

RESPONSE TO FOX: IMPAIRED CONDITIONS,  
FRUSTRATED EXPECTATIONS, AND THE LAW OF TORTS*Gregory C. Keating\**

## INTRODUCTION

Professor Dov Fox’s comprehensive, deeply meditated essay, *Reproductive Negligence*, argues convincingly that the laws of tort, contract, and property severally and jointly fail to govern the promises and perils of modern reproductive technologies in an acceptable way.<sup>1</sup> Our “legal system . . . 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.”<sup>2</sup> There is, Professor Fox writes, a “puzzle” here—“the thwarting of reproductive plans, however egregious or devastating, invades no ‘legally protected interest,’ [and] violates no right,” even though the interests thwarted when sperm are switched, embryos lost, and fetuses misdiagnosed are urgent and central to personal autonomy.<sup>3</sup> Childbearing and childrearing are what the philosopher Bernard Williams called “ground projects.”<sup>4</sup> For many of us, these activities play central roles in determining the persons that we are and hope to be.<sup>5</sup> The interests at stake in our reproductive lives are surely important enough to ground individual rights.<sup>6</sup>

Just as modern procreative technologies require the recognition of new legal rights that will protect longstanding and important interests in novel contexts, so too do these technologies require the recognition of

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1. Dov Fox, *Reproductive Negligence*, 117 *Colum. L. Rev.* 149, 161 (2017).

2. *Id.* at 155.

3. *Id.* at 155–56 (quoting *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928)).

4. Bernard Williams, *Persons, Character and Morality*, in *Moral Luck* 1, 12–13 (1981).

5. See Fox, *supra* note 1, at 155 (“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. Many . . . find profound meaning and fulfillment either in pregnancy and parenthood or . . . in the aims or attachments that freedom from those roles facilitates.” (citation omitted)).

6. See Joseph Raz, *The Morality of Freedom* 166, 180–83 (1986) (arguing urgent interests give rise to rights).

new legal wrongs. *Reproductive Negligence* sorts the inchoate wrongs that now struggle for recognition into three categories. The “first category of [wrongs] *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.”<sup>7</sup> Beneath these distinct wrongs there is a common harm, namely, “being robbed of the ability to determine the conditions under which to procreate.”<sup>8</sup> Both the wrongs and the harm are the offspring of the march of reproductive technology and medical possibility. In its broad contours, our present situation resembles past moments when the march of technology has spurred commensurate creativity in the law of torts. Just as the mass production of “novel goods from power tools to soft drinks” gave birth to modern products liability law, and just as “prying cameras [,] . . . gossip mongering,” and the first stirrings of mass media, gave birth to the privacy torts, “[t]oday, professional assistance in matters of procreation has reached a similar flashpoint.”<sup>9</sup> We are in need of a new tort—or torts—of reproductive negligence.

On the whole, Professor Fox persuades me that we ought to institute a set of rights that we now recognize only in embryonic form. He likewise convinces me that the effective institutionalization of those rights requires the recognition of a companion set of civil causes of action. I am less persuaded that the common law of torts is the right institutional vehicle for the protection of these rights. Common law legal change is complex, but analogical reasoning figures prominently in most descriptions of the process.<sup>10</sup> Courts reconstruct preexisting law to cope with novel circumstances by reasoning from and refashioning existing law. The conceptual structure of the existing law both enables and constrains change.<sup>11</sup> In the circumstance at hand, tort law’s preoccupation with physical harm to presently existing persons and property makes tort ill-suited to respond well to reproductive negligence.<sup>12</sup> The frustrated creation of *new value* is not tort’s natural habitat. Professor Fox’s persuasive conceptualization of the problems of reproductive negligence places frustration of new-value creation through the provision of incompetent assistance at the core of the wrongs involved. So conceived, the wrongs fit poorly with the preoccupations of tort law. Or so this Response shall suggest.

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7. Fox, *supra* note 1, at 153.

8. *Id.* at 155.

9. *Id.* at 210.

10. See generally Edward H. Levi, *An Introduction to Legal Reasoning* (2d ed. 2013) (illustrating this classic statement).

11. See generally *id.*

12. See *infra* notes 33–39 and accompanying text (describing tort law’s focus on physical impairment).

The control that novel reproductive technologies enable over hitherto uncontrollable aspects of pregnancy, parenthood, and the traits of offspring involves interests in personal autonomy important enough to be placed in the select company of Williams's "ground projects."<sup>13</sup> As Professor Fox rightly reminds us, these interests are deemed important enough to warrant constitutional protection.<sup>14</sup> A framework of rights that secures for each of us effective control over our reproductive lives is therefore warranted. Because the political economy of medical regulation makes it unreasonable to hope for a regulatory solution,<sup>15</sup> the common law should draw upon its celebrated powers of self-transformation to recognize a new class of wrongs, just as it has done time and again in its past. Beginning in the late nineteenth century, the common law began to recognize privacy—freedom from unwelcome observation—as an interest distinct from property. This teasing apart of property and privacy culminated in the recognition and progressive articulation of the privacy torts.<sup>16</sup> In a strikingly similar way, courts came to recognize rights to emotional tranquility that were freestanding, not dependent on the well-recognized right to the physical integrity of one's person.<sup>17</sup> And early in the twentieth century, the common law of torts began the construction of modern products liability law.<sup>18</sup>

The invocation of this glorious past tugs at the heartstrings of any torts scholar. But it moves my mind less than my heart. I worry that the common law of torts is poorly positioned to respond to this particular kind of wrongful harm. Tort law is deeply attached to a conception of harm that takes the impairment of bodily integrity as its paradigm case, and it is tethered to the protection of existing value.<sup>19</sup> These features are not conducive to the construction of a new class of wrongs for which the harm is the thwarting of the will in its efforts to bring new value into existence.

