Mix-ups in Assisted Reproduction Technologies, 29 Hum. Reprod. 18 (2014) (evaluating a direct tagging system and concluding that it "is simple, safe and highly efficient, allowing the identification of human oocytes and embryos during the various procedures typically conducted during an assisted reproduction cycle").

398. See generally Mortimer & Mortimer, supra note 8 (recommending processes of troubleshooting, benchmarking, and risk and quality management alongside regulation, licensing, and accreditation for IVF laboratories); Matts Wikland & Cecilia Sjöblom, The Application of Quality Systems in ART Programs, 166 Molecular & Cellular Endocrinology 3, 4–7 (2000) (describing a fully implemented quality-control system in an IVF laboratory).

399. See Fox & Stein, Dualism and Doctrine, supra note 133, at 991. Potential defendants might also overestimate the costs of liability, leading them to take precautions that are not cost justified.

400. See Peter W. Huber, Liability: The Legal Revolution and Its Consequences 153–71 (1988) (discussing the chilling effect of tort liability on the development and sale of contraceptives); Richard A. Epstein, Legal Liability for Medical Innovation, 8 Cardozo L. Rev. 1139, 1153–54 (1987) ("Markets work because the costs to the seller are justified by the benefits to [sic] buyer. They cannot survive when costs are falsely charged to the seller for whom there are, in fact, no parallel buyer benefits.").

value.[401] Anxiety about prohibitive costs and moral hazard keeps insurance carriers from covering liability exposure for negligence in the provision of reproductive services. Scholars have referred to these as "triple risk activit[ies]" that directly implicate the well-being of not just an individual patient but also a partner in procreation and future offspring themselves, all of whom might be "interested in pursuing a lawsuit against the physician, nurse, and/or hospital for bad outcomes."[402] The costs of litigation, award payouts, and safety devices will not be absorbed by health care professionals but will instead be passed along to other patients, making services more expensive.[403] Tort liability would spread these costs across patients rather than concentrate them in negligence victims, but providers might refuse high-risk services or treatment of certain patients at all.[404] The right should thus be crafted in a way—by capping damages, perhaps[405]—that balances the freedoms that reproductive treatment enables against the injuries that it can inflict.[406]

2. *Who: Professionals, Patients, Partners.* — What entitles the recipients of donor, IVF, and other services to make enforceable claims against doctors, pharmacists, sperm banks, fertility clinics, embryologists, and genetic counselors who assist them is that these specialists voluntarily assume a duty of reproductive care.[407] It is not as if anyone forces them to. Indeed, state and federal laws protect reproductive professionals from

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401. See Y. Tony Yang et al., Does Tort Law Improve the Health of Newborns, or Miscarry? A Longitudinal Analysis of the Effect of Liability Pressure on Birth Outcomes, 9 J. Empirical Legal Stud. 217, 218 (2012) (connecting liability pressures to suboptimal precaution taking in obstetrics).

402. Serena Scurria et al., Professional Liability Insurance in Obstetrics and Gynaecology, BMC Res. Notes, June 17, 2011, at 1, 2 (on file with the *Columbia Law Review*).

403. This is the reason the California Supreme Court gave for denying compensation for parental-consortium claims: "[T]he burden of payment of awards," though ostensibly falling on "the 'negligent' defendant or his insurer[,] . . . must be borne by the public generally in increased insurance premiums or [else] in the enhanced danger that accrues from the greater number of people who may choose to go without insurance." Borer v. Am. Airlines, Inc., 563 P.2d 858, 862 (Cal. 1977).

404. See Epstein, supra note 400, at 1154 (noting that vaccine manufacturers might withdraw from markets or scale back production as the perceived risks of production increase).

405. Cf. supra note 143 (suggesting patients and providers might contract for such award ceilings). But cf. Franks v. Bowers, 116 So. 3d 1240, 1248 (Fla. 2013) (holding arbitration clause's limitation on damages void as against public policy).

406. See Guido Calabresi, The Costs of Accidents 26–28 (1970) (noting that "reducing the costs of administering [the] treatment of accidents" is a necessary counterweight to the goal of reducing the cost of accidents).

407. Cf. Huddleston v. Infertility Ctr. of Am., Inc., 700 A.2d 453, 460 (Pa. Super. Ct. 1997) (holding that providers "must be held accountable for the foreseeable risks of the surrogacy undertaking because a 'special relationship' exists between the surrogacy business, its client-participants, and . . . the child which the surrogacy undertaking creates").

being sued, fired, or disbarred for refusing to provide any services such as (emergency) contraception, abortion, tubal ligation, or prenatal testing whose provision would violate their moral conscience.[408] The only exception to the latitude that professionals enjoy to choose who to treat is that they may not deny service based on how a patient looks or lives.[409] Doctors face no sanctions, by contrast, for denying IVF treatment to single women, for example, or for refusing to sterilize younger ones.[410] That reproductive specialists are generally free to decline their fertility services underscores the reasonableness of expecting them to conform their conduct to professional norms for those patients they do agree to take on.[411]

Plaintiffs seeking to assert the procreation right in a reproductive-negligence case would accordingly be required to show that the defendants not only owed them this duty but also breached it through conduct that fell below what is "reasonable to expect of a professional given the state of medical knowledge at the time of the treatment in issue."[412] What counts as reasonable to expect of reproductive professionals will depend on the particular practices in question and will evolve based on relevant advances in medical research and technological innovation.[413] This basic reasonableness standard that applies to all

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408. See Overview of Federal Statutory Healthcare Provider Conscience Protections, U.S. Dep't of Health & Human Servs., http://www.hhs.gov/ocr/civilrights/faq/providerconsciencefaq.html [http://perma.cc/5T4H-SXKZ] (last visited Sept. 16, 2016); Refusing to Provide Health Services, Guttmacher Inst., http://www.guttmacher.org/state-policy/explore/refusing-provide-health-services [http://perma.cc/CV6M-7GX6] (last updated Nov. 1, 2016).

409. See Mark R. Wicclair, Conscientious Objection in Health Care: An Ethical Analysis 95–98 (2011); see also N. Coast Women's Care Med. Grp. v. San Diego Cty. Superior Court, 189 P.3d 959, 962 (Cal. 2008) (holding that state antidiscrimination law forbids physicians from declining to provide IVF on the basis of sexual orientation); infra note 465 (discussing the *North Coast Women's Care* case).

410. Annily Campbell, Childfree and Sterilized: Women's Decisions and Medical Responses 129 (1999) (discussing refusals to sterilize young, unmarried women); Andrea D. Gurmankin et al., Screening Practices and Beliefs of Assisted Reproductive Technology Programs, 83 Fertility & Sterility 61, 65 tbl.6 (2005) (showing that one in five fertility treatment providers report being likely to deny reproductive-assistance treatment to unmarried women).

411. See Dobbs, Hayden & Bublick, supra note 90, § 127, at 410 (describing the "reasonable person standard" as requiring "the duty of all persons to exercise ordinary care").

412. Nowatske v. Osterloh, 543 N.W.2d 265, 272 (Wis. 1996), abrogated by Nommensen v. Am. Cont'l Ins., 629 N.W.2d 301 (Wis. 2001). On the evolution of traditional medical liability away from physician customs and instead toward patient expectations of reasonable care, see Philip G. Peters, Jr., The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium, 57 Wash. & Lee L. Rev. 163, 180–85 (2000).

413. See Jolene S. Fernandes, Note, Perfecting Pregnancy via Preimplantation Genetic Screening: The Quest for an Elusive Standard of Care, 4 U.C. Irvine L. Rev. 1295, 1320 (2014) (arguing that ART doctors owe a standard of care that requires "(a) acquiring

professionals who take on the duty of reproductive care would not condemn mere slips of the hand or mistakes in judgment open to reasonable doubt. But neither would it immunize practitioners simply because their misconduct accords with prevailing custom in the field.[414] The importance-of-duty assumption explains why victims of reproductive misconduct by nonprofessionals could not bring the same claims against sexual partners who assume no such duty in circumstances like failing to disclose a venereal disease that causes their partner to become sterile[415] or deceiving a partner into thinking they cannot conceive.[416]

Constitutional doctrine, in other ways, informs who is entitled to protection under the right. The abortion cases about spousal consent and notification suggest that any such right afforded to fertility patients should extend to partners intimately involved in a shared project to have or avoid having children.[417] *Planned Parenthood of Central Missouri v. Danforth* affirmed a woman's right to an abortion over her partner's objection, explaining that as the one "who physically bears the child," she "is the more directly and immediately affected by the pregnancy."[418] The Court has credited interests in procreation other than just bodily integrity.[419] The acts of gestating and giving birth privilege a woman's interests over her partner's opposition.[420] But her priority does not negate "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and

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knowledge about the safety and effectiveness of the new technology . . . , (b) obtaining appropriate training and expertise . . . , (c) evaluating any specific risks").

414. See *Nowatske*, 543 N.W.2d at 271 ("[S]hould customary medical practice fail to keep pace with developments and advances in medical science, adherence to custom might constitute a failure to exercise reasonable care.").

415. See Barbara A. v. John G., 193 Cal. Rptr. 422, 429 (Ct. App. 1983).

416. See Dubay v. Wells, 506 F.3d 422, 426, 428–30 (6th Cir. 2007) (finding that a man deceived into believing his sexual partner was sterile had no fundamental right to disclaim paternity after birth); cf. Complaint at 6, Lerner v. Fig & Olive DC L.L.C., No. 1:16-cv-01753-ESH (D.D.C. Aug. 30, 2016) (alleging that negligent food handling by a restaurant led to a Salmonella outbreak affecting patron's chances of pregnancy).

417. See Heide, supra note 38, at 77 (noting the importance of parental "involvement" to courts' determination of fertility rights).

418. 428 U.S. 52, 71 (1976).

419. The Court's protection of contraceptive access by minors, for example, relied on interests in making decisions as "private and sensitive" as "whether to accomplish or to prevent conception." Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977). That men share this reproductive interest suggests the right to birth control concerns more than bodily integrity. Only some other value could explain why men are also afforded a right to prevent a state of gestation that does not implicate their own bodily integrity.