The primary aim of this brief Response is thus to deepen Professor Fox's account of why it is that tort law is "puzzlingly" short on the resources needed to recognize and protect these rights, even though tort law, too, is preoccupied with autonomy, harm, and wrongs. In my view,

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13. Williams, *supra* note 4 (describing "ground projects" as projects and commitments that make one who one is).

14. Fox, *supra* note 1, at 218–19.

15. *Id.* at 163–64. The fundamental problem is that public-choice considerations limit the effective operation of legislatures or agencies to the "extent that informed and motivated providers crowd out patient interests." See *id.* at 164 n.89.

16. For an able and favorable retelling of this story, see Fox, *supra* note 1, at 158–59.

17. See William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 *Mich. L. Rev.* 874, 874–75 (1939) (tracing the history of mental suffering as a cognizable tort). Professor Fox cites Prosser in *Reproductive Negligence*. See Fox, *supra* note 1, at 210 n.376.

18. Fox, *supra* note 1, at 210.

19. See *infra* Part I.

the difficulty has its roots in a deep feature of tort law, namely, its modeling of harm on the distinctively important features of physical harm.<sup>20</sup> At its core, tort law imposes obligations that mutually constrain persons not to wrongly harm one another. Harm, for its part, is conceived of as the impairment of normal powers of physical agency—the sort of thing that broken bones, crippling pain, and significant disability effect.<sup>21</sup> More generally, harm is conceived of as impairment. Some psychological harm, for example, can be conceived of as the impairment of normal psychological powers. Childhood sexual abuse, for example, can leave its victims with deeply damaged capacities to trust other human beings.

It takes more effort to extend the conception of harm as impairment to invasions of privacy, but the extension is at least intuitively plausible. Some freedom from unwelcome observation strikes us as an essential condition for the development of a sense of oneself as a being whose personality is not merely a function of one's social roles and relations. Consequently, a right to be free of unwelcome observation in at least some circumstances is an important condition of autonomous agency, and violations of that right impair autonomous agency. This, at any rate, is one way to understand Samuel Warren and Justice Brandeis's great article.<sup>22</sup> When reproductive technologies and procedures misfire, by contrast, what happens normally is a failure to *enhance* autonomy through the creation of a new and prized benefit. Harm involves damage, injury, and impairment. Bodily harm leaves its victims with impaired physical powers. The thwarting of reproductive plans normally leaves those whose plans are thwarted physically intact. The "harm" that they suffer is frustration of their efforts to bring new lives and new value into existence, not the damaging of existing lives and existing value.<sup>23</sup> Tort law is ill-suited to redress this kind of harm; it confers security on people, their lives, and their possessions, as they are.<sup>24</sup>

The aim of this Response is thus to explain why the characteristic way in which reproductive negligence interferes with its victims' pursuit of their projects differs from the interferences with which tort law is characteristically concerned, and why this poses an obstacle to the recognition of reproductive negligence as a wrong.

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20. See *infra* notes 33–39 and accompanying text.

21. See *infra* notes 33–44 and accompanying text.

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

23. Fox, *supra* note 1, at 210–11 (“[T]he central animating principle that [a right to recover for reproductive negligence] serves to protect [is] people’s legitimate expectations to exercise a reasonable measure of control over decisions about having children.”).

24. See John Gardner, *From Personal Life to Private Law* (forthcoming 2017) (manuscript ch. 5, at 1–39) (separately paginated chapters) (on file with the *Columbia Law Review*) (focusing on tort law’s bias in favor of “existing value”).

First, this Response accepts Professor Fox's characterization of the harm characteristically inflicted by reproductive negligence. This harm is the frustration of efforts to create a new benefit—new value. Second, Part I examines tort law's conception of harm, which takes the physical impairment of bodies of existing persons as its core case and moves outward from that core by expanding its notion of impairment. Third, Part II explains why—given this conception of harm—the avoidance of harm is asymmetrically more important in the common law of torts than the provision of benefit. Last, Part III notes that the common law of torts is also characterized by a bias in favor of existing value. That bias is instantiated in its conception of harm, but it also shapes its categories of damages. Together, these features of tort law pose serious obstacles to the construction of an adequate tort cause of action for reproductive negligence.

Reproductive negligence usually thwarts persons' efforts to bring new value into existence. It normally interferes with the creation of a new benefit—of a new life.<sup>25</sup> Ordinary negligence, by contrast, physically damages persons who now exist.<sup>26</sup> Both physical harm and the thwarting of attempts to create new value are detrimental to the wills of those they affect. Physical harm impairs the bodily powers through which people normally exert their wills. When efforts to create new value are frustrated, exercises of the will are ineffective. Notwithstanding the fact that both harm and benefit are intimately related to the will, the legal import of harm and benefit is very different. Harm in general has a significance that benefit does not. The unconsented-to taking of someone's property by the government, for example, triggers a Takings Clause claim whereas the unsought conferral of benefit by the government does not give rise to a right of restitution on the government's part. There is a "takings" clause in the Constitution, but there is no "givings" clause.<sup>27</sup> The asymmetry of harm and benefit is compounded by a larger asymmetry between existing value and value that does not yet exist. Existing value is far more protected by the law of torts. Corrective justice attempts to repair harm wrongly done, loss wrongly suffered. The failure to bring value into existence is much less its concern.<sup>28</sup>

#### I. HARM IN TORT

It is plausible, if contestable, to assert that *physical* harm is the central concern of tort law, and it is almost anodyne to point out that when tort

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25. See Fox, *supra* note 1, at 184–85 (describing wrongs resulting from reproductive negligence).

26. See Thomas C. Grey, *Accidental Torts*, 54 *Vand. L. Rev.* 1225, 1259–60 (2001) (explaining the role of injury in negligence claims).

27. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 *Yale L.J.* 547, 551 (2001).

28. See Gardner, *supra* note 24 (manuscript ch. 5, at 37).

law is concerned with economic and emotional interests it is concerned with protecting those interests *from harm*. Courts wrestling with when to recognize recovery for pure emotional injury struggle to determine when emotional distress amounts to an impairment of agency, as opposed to transient misery.<sup>29</sup> Tort actions for interference with contractual relations protect rights or entitlements created by contractual agreements against impairment by actors who are not parties to the contracts in question. Tort plays a subordinate role here. It does not independently determine that some interests are urgent enough to ground civil causes of action; it accepts contract law's specification of rights and it protects those rights against harm. Physical harm, for its part, is intimately connected to autonomy; tort law conceives of harm as the impairment of normal powers of (human) physical agency. We exercise our wills through our physical persons and our property. Injury to our bodies and to our possessions impairs the principal means at our disposal for making our autonomy manifest in the world. Physical integrity is a condition of normally effective human agency.

Reproductive technologies are also intimately tied to human autonomy. They expand the reach of human control and individual choice by subjecting processes that were heretofore the domain of natural mechanisms to human determination. Whereas harm impairs our ability to assert our wills, reproductive technologies enlarge the reach of our wills. Because the matters that these technologies address figure prominently in many people's construction of their lives, the newfound powers of choice and control that these technologies create implicate important interests in both autonomy and well-being. From the point of view of tort law, however, misfires of these technologies characteristically thwart the exercise of personal autonomy in ways that may be significant and disturbing but that do not trigger liability in tort. The pertinent failures of medical technology and medical assistance lead, as *Reproductive Negligence* notes, to the disappointing of "legitimate expectations," and those expectations are expectations of benefit.<sup>30</sup> The "harm" of "being robbed of the ability to determine the conditions under which to procreate"<sup>31</sup> does not usually give rise to the kind of impairment on which medical malpractice claims can be predicated.<sup>32</sup> Consequently, it is difficult to ground rights to recovery in the law of torts. This difficulty is compounded by the fact that the wrong (as distinguished from the

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29. See Gregory C. Keating, *Is Negligent Infliction of Emotional Distress a Freestanding Tort?*, 44 Wake Forest L. Rev. 1131, 1172–73 (2009) (describing two contemporary philosophical accounts about harm, one holding that "harm should be understood as a setback to a legitimate interest" and a competing account that connects harm to "autonomy and sovereignty").

30. Fox, *supra* note 1, at 160.

31. *Id.* at 155.

32. See *infra* Part II (discussing the importance of physical harm, conceived of as impairment, to tort law).

harm) consists of a failure to provide competent assistance. Just as tort obligations are largely concerned with harm, not benefit, they are also largely concerned with negative duties, not positive ones. The pursuit of mutual benefit is more a task for contract law than for tort law. Whereas tort is an institution preoccupied with preventing and repairing harm, contract is an institution preoccupied with pursuing mutual benefit. Whereas tort protects existing lives and property, contract enables the creation and protection of legitimate expectations of future benefit.

The problems presented by modern reproductive technologies thus fall awkwardly between the stools of tort and contract. What the law fails to do is to confer security on persons' pursuit of the benefits that modern reproductive technologies make possible. The benefits of these technologies can be exploited only with the assistance of specialized agents—medical experts and the institutions that house them. As presently configured, neither the law of contract, nor the law of tort, provides either the assurance of effective assistance by medical specialists or accountability when that assistance goes culpably awry. Professor Fox is therefore right to propose a new cause of action. The question is whether tort law provides promising materials for the construction of such a cause.