420. While the Court maintained that "ideally, the decision to terminate a pregnancy should be" a shared one, it is only "when the wife and the husband disagree on this decision," and thus no consensus between "the two marriage partners" can be reached, that the wife should get the final word insofar as only she "bears the child." *Danforth*, 428 U.S. at 71.

development of the fetus she is carrying."[421] A partner generally has similar interests when a couple enlists reproductive medicine or technology. So long as patients and their partners agree on shared reproductive goals, there is no good reason not to extend protection to partners who do not themselves contribute either gametes or gestation.

The issue is not whether the partner is a "direct victim" or "bystander" whose presence during treatment means that the partner observed the injury take place. Rather, it is whether the partner's participation in the treatment process triggers a duty like the one a psychiatrist owes a patient's parents whose immersion in their child's care makes them "active instrumentalities."[422] Most courts have barred recovery for the partners of reproductive-negligence victims, holding, for example, that a doctor who misprescribed a drug that left a patient unable to provide sperm for IVF owed no duty of care to his wife,[423] while a doctor who refused to provide a post-vasectomy referral for a sperm count owed no duty to the patient's wife who thereafter became pregnant.[424] But in the gestational surrogacy context, the Sixth Circuit has held that a "surrogacy broker and program participants" such as the "medical and legal assistants . . . employ[ed]" incur "an affirmative duty of protection, marked by a heightened diligence, aris[ing] out of a special relationship" with not only the surrogate mother and contracting father but also the surrogate's husband who signed the contract and participated in his wife's medical care during pregnancy.[425]

And a Connecticut court recently adopted and elaborated on this view in a decision authorizing wrongful-abortion claims by a husband "who would have been the father of the child, if born."[426] The man and his wife were told the fetus was diagnosed with ambiguous genitalia and associated risks of hormonal abnormalities and organ dysfunction.[427] Based on this information, the couple decided she would terminate the

421. Id. at 70. The portion of the *Casey* joint opinion that struck down the spousal-notification requirement noted the "husband's interest in the life of the child his wife is carrying." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 897–98 (1992) (plurality opinion) (O'Connor, Kennedy & Souter, JJ.). The plurality in *Casey* held that the high incidence of domestic violence justifies a woman's right to conceal her decision to abort, at least insofar as it is impractical to exempt other reasons to hide a pregnancy. Id. at 892–94, 897. The primacy of a pregnant woman's interests does not, however, diminish her husband's "'deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying.'" Id. at 895 (quoting *Danforth*, 428 U.S. at 69).

422. See Jacoves v. United Merch. Corp., 11 Cal. Rptr. 2d 468, 482 (Ct. App. 1992).

423. See Dehn v. Edgecombe, 865 A.2d 603, 622 (Md. 2005).

424. See Adams v. Cavins, No. B163375, 2003 WL 22456117, at *2–4 (Cal. Ct. App. Oct. 30, 2003).

425. Stiver v. Parker, 975 F.2d 261, 268, 270 (6th Cir. 1992).

426. Meleney-Distassio v. Weinstein, No. FSTCV136018746S, 2014 WL 7462584, at *1, *13 (Conn. Super. Ct. Nov. 20, 2014).

427. See id. at *1.

pregnancy despite their desperately wanting a child.[428] A secretary accidentally typed "XY" instead of "XX" in the field for fetal sex, a mistake that the lab, hospital, doctors, and genetic counselors failed to note until an autopsy revealed that the fetus was healthy.[429] The court let the husband sue due to the "binary relationship in the realm of procreation—biologically driven (required!), not merely societally or legally grounded" as via marriage.[430] It explained:

> [T]here is no sound reason why a spouse (father) cannot assert what amounts to a particularized form of derivative injury, one that is no less real and no less significant than derivative injuries arising from more typical loss-of-consortium-generating injuries. Undivided loyalty and confidentiality would be unaffected—no disclosures are required and there would be no involvement in treatment.[431]

The court reasoned that recognition of "one and only one, clearly identifiable, additional claimant per incident" was "not likely to [drive] any appreciable increase in litigation"[432] either, since the (customarily female) patient's "claim would essentially always be present and the likelihood of a paternal claim without participation of the mother seems vanishingly small (if allowed, at all)."[433] Accordingly, the court set aside any other possible objections to allowing the husband to sue:

> There can be no concern about unidentifiable claimants or unlimited scope of potential claimants; there is unlikely to be a flood of additional litigation; there is no intrusion on the physician-patient relationship; there can be no concern about trivial claims being pursued; and the interests being invaded/harmed are substantial, having received recognition as a right with constitutional implications.[434]

This reasoning provides forceful justification for extending a right to recover against reproductive negligence to reproductive partners, such as the husband in this case, who are not patients themselves.

3. *What: Avoidance, Pursuit, Selection.* — This new right of procreation would reconcile the shared reproductive interests at stake in tort claims against negligent professionals with the "non-tort contexts" in which "various forms of protection" for these same interests in pregnancy, parenthood, and offspring particulars "are found in constitutions, statutes and common law rules which do not involve tort claims."[435] Most

428. See id.

429. See id. at *16.

430. Id. at *13.

431. Id. at *11.

432. Id. at *12.

433. Id. at *9.

434. Id. at *16.

435. Cf. Bloustein, supra note 383, at 994 (making this reconciliation claim in connection with the right to privacy).

obviously, the well-being-focused interests in avoiding unwanted pregnancy and parenthood invigorate autonomy-based substantive due process rights to access birth control and abortion.[436] The Supreme Court called these decisions among "the most intimate and personal choices a person may make in a lifetime" without making clear[437]—as the injuries of imposed procreation do—their exceptional power to orient other aspects of life.[438] Gendered experiences of pregnancy and expectations for parenthood place demands on women's bodies, time, and resources that compete with opportunities for education, employment, or politics so central to financial security and social standing.[439] It is precisely because women's "ability to control their reproductive lives" facilitates their capacity "to participate equally in the economic and social life of the Nation" that their "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role" within the family and society.[440]

Complementary interests in pursuing wanted procreation shore up why it is that those very same constitutional rights protect decisions about "*whether* to bear or beget a child":[441] not just to escape procreation by obtaining birth control or abortion but also to seek out procreation by refusing them.[442] One court even struck down a fetal-experimentation ban based in part on the unelaborated opinion that "within the cluster of constitutionally protected choices that includes the right to access to contraceptives, there must be included . . . the right to submit to a medical procedure that may bring about, rather than prevent,

436. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 875–76 (1992) (plurality opinion) (O'Connor, Kennedy & Souter, JJ.) (holding the Fourteenth Amendment protects the right to an abortion within the undue burden framework); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding the Fourteenth Amendment protects contraception rights for single and married people alike).

437. *Casey*, 505 U.S. at 851.

438. See supra notes 171–189 and accompanying text (discussing pregnancy interests and parenthood interests).

439. See Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (connecting "a woman's autonomy to determine her life's course" to the ability "to enjoy equal citizenship stature"); Siegel, Sex Equality Arguments, supra note 183, at 819 ("Control over" pregnancy "affects women's health and sexual freedom, their ability to enter and end relationships, their education and job training, their ability to provide for their families, and their ability to negotiate work-family conflicts in institutions organized [along] traditional sex-role assumptions . . . ."); Martha J. Bailey et al., The Opt-In Revolution? Contraception and the Gender Gap in Wages 2 (Nat'l Bureau of Econ. Research, Working Paper No. 17922, 2012) (on file with the *Columbia Law Review*) (attributing a third of women's wage increases relative to men since the 1960s to the early availability of birth control).

440. *Casey*, 505 U.S. at 852, 856.

441. Id. at 851 (emphasis added) (citing *Eisenstadt*, 405 U.S. at 453).

442. See People ex rel S.P.B., 651 P.2d 1213, 1216 (Colo. 1982) (holding that "according a father the right to compel the mother of his child to procure an abortion . . . is clearly foreclosed by *Roe*, *Maher*, and *Danforth*").

pregnancy."[443] Yet the existing reproductive rights, while permitting broader reach, do not compel it as a matter of constitutional doctrine.[444] That individual liberties "sound in personal autonomy," the Court has warned, "does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . ."[445] Indeed, it has denied protection to decisions as personal as whether to live with a nonrelative[446] or to end one's life with the help of a physician.[447] Viewed through the lens of individual well-being at stake in deprived procreation, however, the likes of IVF, surrogacy, and donor insemination assume importance far beyond pregnancy-specific interests in bodily integrity and sex equality.[448]

Few practices drive so many to undergo procedures that are painful, expensive, invasive, exhausting, and that risk their health, peace of mind, and livelihoods.[449] Decisions about whether to be pregnant or a parent "have such great significance for personal identity and happiness," Professor John Robertson argues, "that an important area of freedom

443. Lifchez v. Hartigan, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990), aff'd, 914 F.2d 260 (7th Cir. 1990).

444. See Martha Chamallas, Unpacking Emotional Distress: Sexual Exploitation, Reproductive Harm, and Fundament Rights, 44 Wake Forest L. Rev. 1109, 1122 (2009) (attributing reluctance to analogize procreative rights cases to constitutional rights to difference between the "'positive' rights" focus of tort law); Coan, supra note 89, at 239 (arguing that courts generally do not think of reproductive rights as "a right to procreate"); Cohen, The Constitution, supra note 40, at 1149–51 (arguing that *Eisenhardt* extended the court's reasoning in *Griswold* from a privacy right protecting the marital bedroom to something that might be read as a more general right protecting nonprocreative sex); Sonia M. Suter, The "Repugnance" Lens of *Gonzales v. Carhart* and Other Theories of Reproductive Rights, 76 Geo. Wash. L. Rev. 1514, 1525–27 (2008) ("[A]lthough constitutional jurisprudence supports a negative right to avoid procreation, it may provide only 'sketchy support' for the right to reproduce."). This should not obscure the fact that a private tort action for reproductive injuries need "not [be] coextensive with or measured by the woman's constitutional right to decide the fate of her pregnancy." Canesi v. Wilson, 730 A.2d 805, 815 (N.J. 1999); cf. Northern, supra note 104, at 534–35 ("If we view the right of procreative autonomy as sufficiently significant to receive constitutional protection, then its loss due to the negligent conduct of others should be an injury unto itself.").

445. Washington v. Glucksberg, 521 U.S. 702, 727 (1997).

446. Village of Belle Terre v. Boraas, 416 U.S. 1, 5–7 (1974) (rejecting a challenge to an ordinance that zoned an area as "single-family dwellings" and further defined "family" to include only married couples and blood relatives, on the grounds that this did not impose on any constitutionally protected right).

447. *Glucksberg*, 501 U.S. at 751.

448. See Douglas NeJaime, *Griswold*'s Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality, 124 Yale L.J. Forum 340, 340 (2015), http://www.yalelawjournal.org/forum/griswolds-progeny [http://perma.cc/FNB4-WL9V] [hereinafter NeJaime, *Griswold*'s Progeny] (noting that LGBT advocates have "articulated a procreative view of marriage tied to same-sex family formation" that relies on ART).

449. See Kimberly D. Krawiec, Price and Pretense in the Baby Market, *in* Baby Markets 41, 44 (Michele Bratcher Goodwin ed., 2010) (noting some people's "desire for a family is so strong that they will stop at virtually nothing to procure a child").

and human dignity would be lost if one lacked self-determination in procreation."[450] Protection from reproductive negligence can also promote critical new forms of social equality.[451] Rights to secure competent IVF and surrogacy help even out reproductive disadvantages faced by different-sex couples whose medical status leaves them infertile, as well as those faced by single, gay, lesbian, and transgender people whose nonmedical circumstances some have referred to as "dysfertile."[452] Without such rights, they could not access the prized marks of "moral and civic obligation, marital and sexual success, personal maturity, and normality" that having children can confer.[453]

The interests in selecting offspring particulars also inform constitutional consideration of open questions that courts will soon face about the constitutional status of selective abortion bans, such as that enacted most recently in Indiana, that forbid abortion following testing for sex, race, or genetic abnormality.[454] The reproductive wrong of confounded procreation elucidates interests in selecting for traits that parents think would make raising a child more meaningful or gratifying. Professor Robertson explains:

> [I]ndividuals seek or avoid reproduction precisely because of the types of experiences, situations, and responsibilities that it will entail. A person who chooses to reproduce chooses to accept the experiences and responsibilities entailed in reproduction and child rearing, unknown and vague as they may be

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450. Robertson, Liberalism and the Limits, supra note 33, at 236.

451. See NeJaime, *Griswold*'s Progeny, supra note 448, at 346 (arguing that "the expansion of same-sex couples' procreative and parental rights emerges from a . . . sexual orientation equality pushed in part by the growing acceptance of same-sex marriage").

452. E.g., Lisa C. Ikemoto, The In/Fertile, the Too Fertile, and the Dysfertile, 47 Hastings L.J. 1007, 1009 (1996). Medical grounds for infertility might prevent a partner from carrying a pregnancy or providing material that could achieve conception through sexual means. Nonmedical grounds for dysfertility might extend beyond single status or same-sex orientation to strong desires to avoid gestation due to trauma related to a previous pregnancy or to avoid using one's own genetic material due to risk of transmitting hereditary disease. See Bragdon v. Abbott, 524 U.S. 624, 641 (1998) ("It cannot be said as a matter of law that an 8% risk of transmitting a dread[ful] and fatal disease to one's child does not represent a substantial limitation on reproduction.").

453. Carol Sanger, Developing Markets in Baby-Making: In the Matter of Baby M, 30 Harv. J.L. & Gender 67, 72–75 (2007); cf. In re Baby M, 525 A.2d 1128, 1165 (N.J. Super. Ct. Ch. Div. 1987) ("'It should follow [from the right to bear and beget] that married persons also have a right to engage in noncoital, collaborative reproduction, at least where natural reproduction is not possible.'" (quoting John A. Robertson, Surrogate Mothers: Not So Novel After All, Hastings Ctr. Rep., Oct. 1983, at 28, 32)). Equality claims would not justify protecting procreative prospects closed to those who conceive the old-fashioned way.

454. See Fox, Interest Creep, supra note 84, at 325–28 (analyzing purported state justifications); Emma Green, Should Women Be Able to Abort a Fetus Just Because It's Female?, Atlantic (May 16, 2016), http://www.theatlantic.com/politics/archive/2016/05/sex-disability-race-selective-abortion-indiana/482856/ [http://perma.cc/G6VY-NSHZ] (discussing Indiana's recent law).

> at the time of choice. If the package of burdens and responsibilities differs markedly from one she finds acceptable, then that person might choose not to reproduce.[455]

Having not just any child but one with or without particular characteristics—like genetic affinity, physical resemblance, absence of disease, presence of shared features, or donor compatibility to save a dying would-be sibling—can facilitate parents' ability to support a partner or existing children or connect with familial or cultural histories that matter a great deal to them.[456] That is why courts might extend protections, beyond efforts to avoid or pursue procreation, to methods of fetal testing, donor selection, and embryo screening that enable offspring selection for genetic traits.[457]

Pregnancy, parenthood, and particular interests inform more than just these constitutional questions about the justification and scope of the reproductive rights to birth control and abortion. A statutory example from Supreme Court jurisprudence is the question of what conditions qualify for antidiscrimination protections under the Americans with Disability Act.[458] *Bragdon v. Abbott* held that asymptomatic HIV qualifies.[459] That an "infected woman risks infecting her child during gestation and childbirth" makes HIV an impairment that substantially limits the major life activity of "procreation with the normal expectation of bringing forth a healthy child."[460] But the majority lacked the conceptual resources to give an account of why procreation counts as a major life activity, managing only to assert that "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself."[461] The interests in pursuing pregnancy and parenthood and in selecting for the particular trait of genetic health in offspring would have supplied a more compelling rationale. The typology of imposed, deprived, and confounded procreation helps more clearly to identify and evaluate the reproductive interests at stake in a wide range of other contexts beyond professional negligence.[462] These range from the constitutionality of

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455. John A. Robertson, Genetic Selection of Offspring Characteristics, 76 B.U. L. Rev. 421, 427 (1996).

456. See supra notes 198–208, 327–350 and accompanying text (discussing incentives for parents to select for certain traits); infra notes 525–534, 551, 566–567 and accompanying text (same).

457. For a discussion on policy objections, see infra notes 515, 521, 534–541, 545–548, 553–556, 564 and accompanying text.

458. See Bragdon v. Abbott, 524 U.S. 624, 630–42 (1998).

459. See id. at 637.

460. Id. at 640, 643 (quoting with approval from Application of Section 504 of the Rehabilitation Act to HIV–Infected Individuals, 12 Op. O.L.C. 264, 273 (1988)).

461. Id. at 638.

462. See Dov Fox, From Chance to Choice to Court, Huffington Post (Apr. 3, 2016, 1:15 PM), http://www.huffingtonpost.com/dov-fox/from-chance-to-choice-to_b_9605450.html [http://perma.cc/LW27-SNLZ] (last updated May 25, 2016) (discussing reproduc-

refusals to fund abortion,[463] insure birth control,[464] or grant same-sex couples equal access to fertility services,[465] to family or contract law

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tive negligence); Dov Fox & I. Glenn Cohen, It's Time for the U.S. to Cover IVF (for Gays and Lesbians Too), Huffington Post (Mar. 18, 2013, 10:10 AM), http://www.huffingtonpost.com/dov-fox/it-is-time-for-the-us-to-_b_2900323.html [http://perma.cc/XQ5X-KXJG] (last updated Nov. 14, 2013) (expounding the rights "of gays and lesbians to have a genetic child"); Dov Fox & Alex Stein, Reproductive Malpractice and the U.S. Military, Huffington Post (July 2, 2015, 7:16 PM), http://www.huffingtonpost.com/dov-fox/reproductive-malpractice-and-the-us-military_b_7706980.html [http://perma.cc/HWL7-3VFU] (last updated Sept. 26, 2016) (arguing that federal government immunity for military torts under the Federal Tort Claims Act ought not extend to reproductive negligence); Dov Fox, The Reproductive Rights Case the Supreme Court Decided *Not* to Decide, Bill of Health (June 29, 2016), http://blogs.harvard.edu/billofhealth/2016/06/29/the-private-right-of-procreation-in-the-supreme-court/ [http://perma.cc/YCU8-BZVR] (appraising equal protection claims against laws that provide recovery to victims of negligence that causes or fails to detect anomalies affecting the ability to avoid conception or delivery, while refusing them to victims of negligence that prevents them from having a wanted child); Dov Fox, Surrogacy Contracts, Abortion Conditions, and Parenting Licenses, Bill of Health (June 7, 2016), http://blogs.harvard.edu/billofhealth/2016/06/07/surrogacy-contracts-abortion-conditions-and-parenting-licenses-in-the-curious-case-of-cook-v-harding/ [http://perma.cc/WZ65-X2MK] (questioning duties owed by surrogate who refused to reduce multiple-order pregnancy that risked medical problems for resulting children).

463. The Supreme Court has held the abortion right does not "carr[y] with it a constitutional entitlement to the financial resources" a woman needs "to avail herself of" her "protected choices." Harris v. McRae, 448 U.S. 297, 316 (1980). So a state "need not remove [obstacles like poverty] not of its own creation." Id. While existing law does not mandate funding for reproductive care except birth control, it might be good policy. Eileen L. McDonagh, My Body, My Consent: Securing the Constitutional Right to Abortion Funding, 62 Alb. L. Rev. 1057, 1060 (1999) (arguing that government refusal to fund abortion for indigent women is unconstitutional).

464. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759–60 (2014) (exempting corporations with limited shareholders from Affordable Care Act provisions requiring employee health insurance plans to include coverage of contraception); Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 Yale L.J. 2516, 2566–78 (2015) (distinguishing material and dignitary harms resulting from contraceptive refusal).