## II. NEGLIGENCE AND THE ASYMMETRY OF HARM AND BENEFIT

The general law of negligence stands at the center of modern tort law, and it is primarily concerned with the physical integrity of persons and their property. It is preoccupied with physical harm, and it understands physical harm as the impairment of normal powers of bodily agency.<sup>33</sup> Negligence law's preoccupation with physical harm testifies to a connection between harm and autonomy. Harms impair the powers normally available to persons to exert their wills in the world. A broken arm, a chronic illness, a severe pain—all of these deprive people of the normal use of their bodies in pursuit of their ends. Reproductive negligence also thwarts the wills of its victims, but it does not usually harm its victims physically. It dashes their hopes and frustrates their plans. It interferes with their efforts to bring new benefit into being. Harm and benefit stand in different relations to the will. Those different relations explain and justify tort law's preoccupation with harm, understood as impairment of the normal powers of agency. Because negligence law is little concerned with the creation of benefit, freestanding claims for reproductive negligence are hard to fashion out of the conceptual tools of tort law.

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33. This section of the Response borrows from and compresses arguments developed at greater length in Gregory C. Keating, *Is Cost-Benefit Analysis the Only Game in Town?*, 91 S. Cal. L. Rev. (forthcoming Jan. 2018) [hereinafter Keating, *Cost-Benefit Analysis*] (on file with the *Columbia Law Review*).

Michigan's codification of the standard common law rule in the automobile accident context nicely illustrates the normal concept of harm in tort when it describes physical injury as "serious impairment of body function."<sup>34</sup> It elaborates that concept as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."<sup>35</sup> A body of case law grappling with the slowly unfolding consequences of exposure to asbestos is equally instructive. That case law overwhelmingly holds that identifiable subclinical damage to human cells will not support a tort claim.<sup>36</sup> "The threat of future harm, not yet realized, is not enough."<sup>37</sup> Functional impairment must be shown.<sup>38</sup> Without such impairment, there is no physical harm even though there are very real financial and psychic costs imposed by subclinical cellular damage caused by exposure

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34. Mich. Comp. Laws Ann. § 500.3135(1) (West 2017) ("A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement."); see also Keating, *Cost-Benefit Analysis*, supra note 33 (manuscript at 22).

35. Mich. Comp. Laws Ann. § 500.3135(5). A recent Michigan Supreme Court case, *McCormick v. Carrier*, 795 N.W.2d 517 (Mich. 2010), applies this concept of impairment in an instructive manner. The defendant's truck ran over the plaintiff's foot, breaking and bruising it. *Id.* at 521. The foot healed, though it continued to ache occasionally. *Id.* at 521–22. With the healed foot, the plaintiff could perform the same work he performed prior to the injury, but the lingering pain hampered his fishing and other recreational activities. *Id.* at 522. The court found impairment because the injury adversely affected the plaintiff's ability to lead his normal life. *Id.* at 539.

36. See, e.g., *Bernier v. Raymark Indus.*, 516 A.2d 534, 543 (Me. 1986) ("[W]e conclude that the subclinical injury resulting from such inhalation is 'insufficient to constitute the actual loss or damage . . .'" (quoting *Schweitzer v. Consol. Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985))).

37. *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30 (Ariz. Ct. App. 1987) (internal quotation marks omitted) (quoting W. Page Keeton et. al, *Prosser and Keeton on the Law of Torts* § 30, at 165 (5th ed. 1984)). Pleural thickening, a condition in which the lining of the lung thickens, may be the most common form of cellular damage which does not, by itself, count as physical harm. See *Ackison v. Anchor Packing Co.*, 897 N.E.2d 1118, 1126 (Ohio 2008) ("This court has never held that asymptomatic pleural thickening is, by itself, sufficient to establish a compensable injury for asbestos exposure."). Because the harms of asbestos exposure are progressive, pleural thickening is a harbinger of asbestosis and mesothelioma. See Jamie A. Grodsky, *Genomics and Toxic Torts: Dismantling the Risk-Injury Divide*, 59 *Stan. L. Rev.* 1671, 1682–83 (2007) (noting the progressiveness of asbestos-related injuries); Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL875): Black Hole or New Paradigm?*, 23 *Widener L.J.* 97, 103–04 (2013) (describing asbestos-related diseases).

38. In addition to *Burns*, illustrative decisions include *Owens-Illinois, Inc. v. Armstrong*, 604 A.2d 47, 54 (Md. 1992) (holding a cause of action requires showing when an injury occurred), and *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1573 (D. Haw. 1990) (finding the lack of "objectively verifiable functional impairment" precludes recovery). The court in *Verbryke v. Owens-Corning Fiberglas Corp.*, 616 N.E.2d 1162, 1167 (Ohio Ct. App. 1992), held that pleural thickening did constitute bodily harm, but the decision was abrogated by *Ackison*, 897 N.E.2d 1118.

to asbestos.<sup>39</sup> This requirement that negligent wrongdoing must impair the normal physical functioning of its victims is a serious obstacle to the recognition of reproductive negligence claims. Such negligence normally does not result in harm to those whose plans it thwarts. Reproductive negligence generally leaves its victims physically intact even as it frustrates their projects. When sperm are switched and embryos lost, the persons who have their sperm switched and their embryos lost are not themselves physically harmed.<sup>40</sup> Their hopes are ruined but their bodies are intact.