465. See N. Coast Women's Care Med. Grp. v. San Diego Cty. Superior Court, 189 P.3d 959, 965–70 (Cal. 2008) (holding that neither free speech nor free exercise justified the fertility doctor's refusal to provide treatment based on sexual orientation); Daar, Accessing Reproductive Technologies, supra note 59, at 48 tbl.2 (distinguishing informal and unintentional acts that directly or indirectly obstruct ART access); Richard F. Storrow, Medical Conscience and the Policing of Parenthood, 16 Wm. & Mary J. Women & L. 369, 371–93 (2010) (discussing the *North Coast* case); Megan Jula, 4 Lesbians Sue over New Jersey Rules on Fertility Treatment, N.Y. Times (Aug. 8, 2016), http://www.nytimes.com/2016/08/09/nyregion/lesbian-couple-sues-over-new-jersey-rules-for-fertility-treatment.html (on file with the *Columbia Law Review*) (discussing a suit brought by same-sex couples seeking insurance coverage equal to what different-sex couples receive for expensive fertility treatments).

disputes involving surrogacy,[466] embryo disposition,[467] and the deception of sexual partners regarding the ability to have children.[468] This framework for analysis can also press such areas of law in more sound and promising directions.[469]

B. *Determining Damages*

The remedy for violations of the procreation right takes form in damages awards. And yet, injuries to the right's interests in pregnancy, parenthood, and the selection of offspring particulars appear to defy monetary correction. Dollars cannot restore the control that victims have lost over their reproductive lives any more than money can restore the loss of life or liberty in actions for wrongful death or wrongful conviction and imprisonment.[470] There are several reasons why recovery for intangible injuries like these is vulnerable to charges of arbitrariness, unfairness, and abuse: the lack of any clear way to translate imprecise, case-specific harms into determinate fiscal terms; the lack of any objective test to measure the severity of injuries the appraisal of which tends to depend heavily on subjective testimony; the lack of obvious mechanisms to channel legislative or judicial deliberations about corresponding awards; and the lack of market value to confine damages within a ceiling or floor.[471] These are difficult challenges that admit of no simple

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466. Gestational surrogacy is an example in which nonspecialists assume a contractual duty of reproductive care to carry a pregnancy to term, or to terminate it upon a diagnosis of fetal anomaly, for example, based on agreed-to terms between the surrogate and intended parents. See Deborah L. Forman, Abortion Clauses in Surrogacy Contracts, 49 Fam. L.Q. 29, 31 (2015) (describing common surrogacy-agreement provisions). For sex-differentiated pregnancy interests, however, enforcement of duties that would require waiver of abortion rights risks exploiting the "special vulnerability of women." Laurence H. Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 Harv. L. Rev. 330, 337–38 (1985).

467. See supra notes 40, 204 and accompanying text (discussing work on these issues by Professor Cohen and others).

468. See supra note 416 and accompanying text (describing cases involving misrepresentation of fertility); see also supra notes 204, 220–224 and accompany text (describing sperm misappropriation). For a discussion of so-called contraceptive-sabotage cases such as putting holes in condoms, hiding birth control pills, or removing intrauterine devices without a person's knowledge, see A. Rachel Camp, Coercing Pregnancy, 21 Wm. & Mary J. Women & L. 275, 282–83 (2015); Plunkett, supra note 239, at 105.

469. See Dov Fox, Birth Rights and Wrongs (forthcoming 2017–2018) (on file with the *Columbia Law Review*).

470. Cf. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty . . . it will be enough . . . [to] show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.").

471. See Stanley Ingber, Rethinking Intangible Injuries: A Focus on Remedy, 73 Calif. L. Rev. 772, 779 (1985) (noting "the administration of the law under the present system for compensating intangible injuries is vulnerable to criticism of unfairness and abuse").

solutions. As the comparisons to wrongful death and conviction suggest, however, they are not exceptional, and they need not be decisive.

Incommensurability is no greater problem for reproductive negligence than it is in other contexts in which juries determine recovery for intangible losses.[472] These losses include tort actions for the humiliation of the privacy intrusion, the betrayal of fiduciary breach, and the lost choice of uninformed consent.[473] Another example is a "wrongful living" case, in which medical providers negligently breach their duty to know and honor a patient's expressed wish to forgo lifesaving treatment.[474] These cases typically involve resuscitation despite the "do-not-resuscitate" order displayed in a patient's chart.[475] These cases involve a loss of decisional autonomy and have practical effects such as prolonging patients' suffering and causing family members to witness that suffering. People may be less familiar with harms related to procreation.[476] But it is not so much harder in the reproductive context, as compared to similarly intangible losses in the others above, to affix awards for negligently thwarted interests that vary in systematic ways based on plausible judgments about the relevant facts.[477]

1. *Tailoring Injury Severity.* — Damages awards for reproductive negligence should correspond to how much better off plaintiffs could have been had competent professional services honored their decisions about whether and how to procreate. For example, compensation levels might correspond to the chance that competent care would have enabled them to have a wanted child (procreation deprived), not have an unintended one (procreation imposed), or have or not have a child

472. See generally Nancy Levit, Ethereal Torts, 61 Geo. Wash. L. Rev. 136 (1992) (tracing the evolution of intangible injuries and suggesting reforms to improve compensation).

473. In practice, courts have balked at requests to remedy such wrongdoing that does not leave plaintiffs worse off in physical or economic terms. See Heinrich v. Sweet, 308 F.3d 48, 70 (1st Cir. 2002) (denying relief on an informed-consent claim, reasoning that the defendant performed a procedure no different than what the plaintiffs consented to); Boyles v. Kerr, 855 S.W.2d 593, 601–02 (Tex. 1993) (holding there is no "independent right to recover for negligently inflicted emotional distress").

474. See Holly Fernandez Lynch et al., Commentary, Compliance with Advance Directives: Wrongful Living and Tort Law Incentives, 29 J. Legal Med. 133, 173–74 (2008) (arguing that patients harmed by continued life that is worse off than death should be compensated if their wish to discontinue lifesaving treatment is breached).

475. See, e.g., Anderson v. St. Francis-St. George Hosp., 671 N.E. 2d 225, 229 (Ohio 1996) (denying damages on the basis that the plaintiff suffered no damage because of the defribulation of his heart); Cronin v. Jam. Hosp. Med. Ctr., 875 N.Y.S.2d 222, 222 (App. Div. 2009) (affirming that the plaintiff did not suffer any legally cognizable injury in New York because of resuscitation).

476. See, e.g., Motro, supra note 261, at 963–64 (discussing the determination of damages for unintended pregnancy).

477. Cf. Theodore Eisenberg et al., Juries, Judges, and Punitive Damages: An Empirical Study, 87 Cornell L. Rev. 743, 754–55 (2002) (finding that judges and juries award compensatory and punitive damages in similar and nonarbitrary ratios).

born with or without different genetic traits (procreation confounded).[478] This damages inquiry operates in two steps. The first step determines the severity of injuries sustained to interests in pursuing or avoiding pregnancy, parenthood, or offspring particulars.[479] The second step determines the extent to which professional wrongdoing is responsible for having caused that injury.

The first step spells out the severity of reproductive injury in terms of how seriously the misconduct impairs plaintiffs' interests in pregnancy, parenthood, or offspring particulars.[480] Part II showed how this determination turns not only on whether negligence interfered with the pursuit or avoidance of these reproductive interests, or even on whether it frustrated just one as opposed to more of them. The relative severity of reproductive injuries also depends on more case-specific factors including plaintiffs' life plans and social identities or the individual consequences and durations of time those injuries implicate.[481] This still leaves a great deal for decisionmakers to fill in. The pages ahead elaborate on the conditions under which participants, lawmakers, judges, or juries are best equipped to make these determinations and how.[482]

The severity of injuries to the interest in selecting offspring particulars will likewise depend on the impact those injuries have on the reproductive lives of victims in particular cases. Those consequences for the well-being of plaintiffs should in turn be understood in terms of which trait preferences were wrongfully frustrated and why they preferred those traits in the first place. The issue is not whether plaintiffs would have decided otherwise about whether to have children, in a subjective counterfactual sense, had they known that negligence would thwart their efforts to have offspring of a particular type. If a parent refuses to have a child with traits that are different from the ones they had selected, it might reflect simple intransigence, which is itself unworthy of special protection. The severity of these injuries is not a function of how much distress it caused the plaintiffs. It is instead about the extent to which the wrongful frustration of efforts to have or avoid having a child of a certain type can be expected to impair their lives, from the perspective of their own (not illegitimate) values and circumstances.

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478. See supra note 392 and accompanying text (discussing the purpose of compensation under the proposed right to recover for reproductive negligence).

479. See supra notes 174–211 and accompanying text (discussing general injuries resulting from either pregnancy, parenthood, or other particulars).

480. Supra notes 238–242, 292–297, 327–350 (explaining how forced pregnancy, deprivation of procreation, and/or confounded choice in offspring traits have detrimental effects).

481. See supra notes 238–242, 292–297, 327–350 and accompanying text (accounting for factors such as ability to support a child and reasons for choosing one with certain traits).

482. See infra section III.B.3. (evaluating relative institutional competencies of juries, judges, and lawmakers).

2. *Loss-of-Chance Probabilities*. — It is not just the severity of injuries to interests in pregnancy, parenthood, and particulars that matters in determining the fitting size of monetary remedies under the procreation right. Also critical is the extent to which those injuries were caused by reproductive negligence and not some other force altogether for which the defendant professionals cannot properly be held accountable. The second determinant of awards under the procreation right is the probability that negligence is responsible for those injuries. The level of compensation for those injuries is reduced by the extent to which they were caused by factors besides professional wrongdoing like patient infertility, contraceptive user error, or genetic uncertainty.[483] This kind of remedy for lost chances has been adopted in "a substantial and growing majority of the [s]tates that have considered" it.[484] Loss-of-chance doctrine gives patients with preexisting conditions an opportunity to recover for the probability they lost "a chance to survive, to be cured, or otherwise to achieve a more favorable medical outcome."[485] That patients were already disposed to some bad outcome means that it could still have happened even in the absence of any wrongdoing. This approach entitles those afflicted by such susceptibilities "to the same level of care as less-threatened patients."[486] And it affords them an avenue for recovery by conceptualizing the relevant injury as their loss of a chance for a better outcome (like cure or survival) that competent treatment would have made more likely.[487]

There is no reason that courts cannot recognize loss of chance as a harm beyond the medical malpractice paradigm.[488] The doctrine asks patients to prove that negligence more likely than not caused a substantially reduced probability of a more favorable outcome.[489] This sets a low bar for showing causation. Say competent care of a preexisting condition "would have given the plaintiff, at a minimum, a 60% chance to survive the illness," while "the defendant's negligence" is shown to

483. See supra notes 306–312, 351–364 (detailing how infertility and genetic uncertainty can cause complications in procreation).

484. Matsuyama v. Birnbaum, 890 N.E.2d 819, 828 (Mass. 2008).

485. See id. at 832 (redressing patient's wrongfully reduced chance "to achieve a more favorable medical outcome").

486. Cahoon v. Cummings, 734 N.E.2d 535, 540 (Ind. 2000).

487. See Dobbs, Hayden & Bublick, supra note 90, § 196.

488. The Seventh Circuit applies this approach to damages in employment discrimination cases, for example. See Biondo v. City of Chicago, 382 F.3d 680, 688–89 (7th Cir. 2004) (reviewing district court's use of loss of chance to calculate if using a racially segregated list to determine promotion adversely harmed white firefighters).

489. See Dickhoff ex rel. Dickhoff v. Green, 836 N.W.2d 321, 329 (Minn. 2013) (applying this theory under circumstances in which the "the defendant negligently deprived [the plaintiff] of a chance of a better outcome").

have cut that chance "down to 40%."[490] Even if the plaintiff survived, or if her estate could not prove malpractice caused her death, this doctrine would provide recovery for the resulting thirty-three-percent "reduction in her chances to stay alive"— that is, less by one-third when compared to her pre-negligence life expectancy.[491] So long as plaintiffs can demonstrate that the negligent conduct was at least as much to blame as other factors for the injuries to their reproductive interests, awards would be calculated based on this proportional-recovery rule that "apportion[s] damages consistent with the degree of fault."[492] Whatever compensation would have attached for the injury to interests in pregnancy, parenthood, and particulars would be reduced accordingly by the extent to which other forces caused them.[493] The statistical uncertainty that these issues pose in the reproductive context is unlikely to be much more complex than the others in which loss-of-chance doctrine is readily and routinely applied.[494]

3. *Institutional Competence*. — Which decisionmakers are best situated to determine the gravity and relative causation of reproductive injuries sustained in particular cases of negligence? Most straightforwardly, patients could themselves insure, in advance of any reproductive procedure, against the various kinds of injuries they care about preventing in the amount that corresponds to how much it matters to them. But insurers lack economic incentives to cover even reproductive care, let alone negligence.[495] So opportunities to insure against reproductive injuries are unlikely to be available anytime soon. Another way for patients to have a say in how much their interests under the procreation right are worth to them would be to let them give up the protections in exchange for lower-cost services.[496] This would encourage acquisition of valuable information about the rules that govern transactions for

490. See id. at 326 (describing a case in which negligence resulted in a patient having a forty-percent chance of survival due to the doctor's negligence, when typical survival rates are sixty percent).

491. See id. (noting the decline of twenty percent in lost chance represents a decrease of thirty-three percent in chance of survival).

492. Id. at 335.

493. For discussion of when and how to apply proportional recovery for reproductive negligence see supra notes 240–250, 306–312, 351–368 and accompanying text (accounting for factors such as the ability to support a child and reasons for choosing one with certain traits).

494. See Ariel Porat & Alex Stein, Tort Liability Under Uncertainty 73–76, 116–29 (2001) (outlining how lost chance can be effectively applied in cases involving uncertain events that have already occurred).

495. See Urska Velikonja, The Costs of Multiple Gestation Pregnancies in Assisted Reproduction, 32 Harv. J.L. & Gender 463, 491–92 (2009) (discussing several reasons why insurers tend to decline coverage for infertility treatment).

496. But see Jennifer Arlen, Contracting over Liability: Medical Malpractice and the Cost of Choice, 158 U. Pa. L. Rev. 957, 1022 (2010) (arguing that contractual liability surrenders the value of standardized care and associated network benefits).

reproductive services.[497] But allowing waiver of the right would make it too easy for providers, given the power they wield over patients, to contract around their duties of reproductive care.[498] It will not do to let patients trade away protections so long as bargaining conditions remain lopsided. This is indeed why medical malpractice doctrine more generally bars enforcement of bargaining over liability in the event of negligence for treatments ranging from dental services to abortion.[499]

These are decisions best left to "the voice of the community."[500] Courts should fortify the power of the jury to enact reasonable judgments about the severity of reproductive harms and the probability that negligent conduct is to blame.[501] Generic instructions that jurors should gauge the impairment to interests in pregnancy, parenthood, and particulars are not enough to help juries adjust appropriate compensation levels based on more or less serious injuries.[502] But a number of strategies can help to distinguish such gradations in the severity of reproductive injuries.[503] First, judges could instruct juries about the damages awarded within the relevant jurisdiction for similar claims arising under the same cause of action. Using such award patterns or injury profiles as guidance would do little, however, to rein in arbitrary or excessive judgments in past cases, and might even risk reinforcing

497. See Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 99 (1989) (noting that crafting rules to force the informed party to reveal information can increase contractual efficiency).

498. See supra notes 144–149 and accompanying text (noting that there is judicial disapproval of liability waivers in the general medical realm but liability waivers are accepted in the reproductive context). But cf. John A. Robertson, Precommitment Strategies for Disposition of Frozen Embryos, 50 Emory L.J. 989, 1029 (2001) (arguing that patients should be allowed to waive their constitutional "reproductive rights when the interests of others who relied on [the waiver] would be significantly hurt and such waiver enabled the parties to engage in the socially useful practice of treating infertility").

499. See Ash v. N.Y. Univ. Dental Ctr., 564 N.Y.S.2d 308, 310 (App. Div. 1990) (holding that an exculpatory contract, used to refute a claim of negligence for dental services, is against public policy); Olson v. Molzen, 558 S.W.2d 429, 430, 432 (Tenn. 1977) (ruling that a doctor may not use an exculpatory contract to defend against a negligence action for an improperly performed abortion).

500. Spaziano v. Florida, 468 U.S. 447, 461 (1984). For discussion of competing ideals of the jury, see Dov Fox, Neuro-Voir Dire and the Architecture of Bias, 65 Hastings L.J. 999, 1006–09 (2014).

501. See JoEllen Lind, The End of Trial on Damages? Intangible Losses and Comparability Review, 51 Buff. L. Rev. 251, 252–53 (2003) (arguing against appellate courts' use of "comparability review" to determine if damages awards for intangible losses are appropriate).

502. See Roselle L. Wissler et al., Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities, 6 Psychol. Pub. Pol'y & L. 712, 718 (2000) (noting that standard jury instructions provide "no guidance" to approximate the amount of money that would return plaintiffs to their position prior to injury).

503. See Rabin, supra note 392, at 373–77 (discussing "ceilings, scheduling, and informational approaches" to redress for intangible losses, none of which "require efforts to engage in precisely contoured case-by-case implementation").

them.[504] Any such multifactor test need not mask a "pretense of analytical rigor."[505] Insofar as jurors "vary in their estimate of the sum which will be a just pecuniary compensation," judges can review jury awards for unwarranted variability or extravagance.[506] But this approach would not even be much use until a sufficient number and diversity of suits under the right come before the courts.

Elected officials are unlikely to issue contentious judgments about the worth of deprived pregnancy, imposed parenthood, or confounded efforts to select children with particular traits for the same reasons that assisted reproduction goes virtually unregulated in the United States.[507] But lawmakers could delegate this task and establish a special agency that operates like the Sentencing Commission, whose members the President nominates and the Senate confirms.[508] An agency of this kind designed to oversee the procreation right would guide determinations of damages awards for reproductive negligence (rather than criminal sentencing factors or recommendations). Workers'-compensation-type schedules would probably be too rigid to accommodate such varied reproductive harms, while more flexible scales that isolate relevant factors and convert them to dollars are too fluid to supply systematic enough guidance.[509] A better solution is to use tables of award ranges corresponding to subcategories of reproductive harm. This would be similar to the sentencing guidelines that prescribe punishment for various crimes.[510] This approach would anchor injuries like imposed pregnancy or deprived parenthood within benchmarks that would be tailored to reflect objective indicators of the losses sustained in particular cases.[511] This tailoring

504. See Mark Geistfeld, Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries, 83 Calif. L. Rev. 773, 791–92, 836–37 (1995) (positing that making "prior awards the cornerstone of future awards . . . may ensure that like cases are treated alike in that all involve inappropriate damages awards").

505. Richard A. Posner, Divergent Paths: The Academy and the Judiciary 117 (2016).

506. Bethke v. Duwe, 41 N.W.2d 277, 280 (Wis. 1950).

507. See supra notes 72–89 and accompanying text (discussing the unregulated nature of assisted reproduction in America in public and private law).

508. See Rachel E. Barkow & Kathleen M. O'Neill, Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation, 84 Tex. L. Rev. 1973, 1985–92 (2006) (considering the various factors that lead a legislature to delegate the task of setting punishment guidelines).

509. See Ronen Avraham, Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change, 100 Nw. U. L. Rev. 87, 92–106 (2006) (looking at the "variance in pain-and-suffering awards" and different proposals to make damages awards more predictable).

510. See Amy Baron-Evans & Kate Stith, Booker Rules, 160 U. Pa. L. Rev. 1631, 1681 (2012) (discussing concerns with mandatory sentencing and the value of greater judicial discretion).