Generally speaking, tort law distinguishes between a broad conception of tortious wrongdoing as conduct that invades “legally protected interests” (or rights) and a narrower conception of physical harm as the suffering of an impaired condition.<sup>41</sup> The *First Restatement of Torts*, for example, defined “bodily harm” as “any impairment of the physical condition of another’s body or physical pain or illness.”<sup>42</sup> The *Second Restatement* refined this definition. “Bodily harm” was defined as “any physical impairment of the condition of another’s body,” and “an impairment of the physical condition of another’s body [exists] if the structure or function of any part of the other’s body is altered.”<sup>43</sup> The *Third Restatement* now defines “physical harm” as “the physical impairment of the human body (‘bodily harm’) or of real property or tangible personal property . . . [including] physical injury, illness, disease, impairment of bodily function, and death.”<sup>44</sup> Professor Fox is sensitive to the importance of recognizing a legally protected interest and argues forcefully for such recognition.<sup>45</sup> Perhaps because he is influenced by the economic

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39. Medical monitoring costs, for example, are very likely to be incurred if a patient presents with subclinical damage from asbestos. The psychic costs are even larger. Persons afflicted by such changes live under swords of Damocles that are beginning to drop. This is a real and serious psychic burden, as the U.S. Supreme Court noted in *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 150 (2003) (“[C]ourts [have] sustained a variety of other ‘fear-of’ claims . . . [including] fear of cancer. Heightened vulnerability to cancer . . . ‘must necessarily have a most depressing effect upon the injured person. Like the sword of Damocles,’ he knows it is there, but not whether or when it will fall.” (quoting *Alley v. Charlotte Pipe & Foundry Co.*, 74 S.E. 885, 886 (N.C. 1912))).

40. Fox, *supra* note 1, at 155–56.

41. See, e.g., Restatement (Second) of Torts §§ 7, 15 (Am. Law Inst. 1965).

42. Restatement (First) of Torts § 15 (Am. Law Inst. 1934).

43. Restatement (Second) of Torts § 15 cmt. a. Section 7 distinguishes “bodily harm” from “injury” with “injury” covering cases in which a “legally protected interest” is invaded, but no harm is done. A harmless trespass would be an injury in this sense. *Id.* § 7.

44. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 4 (Am. Law Inst. 2010). The *Third Restatement* extends the idea of harm as an impaired condition to include the impairment of property. *Id.* § 4 cmt. a. The philosophical conception of harm is concerned only with harm to persons. The question of how to account for the importance of property damage to tort is peripheral to the concerns of this Response. Offhand, the easiest way to make the extension would be to draw upon the fact that we have rights in property. Those rights give rise to claims against others that they neither damage our property nor make impairment of our property a harm to us.

45. See, e.g., Fox, *supra* note 1, at 155–56, 176–84.

conception of negligence, he is less sensitive to the importance of impairment.<sup>46</sup>

The influence of economic analysis on contemporary understanding of negligence law may have obscured the depth of negligence law's preoccupation with harm. The economic analysis of negligence law fixes on the Hand Formula as the master test of negligence and takes the Hand Formula to be cost-benefit analysis by another name.<sup>47</sup> Harm has no special significance in cost-benefit analysis. Harm is just one possible cost in a calculus of cost and benefit, and costs and benefits are minuses and pluses on the same scale. One economically inclined scholar observes:

From an abstract perspective, there would seem to be little reason for harms and benefits to be treated differently. Decades of cost-benefit analyses suggest that the two categories are interchangeable: reducing by one dollar damage that would otherwise occur is equivalent to providing a dollar's worth of new goods or services."<sup>48</sup>

This claim of symmetry is true to cost-benefit analysis but at odds with our ordinary intuitions and our law. In both morality and law, our obligations to avoid harming others are stronger than our obligations to benefit them. We can be compelled to refrain from battering our neighbors, but we cannot be compelled either to love or to help them.

Many examples of the harm-benefit asymmetry manifesting itself in our law might be given,<sup>49</sup> but for our purposes the following two will do:

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46. *Reproductive Negligence* deploys an economic conception of negligence. See, e.g., *id.* at 213 ("The new tort aims . . . to discipline fertility providers to adopt precautions that cost less than the harms those measures would have averted.").

47. See Richard Posner, *A Theory of Negligence*, 1 *J. Legal Stud.* 29, 39 (1972). For a brief discussion of the relation of the Hand Formula to economic analysis, see Gregory C. Keating, *Response, Must the Hand Formula Not Be Named?* 163 *U. Pa. L. Rev. Online* 367, 368 (2015), [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1150&context=penn\\_law\\_review\\_online](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1150&context=penn_law_review_online) [<http://perma.cc/UJ52-S55P>].