511. Cf. Randall R. Bovbjerg et al., Valuing Life and Limb in Tort: Scheduling "Pain and Suffering," 83 Nw. U. L. Rev. 908, 938–60 (1989) (arguing against the use of vague guidelines and broad discretion in assessing noneconomic damages).

could take form in tests that weigh factors responsive to the reasons for reproductive plans or the aftermaths of their frustration.[512]

4. *Public Policy Concerns.* — Public policy could also preclude recovery in some confounded procreation cases. These concerns might include empirical or normative judgments about sex ratios, newborn health, and secular values about group equality or offspring acceptance that are bound to be controversial.[513] Here, decisionmaking authority would shift from juries (as instructed by judges) to judges alone. For a judge to treat reproductive negligence as noncompensable, she would have to conclude that policy concerns outweigh the countervailing expression of values favoring interests in procreation. But there is nothing unusual about courts evaluating such policy exceptions to judge-made law.[514]

The examples below illustrate the factors that might inform judicial determinations about the circumstances under which a remedy for reproductive negligence may be void for public policy. Reasonable disagreement about such policies will usually warrant allowing plaintiffs to bring suit and seek compensation for confounded procreation. Some might even raise public policy concerns against recovery for thwarted efforts to have genetically related children. Protecting such preferences for biological ties, they might argue, risks privileging genetic over meaningful social parenthood in a way that devalues devoted nonnuclear families.[515] Whatever the merits of this objection, it is unlikely to succeed given that so many accept and indeed applaud parents who want a genetic bond with their children.[516]

a. *Resemblance and Race.* — Physical resemblance tends to be valued most as a byproduct of that genetic connection. In *Harnicher v. University of Utah Medical Center*, a couple with male-factor infertility selected a sperm donor to "closely match[] [the husband's] physical characteristics" so that they could "believe and represent that any child born would be" genetically related to him.[517] After triplets were born who looked nothing like the husband, the couple learned that their clinic's "mis-

512. See supra notes 206–208, 328–332 and accompanying text (discussing the effect of thwarted selection for various traits).

513. See supra note 84 and accompanying text (noting division even within constituencies and reticence among lawmakers to cross certain boundaries).

514. See Robert J. Kaczorowski, The Common-Law Background of Nineteenth-Century Tort Law, 51 Ohio St. L.J. 1127, 1143–50 (1990) (describing English and American courts' evaluations of policy exceptions to the tort law rule of strict liability for common carriers).

515. Cf. Sanger, supra note 453, at 73–75 ("[C]ultural attitudes regarding the meaning of parenthood, when combined with technologies that offer even the chance of biological parenthood, have made childlessness . . . less acceptable").

516. See supra notes 198–204 and accompanying text (spelling out reasons why parents and society value heredity and shared parent–child biology).

517. 962 P.2d 67, 68 (Utah 1998).

taken use of the wrong donor thwarted their intention" that he could hold himself out as their "biological father."[518] The negligent use of sperm from a different-looking donor did not deprive him of a genetic tie to any resulting offspring who could not have been biological kin even if the right donor had been used.[519] His distinct grievance was that his children "do not look as much like [him] as different children might have."[520] The majority's conclusion that existing protections offered no legal basis for the couple to recover sounded in the register of a policy objection to any such remedy at all. "Exposure to the truth about one's [genetic relation to one's children] cannot be considered an injury and has never been a tort . . . . [D]estruction of a fiction cannot be grounds for either malpractice or negligent infliction of emotional distress."[521]

The dissenting judge's convincing reply was that but for the "mixing [of] sperm from the wrong donor," that fiction "would simply have been an 'alternative reality' for the Harnicher family."[522] Part II's discussion of various rationales that animate parental selection for offspring resemblance suggests that the desire for this alternative reality is not illegitimate.[523]

How should courts deal with negligence that thwarts not just physical but racial likeness? The *Harnicher* court implied in dicta that it would have been more sympathetic to the parents' suit had they instead claimed "racial or ethnic mismatch."[524] Frustrated efforts to choose for offspring "race" would indeed warrant considerable recovery under the procreation right when apparently race-based preferences actually reflect selection for health (for example, to avoid conditions like sickle cell anemia that correlate with black ancestry[525]) or heredity (to avoid using *any* genetic material other than one's own).[526] But many parents might want a child's race to match their own for other reasons. Racially phenotypic differences might, as in the case of the Harnichers, prevent a family

518. Id.

519. See id. at 68, 73 (noting the fertility experts the man and woman had enlisted informed them that his "low sperm count and decreased sperm mobility" explained why "[a]rtificial insemination using [his] sperm yielded no results").

520. Id. at 72.

521. Id.

522. Id. at 74 (Durham, J., dissenting).

523. See supra notes 343–350 and accompanying text (discussing various rationales for selection for resemblance).

524. *Harnicher*, 962 P.2d at 72.

525. See Dov Fox, Genomic Justice: Genetic Testing and Health Insurance in America, Roosevelt Rev., Summer 2005, at 109, 112 ("[S]tudies show that individuals of African descent are twelve times more likely than the general American population to carry the patterns of gene expression associated with sickle cell anemia.").

526. Michael Lasalandra, Woman, Ex and Hospital Settle over Sperm Mixup, Bos. Herald, Aug. 27, 1998, at 12; Mike Stobbe, Alleged Mix-up Leads to Lawsuit, Fla. Times-Union (Sept. 1, 1997), http://jacksonville.com/tu-online/stories/090197/3a5LOOKB.html [http://perma.cc/MW66-5KT2].

from passing as genetically related.[527] Alternately, parents may seek to spare a child racial taunts, a confused racial identity, or deficient access to a racial culture.[528] In a recent such case, a white couple that chose a white donor was sent material from a black one.[529]

> [Jennifer Cramblett] and her partner, Amanda Zinkon, wanted their child to bear some resemblance to them—particularly Zinkon, who would not be carrying the baby. After hours spent poring over sperm donor profiles, they found a donor with blond hair and blue eyes who looked like he shared heritage with Zinkon. But they didn't get the sperm they ordered . . . . "We love her—she's [a] dream come true," Cramblett said of her 2-year-old daughter Payton . . . . But because Payton isn't completely white, Cramblett said the family will have to move away from their current home in . . . a place she described as white, conservative and too racially intolerant . . . . "Being a lesbian growing up in a small town, I went through a lot of things that were hard on me. I don't want her to have to go through that."[530]

The couple argued that race mattered to them because they lacked the "cultural competency" to help their "obviously mixed-race baby girl" manage the challenges of racial bias and indifference in their all-white and racially insensitive community.[531]

In a society that can be hostile to differences, it is easy to appreciate why some prospective parents might prefer a child of their own race or why negligence that frustrates such efforts might impair reproductive well-being (in terms of parenting experiences) or equality (in terms of enabling infertile couples, like others, to choose a procreative partner's race).[532] The Supreme Court has even limited its general exclusion of racial considerations by the state when it comes to child placement decisions, explaining that "a child living with a [parent] of a different race may be subject to a variety of pressures and stresses not present if

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527. See supra notes 344–348 and accompanying text (discussing why both different- and even same-sex couples seek to "pass" in related ways).

528. Fox, Racial Classification, supra note 47, at 1861.

529. See Roy Strom, Sperm Bank Sued over Donor Mix-up, Nat'l L.J. (Apr. 22, 2016), http://www.nationallawjournal.com/id=1202755752374/Sperm-Bank-Sued-over-Donor-MixUp#ixzz47dA3NPBL [http://perma.cc/R9QQ-64QU].

530. Kim Bellware, White Woman Who Sued Sperm Bank over Black Baby Says It's Not About Race, Huffington Post (Oct. 2, 2014), http://www.huffingtonpost.com/2014/10/02/black-sperm-lawsuit_n_5922180.html [http://perma.cc/434R-P6PZ].

531. Meredith Rodriguez, Lawsuit: Wrong Sperm Delivered to Lesbian Couple, Chi. Trib. (Oct. 1, 2014, 7:22 AM), http://www.chicagotribune.com/news/local/breaking/ct-sperm-donor-lawsuit-met-20140930-story.html [http://perma.cc/T9FR-RD88].

532. Cf. NeJaime, *Griswold*'s Progeny, supra note 448, at 346–47 (arguing that surrogacy and parentage restrictions "may arise out of and perpetuate the unequal treatment of same-sex families and may restrict the equal procreative liberty of same-sex couples").

the child were living with parents of the same rac[e]."[533] Even so, judges might object to such actions on policy grounds.[534]

Enforcing special protections for racial reproductive preferences could give legal effect to the judgment that race deserves a prized place in family formation, courts might argue. Compensation for thwarted race matching could also judicially sanction partiality for single-race families over multiracial ones.[535] Protecting such race-matching efforts could trade on or reinforce a racially essentializing assumption that people should have children of their own race, or the divisive notion that citizens should "be set apart by race across family units."[536] It is unlikely, however, that such worries about racial sorting in family formation will garner broad enough support to sustain public policy objections.[537] The ostensibly "natural" origins of racial matching confer the appearance of legitimacy.[538] Concerns about family grouping by race are sufficiently contested that victims of confounded procreation should be allowed to argue the wrongful thwarting of their selection interests merits recovery.[539]

b. *Ability and "Disability."* — Similar policy objections might be raised against recovery for the negligent thwarting of selection for offspring health. A legal remedy that supports the elimination of potential lives

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533. Palmore v. Sidoti, 466 U.S. 429, 433 (1984); see also Katie Eyer, Constitutional Colorblindness and the Family, 162 U. Pa. L. Rev. 537, 541–42 (2014) (showing that the Supreme Court has "deliberately shielded continued uses of race in the family law context from rigorous constitutional scrutiny"); Dov Fox, Race Sorting in Family Formation, 49 Fam. L.Q. 55, 58–68 (2015) [hereinafter Fox, Race Sorting] (distinguishing and evaluating four salience-varying ways—race-dominant, race-attentive, race-sensitive, and race-indifferent—to manage racial preferences as those approaches operate in the contexts of child adoption and assisted reproduction).

534. See Roberts, supra note 204, at 244 (chalking up the popularity of reproductive technologies in American culture not only to "the value placed on the genetic tie, but [more specifically to] the value placed on the white genetic tie").

535. For extended discussion of this point, see Fox, Racial Classification, supra note 47, at 1874–92 (discussing the ways racial classification plays into assisted reproduction and whether racial classifications have a legitimate social meaning in this context).

536. Fox, Race Sorting, supra note 533, at 59; see also Alberto Bernabe, Do Black Lives Matter? Race as a Measure of Injury in Tort Law, 18 Scholar: St. Mary's L. Rev. on Race & Soc. Just. 41, 66–67 (2015) (arguing that courts "should not extend the notion of wrongful birth to apply to a claim where the injury is . . . based on . . . the race of a child" because to recognize such a claim would reinforce bias and prejudice).

537. See Fox, Racial Classification, supra note 47, at 1879–86 (appraising considerations about decisional autonomy, reproductive privacy, and racial expression that support parental freedom to exercise selection regarding offspring race).

538. See Drummond v. Fulton Cty. Dep't of Family & Children's Servs., 563 F.2d 1200, 1205 (5th Cir. 1977) (en banc) ("It is a natural thing for children to be raised by parents of their same ethnic background.").

539. See Dov Fox, Reproducing Race, Huffington Post (Oct. 6, 2014), http://www.huffingtonpost.com/dov-fox/reproducing-race_b_5942166.html [http://perma.cc/E6EH-YSE7] (arguing that "people who turn to reproductive medicine" should not be without "recourse when fertility middle men" negligently distribute sperm samples of a different race).

based on the conditions they would have been born with could be understood to demean people with disabilities by suggesting either that they do not lead rewarding lives or that their entire existence can be reduced to their impairment.[540] Protecting offspring selection on this basis need not, however, reflect the disadvantaging impact of stereotypes or indifference.[541] Nor need it suggest that prospective parents with moderate coping skills would suffer lasting grief or family dysfunction were they to have a child with a disabling condition; indeed, most do not.[542] Instead, recovery need only imply that parents wish to forgo the emotional, physical, and financial pressures of hospital visits, medical expenses, and special education that caring for a child with special needs can entail.[543] That offspring disability implicates such parenting challenges makes it reasonable to think that decisions to avoid them "treat[] a disabled child as having exactly the same worth as a non-disabled child."[544] Enforcing the procreation action for thwarted efforts to prevent some genetic anomaly that tends to incapacitate those who possess it vindicates people who envision their family life would be meaningfully different were it to include a child born with it.

There is a stronger policy rationale for refusing a recovery right to malpractice victims who seek to choose *for* rather than *against* disabling conditions like deafness, dwarfism, or Down syndrome.[545] One publicized case involved a deaf lesbian couple that set out to select a donor who was deaf too.

> Sharon [Duchesneau] and Candy [McCullough]—both stylish and independent women in their mid-thirties . . . both holders of graduate degrees from Gallaudet University [for the deaf], both professionals in the mental health field—sat in their

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540. See Glover, supra note 208, at 35 (arguing that "singl[ing] out disability among the obstacles to flourishing," without taking adversities like poverty and child abuse "just as seriously," risks conveying or condoning "shrinking from certain kinds of people, or some horrible project of cleansing the world of them").

541. For discussion of this point, see Dov Fox, Prenatal Screening Policy in International Perspective: Lessons from Israel, Cyprus, Taiwan, China, and Singapore, 9 Yale J. Health Pol'y L. & Ethics 471, 478–79 (2009) (reviewing Ruth Schwartz Cowan, Heredity and Hope: The Case for Genetic Screening (2008)).

542. See Sally Baldwin, The Costs of Caring: Families with Disabled Children 141–42 (1985) (demonstrating through empirical results that families cope well with the financial costs of raising disabled children in most circumstances).

543. See Parkinson v. St. James & Seacroft Univ. Hosp. NHS Tr. [2001] EWCA (Civ) 530 [90], [2002] QB 266, 293 (Eng.) (referring to "additional stresses and strains").

544. Id. at 530, [2002] QB at 293.

545. See supra note 192 and accompanying text (describing instances in which a parent may select an embryo for the presence of a disability like deafness or dwarfism that parents share); see also Melissa Healy, Fertility's New Frontier: Advanced Genetic Screening Could Help Lead to the Birth of a Healthy Baby, L.A. Times (July 21, 2003), http://articles.latimes.com/2003/jul/21/health/he-pgd21 (on file with the *Columbia Law Review*) (reporting an IVF doctor asked "to identify an embryo with Down's syndrome" to give a couple's "Down's-affected child a similar sibling").

> kitchen trying to envision life if their son [with whom Sharon was pregnant] turned out not to be deaf [like they are, born into their vibrant deaf identity and community]. It was something they had a hard time getting their minds around. When they were looking for a donor to inseminate Sharon, one thing they knew was that they wanted a deaf donor . . . . So Sharon and Candy asked a deaf friend to be the donor, and he agreed . . . . As Sharon puts it: "A hearing baby would be a blessing. A deaf baby would be a special blessing."[546]

It must again be noted that genetic conditions like deafness or Down syndrome vary in how traits are expressed: For example, most people with achondroplasia (commonly referred to as dwarfism) have a normal lifespan without notable health complications, while others develop severe, even life-threatening, bone problems. Still, the state has a strong interest in promoting the birth of offspring with basic capacities like hearing and avoidance of serious medical risks.[547] Federal mandates that grain manufacturers add folic acid to reduce the risk of offspring with neurological disorders reflects this policy to promote newborn health.[548] Selecting for incapacitating conditions works against this policy that the next generation of citizens suffer from fewer such limitations at birth. That such selection efforts are rare, however, diminishes their health implications for the general population.[549] Parens patriae interests face conceptual challenges that a child cannot be said to have been harmed by the prenatal conduct to which she owes her existence.[550] More critically, most people who choose offspring for deafness or dwarfism themselves live with these conditions (or have children who do) and reject the idea that a child who results suffers from a disability. Instead, these parents maintain that this child compared with a different unaffected one would be raised with more meaningful or rewarding

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546. Liza Mundy, A World of Their Own, Wash. Post (Mar. 31, 2002), http://www.washingtonpost.com/archive/lifestyle/magazine/2002/03/31/a-world-of-their-own/abba2bbf-af01-4b55-912c-85aa46e98c6b/ (on file with the *Columbia Law Review*); see also Darshak M. Sanghavi, Wanting Babies like Themselves, Some Parents Choose Genetic Defects, N.Y. Times (Dec. 5, 2006), http://www.nytimes.com/2006/12/05/health/05essa.html (on file with the *Columbia Law Review*).

547. Maher v. Roe, 432 U.S. 464, 478 (1977) (discussing the state's interest in "'encouraging [healthy] childbirth'" (quoting Beal v. Doe, 432 U.S. 438, 446 (1977))).

548. For discussion of the state's interest in the health of newborns, see Fox, Interest Creep, supra note 84, at 300–02 (discussing justifications for the state's postnatal welfare interest).

549. See Baruch, Kaufman & Hudson, supra note 8, at 1055 (noting that three percent of 186 IVF clinics surveyed reported having enabled couples "to select an embryo for the presence of a disability").

550. For discussion of this "nonidentity problem," see sources cited supra notes 207–211 and accompanying text.

experiences by virtue of sharing that valuable identity, language, or community with one's family.[551]

c. *Sex, Height, Intelligence.* — Other couples enlist reproductive assistance to choose a child's sex for nonmedical reasons. One example involves a couple with four boys who were mourning the loss of their only daughter.

> Alan and Louise Masterton . . . have four sons and want to use IVF and pre-implantation genetic diagnosis (PGD) to ensure their next child is a girl. Their daughter, Nicole, died last summer at the age of three . . . . "It is difficult to explain," said Mr. Masterton. "We tried for Nicole for 15 years. We were blessed with her and she was a fantastic child. We are looking for the opportunity to try for another daughter, not another Nicole, but to bring a female dimension to our family."[552]

If sex-choosing parents face negligent sperm sorting, embryo selection, or selective abortion that thwarts that preference, should policy concerns bar their ability to recover? To provide relief for frustrated sex selection in parts of China, India, or South Korea would very likely exacerbate sex disparities and reinforce patriarchies that underlie preferences for male offspring.[553] That these concerns are comparatively less urgent in the United States gives less reason to categorically deny relief if parents' sex selection is wrongfully thwarted in this country, where parental preferences for boys and girls run nearly even and sex

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551. Philosopher Russell Blackford argues that deaf parents who preselect for a deaf child do so not out of "ignorance or irresponsibility, but out of a conviction that they are better placed to nurture and socialize a deaf child than one with normal hearing" and to grant her "access to a culture that they experience as rich, complex, and satisfying—and not available to those with normal hearing." Russell Blackford, Humanity Enhanced: Genetic Choice and the Challenge for Liberal Democracies 27–28 (2014). Blackford does well to note that while such parents "might not be in a position to assess the full richness of what they have missed out on by being cut off from the world of music, for example, the rest of us perhaps are no better placed to assess what can be substituted for it by the parents' own culture." Id. at 28. Yet those who cannot hear miss out on experiencing resonant sounds from a bird's song to a stream's gurgle to a baby's laughter. "Rather than denying that deafness is a disability at all," Blackford concludes

> that this particular disability is one that has been addressed with great effort and creativity in modern times, to the degree that it is not always a significant barrier to a growing individual's welfare, flourishing, and success. Where the individual's parents are deaf and immersed in Deaf culture it is even conceivable that deafness could, on balance, enhance the child's future prospects; in any event, a parent could reasonably come to that conclusion, even if other reasonable people differ.

Id.

552. Kirsty Scott, Bereaved Couple Demand Right to Baby Girl, Guardian (Oct. 4, 2000), http://www.theguardian.com/uk/2000/oct/05/humanrights.world1 [http://perma.cc/BJ9M-9TNG].