48. Wendy T. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 *J. Legal Stud.* 449, 451 (1992).

49. For example, if I pollute your water when working on my own property, I am likely to be liable in nuisance for the harm that I do. By contrast, if I purify your water in the course of purifying my own, my unjust enrichment claim is likely to fail. Businesses can normally "free ride" off of the positive externalities of other businesses without doing any legal wrong. A story, popular in property circles, about Disneyland and Disney World is illustrative. When Disney built Disneyland, it acquired just enough land for its theme park. The park conferred a major windfall on neighboring landowners and businesses. Lured by Disneyland, customers came from all over the world and the value of neighboring land soared. Several decades later, when Disney built Disney World, it purchased much more land than it needed for its theme park. The strategy worked, but imperfectly. Disney kept more of the total value added by its theme park, but the park's positive externalities also expanded into a larger geographic area. See Richard A. Epstein, *A Conceptual Approach to Zoning: What's Wrong with Euclid*, 5 *N.Y.U. Envtl. L.J.* 277, 289 (1986). "Rescue cases" afford another important example. In the course of performing a rescue, a rescuer may inflict lesser harm to avoid greater harm, but people may not inflict harm merely in order

1. *Tort and Restitution.* The law of torts—whose province is liability for harm done—is robust. The law of autonomous unjust enrichment—whose province is liability for benefit conferred—is much smaller.<sup>50</sup>

2. *Takings and Givings.* In public law there is a takings clause but there is no “givings” clause. Yet, as Professors Abraham Bell and Gideon Parchomovsky observe, “the efficiency rationale for takings compensation also dictates that the state properly measure the benefits of its actions. Just as the state’s failure to internalize the cost of takings creates fiscal illusion and inefficiency, the state’s failure to internalize the benefits of givings creates fiscal illusion and inefficiency.”<sup>51</sup>

In economic terms, both of these examples involve differential treatment of negative and positive externalities. The law of torts is largely about harms; harms are negative externalities. The law of restitution is about unbargained-for benefits; benefits are positive externalities. When the government takes property to build a freeway, it creates a negative externality; when it builds a freeway, it creates a positive externality.

Noticing—and understanding—the harm–benefit asymmetry helps to illuminate just why it is that negligence law is more resistant to the recognition of reproductive negligence claims than scholars steeped in economic analysis think it is, or ought to be.<sup>52</sup> From an economic point of view, negative and positive externalities are pluses and minuses on the same scale. They are symmetrical. Presumptively, the law should care as much about addressing positive externalities as it does about correcting negative ones. Law and morality, however, reject this presumption. “[O]ther things being equal, harms, harming events, and opportunities to harm are more important morally [and legally] than benefits, benefitting events, and opportunities to benefit.”<sup>53</sup> Harm’s special signifi-

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to confer benefit. For a perceptive discussion of this example see Seana Valentine Shiffrin, *Harm and Its Moral Significance*, 18 *Legal Theory* 357, 363–65 (2012). For a discussion of interesting and related asymmetries in the rules of praise and blame see Leo Katz, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* 197–203 (1996).

50. See, e.g., Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 *Va. L. Rev.* 1147, 1147 (2006) (“In some instances, restitution allows the capture of positive externalities, but compared to tort, it is a trifling part of the law.”); Saul Levmore, *Explaining Restitution*, 71 *Va. L. Rev.* 65, 71 (1985) (“[T]he legal remedies available to victims of harms are far superior to those enjoyed by analogous providers of nonbargained benefits.”).

51. Bell & Parchomovsky, *supra* note 27, at 554.

52. *Reproductive Negligence* masterfully combines diverse academic perspectives, but it does embrace an economic conception of negligence. See, e.g., Fox, *supra* note 1, at 213 (“[A] right [to recover] should discourage negligence by hospitals, clinics, and sperm banks that agree to help patients have or avoid having children . . . . 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.”). This acceptance of an economic framework clouds the essay’s appreciation of just how differently our law treats harms and benefits.

53. Shiffrin, *supra* note 49, at 361. Professor Shiffrin describes this as the “first” and “principal” harm–benefit asymmetry. *Id.* There are two subordinate asymmetries. First,

cance—and its asymmetrical relation to benefit—has its roots not in considerations of efficiency but in harm’s intimate relation to autonomy. Harms and benefits stand in very different relations to autonomy because they stand in very different relations to our wills. Physical harms—death, disability, disease, and the like—rob us of normal and foundational powers of agency. Broken bones, severed limbs, disabilities of sight and hearing, diseased organs, and disfigured body parts all compromise the capacities through which we act. When we are physically injured or in serious pain, we are deprived of our normal capacities to exert our wills upon the world.

Benefits stand in a fundamentally different relation to autonomy. First, benefits enhance our lives instead of impairing them. Second, few benefits augment our basic powers of agency as much as ordinary physical harms impair our agency. Third, and most importantly, benefits enhance our lives only if they are congruent with our wills. To thrust an unsought benefit upon someone and demand compensation from them for the value conferred is to impose upon them.<sup>54</sup> Unsought benefits stand in the same relation to our wills as harms do. They subject us to conditions we have not chosen; they sever the link between our wishes, our wills, and our lives, and they enlist us in other people’s projects. If I play beautiful music outside your open bedroom window and then stick you with a bill for my services, I determine the use to which you must put some of your time and some of your money. You are presumptively entitled to determine those things, and your ability to do so is an important aspect of your autonomy.