553. See Mara Hvistendahl, Unnatural Selection 10–15 (1st ed. 2011) (discussing reasons for sex selection and gender imbalances).

ratios at birth fall squarely within population norms.[554] Many here argue that sex selection is still "steeped in the same kind of gendered social norms and expectations as preferences that lead to sex ratio imbalances in other countries"[555] and could, if it happens more, "contribute to a society's gender stereotyping and overall gender discrimination."[556] These are the concerns that courts must balance against those reasons to protect sex-selection interests.[557]

People who reproduce using donated sperm or eggs can pick and choose among donors with or without genetically influenced traits like height, intelligence, or perfect pitch.[558] Some IVF clinics have even, for a time, offered embryo selection for eye, hair, and skin color.[559] Others test embryos for tissue matching to an existing sick child in need of cord-blood stem cell transplants:

> Molly Nash was born with a severe type of Fanconi anemia, a blood disorder that almost always results in leukemia by the age of 10. It's rare, but far more common among people of Eastern European Jewish descent like the Nashes . . . . The only treatment is a bone marrow transplant. The greatest likelihood of success is when the donor marrow comes from a sibling who has genetically identical tissue, called HLA. The Nashes thought they would never have more children—until . . . [learning] [t]hey could . . . produce several embryos, then genetically test all of them for both Fanconi anemia and HLA type . . . [and] use the infant's umbilical cord blood as a source of new bone

554. See Fox, Interest Creep, supra note 84, at 330 (discussing sex ratios at birth in the United States); Jasmeet Sidhu, How to Buy a Daughter, Slate (Sept. 14, 2012), http://www.slate.com/articles/health_and_science/medical_examiner/2012/09/sex_selection_in_babies_through_pgd_americans_are_paying_to_have_daughters_rather_than_sons_.html [http://perma.cc/9U4T-QUVF] ("[D]ata from Google show that 'how to have a girl' is searched three times as often in the United States as 'how to have a boy.' Many fertility doctors say that girls are the goal for 80 percent of gender selection patients.").

555. Sujatha Jesudason & Susannah Baruch, Editorial, Sex Selection: What Role for Providers, 86 Contraception 597, 597 (2012).

556. Ethics Comm. of the Am. Soc'y of Reprod. Med., Sex Selection and Preimplantation Genetic Diagnosis, 72 Fertility & Sterility 595, 597 (1999).

557. For discussion of how to weigh these various policy concerns, see Fox, Interest Creep, supra note 84, at 330–34.

558. See supra notes 190–193 and accompanying text (discussing a parent's ability to choose certain traits or characteristics).

559. Philip Sherwell, Designer Baby Row over Clinic that Offers Eye, Skin and Hair Colour, Telegraph (Feb. 28, 2009), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/4885836/Designer-baby-row-over-clinic-that-offers-eye-skin-and-hair-colour.html (on file with the *Columbia Law Review*) ("The Fertility Institutes clinic has just started offering prospective parents the opportunity to select physical traits of future offspring thanks to 'cosmetic medicine.'").

> marrow for Molly . . . . "We were doing the right thing for our family."[560]

If misconduct were to thwart such selection, and the injured patients sued the negligent provider, judges might fear that authorizing recovery risks imparting a sort of "quality control" on procreation that could erode parental norms of unconditional love.[561] More than one court has even connected this anxiety about offspring acceptance to Nazi eugenics, worrying what will happen when advances in prenatal screening uncover genetic contributions for

> psychoses, hypertension, diabetes, early- and late-appearing cancers, degenerative disorders, susceptibility genes for communicable diseases, genes for various mental deficiencies, aging genes, and other variations and disorders . . . . Will we then see the tort of wrongful birth extended to physicians who neglect or misinterpret genetic evidence and thereby fail to extend the option of a eugenic abortion to the unsuspecting parents of a genetically "unfit" or "defective" child?[562]

Courts worry that to "allow the parents of every child" who exists due to a specialist's wrongdoing to recover "for any perceived genetic [departure] no matter how slight," so long as the departure "was a foreseeable consequence of the defendant's negligence" would promote a disquieting impulse of control over offspring traits or reinforce intolerance of people who are born abnormal or different.[563] For people to intervene so actively and directly to enact particularistic preferences about offspring traits would, on this account, run roughshod over the moral posture of openness that they should adopt toward future children, and entertaining suits for their stymied attempts to exercise those preferences would troublingly reflect and strengthen that conception.[564]

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560. Josephine Marcotty, 'Savior Sibling' Raises a Decade of Life-and-Death Questions, StarTribune (Sept. 22, 2010), http://www.startribune.com/savior-sibling-raises-a-decade-of-life-and-death-questions/103584799 [http://perma.cc/95GC-7RJQ].

561. The unconditional love of parents toward children can be contrasted with discriminating "norms of particularity" that "prompt us to choose among potential [romantic] partners on the basis of whatever characteristics—a quick wit, straight teeth, or shared racial background—we find desirable." Fox, Racial Classification, supra note 47, at 1883–84.

562. Taylor v. Kurapati, 600 N.W.2d 670, 690 (Mich. Ct. App. 1999); see also Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C., 120 S.W.3d 682, 690–91 (Ky. 2003) (quoting *Taylor*, 600 N.W.2d at 690); Azzolino v. Dingfelder, 337 S.E.2d 528, 535 (N.C. 1985) ("As medical science advances in . . . detect[ing] genetic imperfections in a fetus, physicians in jurisdictions recognizing claims for wrongful birth will . . . carry an increasingly heavy burden . . . when attempting to obtain [parents'] informed consent for the fetus to be carried to term[,] . . . plac[ing] increased pressure upon physicians to recommend[] abortion.").

563. Williams v. Rosner, 7 N.E.3d 57, 68 (Ill. App. Ct. 2014).

564. Cf. Michael J. Sandel, The Case Against Perfection: Ethics in the Age of Genetic Engineering 85–87 (2007) (arguing that "a world[] in which parents became accustomed

Reasonable people disagree, often sharply, however, about the ethics of prenatal selection, especially for nonmedical traits.[565] Far-reaching prenatal selection might be defended as a way to help parents form the families they want and help their children to lead lives more likely to go well.[566] Of course, we can easily imagine cases—setting out to create a child to suffer or be a slave—that manifest undeniably base reasons to reproduce. For many other unusual or idiosyncratic offspring preferences such as deafness or transplant compatibility, however, the reason they are not widely shared or appreciated may owe at least as much to general unfamiliarity with the experiences and perspectives of would-be parents who have unique values, backgrounds, or circumstances.[567] The contested character of this concern about parental values accordingly leaves precarious footing for a policy objection to leave otherwise compensable confounded procreation without remedy.[568]

CONCLUSION

Transformations in the methods and mores of reproduction invite us to rethink the legal status of professional misconduct that bears profoundly on a person's capacity to plan a life and experience it as good. Our legal system treats wrongfully disrupted plans concerning reproduction like one of those life adversities that people are expected to abide without any remedy. This Essay argues that such transgressions

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to specifying the sex and genetic traits of their children[] would be inhospitable" to children who do not meet their prenatal expectations, creating "a gated community writ large"). A related concern is that fears about liability could incentivize prenatal testing for trivial traits. See Dov Fox, Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos, 33 Am. J.L. & Med. 567, 604–09 (2007) (addressing arguments that liability would shift the "locus of moral authority for adverse genotypes from society-at-large to individual parents"); Sonia Mateu Suter, The Routinization of Prenatal Testing, 28 Am. J.L. & Med. 233, 251 (2002). For related notes about overdeterrence risks, see supra notes 396–404 and accompanying text.

565. Compare Fox, Parental Attention, supra note 208, at 257–58 (arguing that love for prospective offspring is less about whatever particular traits she might have than that she "comes to occupy that special role within the parent–child relationship, regardless of whether or not the child's attributes are ones that the parents ever wished for"), with Frances M. Kamm, Is There a Problem with Enhancement?, 5 Am. J. Bioethics 5, 9 (2005) (arguing that before a person is born "it is permissible to think more broadly in terms of the characteristics we would like [her] to have").

566. See Julian Savulescu & Guy Kahane, The Moral Obligation to Create Children with the Best Chance of the Best Life, 23 Bioethics 274, 274 (2009).

567. See generally Victoria Chico, Genomic Negligence 106–40 (2011) (adopting an autonomy-based approach to the wrongful frustration of selection interests in "savior siblings").

568. This is not to say such court-imposed policy would be an unconstitutional violation of the Establishment Clause. For discussion of this point, see Dov Fox, Religion and the Unborn Under the First Amendment, *in* Law, Religion, and Health in the United States (I. Glenn Cohen, Holly Fernandez Lynch & Elizabeth Sepper eds., forthcoming 2017), http://ssrn.com/abstract=2599889 (on file with the *Columbia Law Review*).

constitute a legal wrong in need of a right. It derives from the interstices of existing tort doctrine a cause of action against reproductive negligence that would protect distinct and important interests in procreation. The Essay grounds this right in the early-twentieth-century origins of privacy rights and in the traditional judicial responsibility to adapt the common law to advances in culture and technology. And it counsels calculating damages based on the severity of those injuries and the probability that professional wrongdoing as opposed to other factors caused them. It also considers the roles of judges, juries, and others in determining compensation and public policy objections under this new cause of action. Most critically, the Essay introduces an original comprehensive paradigm for understanding and addressing the reproductive injuries in both tort and nontort contexts when procreation is wrongfully imposed, deprived, or confounded. This anatomy of reproductive wrongs places constitutional rights to abortion and birth control on firmer footing. The focus on well-being explains the privileged status that procreation holds in our constitutional tradition better than predominant accounts based on autonomy or equality alone. And the connection it draws between unjustly frustrated plans to avoid unwanted pregnancy and those to pursue wanted parenthood for any offspring or certain types is uniquely equipped to meet emerging challenges about genetic modification that loom on the horizon.[569]

569. See Niklaus H. Evitt et al., Human Germline CRISPR-Cas Modification: Toward a Regulatory Framework, 15 Am. J. Bioethics. 25, 26 (2015) (warning about the risks of "unintended side effects that are only recognized generations after initial gene editing"); Dov Fox, Selective Procreation in Public and Private Law, 64 UCLA L. Rev. Discourse (forthcoming 2016) (manuscript at 7–8), http://ssrn.com/abstract=2782888 (on file with the *Columbia Law Review*) (discussing gene-editing tools that would enable prenatal modification); Erika Check Hayden, Tomorrow's Children: What Would Genome Editing Really Mean for Future Generations?, 530 Nature 402, 403 (2016) (describing how to "alter[] the heritable genome" by "editing DNA in human embryos"); Michael Le Page, Second CRISPR Human Embryo Study Shows There Is a Long Way to Go, New Scientist (Apr. 11, 2016), http://www.newscientist.com/ article/2083833-second-crispr-human-embryo-study-shows-there-is-a-long-way-to-go/ [http://perma.cc/R89V-7QK6] (reporting risks of gene editing that range from ninety-percent failure rates in early experiments to mosaicism, whereby "not all of the organs and tissues in the body" "pick[] up the desired change").