The fact that physical harm, understood as the impairment of normal powers of bodily agency, plays such a prominent role in negligence law goes a long way toward explaining why claims of reproductive negligence have turned out to be stillborn. In this context, as *Reproductive Negligence* shows, negligent conduct thwarts persons in their efforts to pursue benefits that are of utmost importance to them.<sup>55</sup> Reproductive

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lesser harm may be inflicted to avoid greater harm, but harm may not be inflicted simply in order to bestow benefit. *Id.* at 362. If you are drowning, I may break your arm to save your life. *Id.* at 363. I may not, however, knock you unconscious in order to operate on you and endow you with encyclopedic knowledge of the works of Shakespeare or the athletic prowess of Michael Jordan. Second, there is an asymmetry between what others may do and what a person may do to herself. *Id.* at 363. Others may not knock someone out to perform an operation that will endow the victim with great knowledge or skill, but someone may themselves elect to submit to such a procedure. See *id.* at 363–66. Other complications or qualifications are sometimes necessary. For example, some failures to benefit are harms because the victim has a right to the benefit. If USC fails to pay my salary, its failure to benefit me is a harm because I have a right to be paid.

54. See, e.g., Lee Anne Fennell, *Forcings*, 114 *Colum. L. Rev.* 1297, 1299–300 (2014) (discussing forced ownership of property by the government).

55. See Fox, *supra* note 1, at 155 (“Many people find profound meaning and fulfillment either in pregnancy and parenthood or else in the aims or attachments that freedom

negligence involves medical professionals and medical institutions failing to perform up to the standards of competence necessary to provide effective assistance to patients undertaking reproductive medical procedures. These failures thwart the wills of the patients who are the victims of these forms of negligence and they thwart those wills in a domain that matters dearly. For many people, having and raising children—and not having or raising children—are of utmost importance. Having control over one’s capacity to do so, over the terms under which one does so, and over the condition in which one’s offspring are born and raised, are things that matter. We have good reason to want these decisions and projects to be responsive to our wills. Reproductive negligence culpably thwarts that responsiveness but leaves its victims with unmet expectations, not with physical impairments.

### III. EXISTING VALUE

In a forthcoming book on private law, the philosopher John Gardner suggests value that already exists makes a greater claim on us than value that has yet to be created.<sup>56</sup> Whether or not this is true generally, tort law takes it to be true. Tort protects people’s lives and possessions as they are and does not protect lives that might be or *as* they might be. We see this, for example, not only in tort law’s core conception of harm as the impairment of (existing) powers of bodily agency but also in the very different domain of the economic torts. Pure economic losses are rarely recoverable when they are merely future prospects, and they are commonly recoverable when they are protected by presently existing contractual rights.<sup>57</sup>

Strikingly, in the reproductive domain, tort law gets stretched to recognize harms when children have come into existence. For example, courts more readily recognize recovery for pure emotional distress when there is an actual child whose parent suffers emotional trauma either from harm to the child or from a medical mishap impairing her relationship to a child who has come into existence. *Dillon v. Legg*, the most famous negligent infliction of emotional distress case of all, recog-

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from those roles facilitates. That is why the wrongful frustration of reproductive plans disrupts personal and professional lives in predictable and dramatic ways.”).

56. See Gardner, *supra* note 24 (manuscript ch. 5, at 19) (“Our reasons to support and care for friendships already made and books already written and food already prepared and children already existing are more stringent, all else being equal, than our reasons to make new friends or write new books or prepare new food or bear new children . . .” (citation omitted)).

57. “[A]ctionable interference is shown *prima facie* by showing intentional and improper interference with the plaintiff’s contract . . . .” Dan B. Dobbs, *The Law of Torts* 1259 (1st ed. 2000). More fully, the elements are “(1) the existence of a contract . . . , (2) the defendant’s knowledge of it, (3) the defendant’s malicious, improper, or intentional interference with it, (4) breach of the contract or other legally cognizable disruption of economic opportunity, and (5) resulting damage to the plaintiff.” *Id.* at 1259–60.

nizes a mother's right to recover for the emotional trauma of witnessing her child's death at the hands of a careless driver.<sup>58</sup> *Perry-Rogers v. Obasaju*, discussed by Professor Fox, illustrates the law's willingness to recognize recovery for emotional distress when reproductive negligence results in the creation of a life.<sup>59</sup>

In *Perry-Rogers*, "a doctor implanted a couple's embryos into another woman, who gave birth to their genetic child."<sup>60</sup> In allowing plaintiffs to recover for pure emotional distress, the court emphasized the relational harm that the parents suffered when they learned "that the child that they wanted so desperately . . . might be born to someone else and that they might never know his or her fate."<sup>61</sup> 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."<sup>62</sup> Those experiences had come into existence, but not as the plaintiffs' experiences. Plaintiffs were thus deprived of existing experiences, to which they had a right, because defendant's negligent wrong brought those experiences into existence in the wrong body and the wrong relationship. Last, *Chizmar v. Mackie*, also cited in *Reproductive Negligence*, allows recovery for pure emotional distress when medical negligence in the form of a misdiagnosis of AIDS wreaks havoc on the victim's marriage.<sup>63</sup> All three of these emotional distress cases thus involve harm to existing value—to a child (*Dillon*), to a parent-child relationship sundered by misplacing an in vitro infant (*Perry-Rogers*), and to a marriage (*Chizmar*). Professor Fox, by contrast, is urging us to recognize a new tort right that will enable people to control the future more effectively. The "right to recover for reproductive negligence" that he proposes "serves to protect people's legitimate expectations to exercise a reasonable measure of control over decisions about having children."<sup>64</sup> The proposed right is designed to enable people to shape their futures more effectively.

#### CONCLUSION

Tort law's conception of harm—and its larger bias in favor of existing value—are pillars of a deep conceptual structure that is inhospitable to the recognition of the reproductive wrongs so well described by

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58. 441 P.2d 912, 913 (Cal. 1968). Of course, the negligence here is not reproductive. The relevant point, however, is that the harm is to an existing life and an existing relationship.

59. See 723 N.Y.S.2d 28, 29–30 (App. Div. 2001). For Professor Fox's discussion of *Perry-Rogers*, see Fox, *supra* note 1, at 196.

60. Fox, *supra* note 1, at 196.

61. *Perry-Rogers*, 723 N.Y.S.2d at 29–30.

62. *Id.* at 29.

63. See 896 P.2d 196, 202–05 (Alaska 1995).

64. Fox, *supra* note 1, at 210–11.

Professor Fox. This does not mean that Professor Fox is mistaken to believe that the march of technological progress has once again put us in a position in which new wrongs ought to be recognized. But it ought to give us pause. The gap between the law of torts as it needs to be to redress contemporary reproductive wrongs, and the law of torts as it now is, may be greater than Professor Fox believes. The broad outlines of the emergence of the privacy torts may help to explain why this is so. The privacy torts protect, at their core, the interest in being free from unwelcome observation.<sup>65</sup> Before the torts themselves were recognized, that interest was receiving incipient and incomplete protection through various property doctrines. Or so Warren and Brandeis argued.<sup>66</sup> In classic common law fashion, that interest in not being subject to unwelcome observation slowly (though perhaps incompletely) worked itself free of property law and received recognition as an independent interest.<sup>67</sup> For Professor Fox's reproductive negligence torts to flower, tort law has to move from protecting the will against impairment by harm to protecting the will in its efforts to bring new instantiations of value into existence. That is a much larger step.

Moreover, the deep features of tort law canvassed here—the harm-benefit asymmetry and the bias in favor of existing value—ought to prompt us to consider whether we need to look somewhere other than tort law for a suitable model of wrong and harm. *Reproductive Negligence* argues persuasively that the harm suffered by victims of such negligence is serious enough to warrant legal protection. A well-articulated civil cause of action should succeed both in assuring the provision of competent medical assistance and in effecting accountability when that medical assistance fails because of negligent misconduct. And the material for a tort cause of action seems to lie ready at hand. The phenomenon of reproductive negligence implicates tort law because medical treatment is concerned with health, and health and physical integrity are intimately related. A nondisclaimable duty of care therefore seems well justified. But reproductive negligence also appears to implicate contract law even more than it implicates tort law. For one thing, modern technologically assisted reproduction involves enlisting

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65. See Thomas Scanlon, Thomson on Privacy, 4 Phil. & Pub. Aff. 315, 315 (1975) (arguing rights to privacy “have a common foundation in the special interests that we have in being able to be free from certain kinds of intrusions”).

66. See Warren & Brandeis, *supra* note 22, at 198–205.

67. See Levi, *supra* note 10, at 9–27 (discussing the common law process through which modern product liability was born); William L. Prosser, Privacy, 48 Calif. L. Rev. 383, 384–86 (1960) (tracing the development of a privacy right through case law). For a discussion of just how independent privacy is from property, compare Scanlon, *supra* note 65, at 315 (arguing privacy rights have a common foundation), with Judith Jarvis Thomson, The Right to Privacy, 4 Phil. & Pub. Aff. 295, 306 (1975) (arguing there is no such thing as the right to privacy, just a cluster of diverse rights that lack a common foundation and each of which is a right of some other kind—a right of ownership, for instance).

the aid of others in the pursuit of one's ends. For another, when reproductive negligence is committed, the resulting harm is the defeat of legitimate expectations of benefit. Tort damages are not designed with this kind of loss in mind. They are concerned with repairing injury to existing bodies and existing property. What we need is a hybrid legal regime that borrows from both tort and contract law. An adequate regime would take from tort law the principle that duties of care are binding and inalienable. It would take from contract law both a concern with fashioning the terms on which the assistance of others may be enlisted and a regime of remedies designed to address cases in which malfeasance results in the failure to realize a legitimate expectation of benefit.