

# BOOK REVIEW

## BEYOND TORTS: REPRODUCTIVE WRONGS AND THE STATE

Birth Rights and Wrongs:  
How Medicine and Technology Are Remaking Reproduction and the Law  
By Dov Fox. New York: Oxford University Press, 2019. Pp. 265. \$44.00.

*Khiara M. Bridges\**

*In Birth Rights and Wrongs: How Medicine and Technology Are Remaking Reproduction and the Law, Dov Fox schematizes the concept of “reproductive negligence” (also called “reproductive wrongs”) into three categories: procreation imposed, procreation deprived, and procreation confounded. This Book Review aims to extend Fox’s analysis by looking beyond the law of torts, which is Fox’s primary focus. This Review observes that public actors also foil the reproductive plans that individuals set for themselves, and it uses a reproductive justice framework to interrogate the social significance of individuals’ thwarted reproductive desires. Part I of this Review describes the interventions Fox makes in his book. Part II asks about the harms that result when public actors impose, deprive, and confound procreation: How do state-inflicted harms in this domain compare to private actor–inflicted harms? Lastly, in Part III, this Review returns to Fox’s analysis and reconsiders the harms caused by private actors’ reproductive negligence in light of inequality along race and class lines.*

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\* Professor of Law, University of California, Berkeley School of Law. Thanks to Samira Seraji for excellent research assistance.

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### INTRODUCTION

In March 2018, a freezer malfunction at an Ohio fertility clinic resulted in the destruction of thousands of eggs and embryos that clients had stored with the business.<sup>1</sup> For some of these clients, the malfunction meant that they had lost their last chance of having a genetically related child. A couple of years prior, an Illinois woman, who is a carrier for sickle cell anemia, entrusted her doctor to perform a tubal ligation on her. She and her husband, who is also a carrier for sickle cell anemia, decided against having children after they learned there was a twenty-five-percent chance that any child that she conceived with her husband would have the disease.<sup>2</sup> After her physician incompetently performed the tubal-ligation procedure, she became pregnant and gave birth to a baby with sickle cell anemia.<sup>3</sup>

When legal scholars have taken interest in events like these, it is usually to weigh in on debates about whether the individuals who have had their reproductive goals thwarted by the negligence of others should be allowed to recover for the harm that they have suffered.<sup>4</sup> The philosophical stakes of these debates are incredibly high. Does awarding damages to a couple after a fertility clinic negligently destroys the frozen embryos that they paid the business to retrieve and store represent an unjustified boon to the couple, inasmuch as there are no guarantees that the embryos would have been successfully implanted and subsequently developed into healthy babies? Does recognizing the claim of a woman who becomes pregnant after her gynecologist botches a tubal ligation—leaving her with an unexpected and unwanted pregnancy—construct a child as a legal injury?

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1. See Michael Cabanatuan, *Nitrogen Failure at S.F. Fertility Clinic; Damage to Frozen Eggs Unknown*, SFGate (Mar. 11, 2018), <https://www.sfgate.com/bayarea/article/Nitrogen-failure-at-SF-fertility-clinic-damage-12745335.php> [<https://perma.cc/3TZB-29S5>]; Nicole Wetsman, *Will Fertility Clinic Disaster Redefine Personhood*, Daily Beast (Apr. 13, 2018), <https://www.thedailybeast.com/will-fertility-clinic-disaster-redefine-personhood?ref=scroll> [<https://perma.cc/2XLE-WVEJ>].

2. Katie Moisse, *Mom Sues for Wrongful Pregnancy After Failed Sterilization*, ABC News (Mar. 17, 2014), <https://abcnews.go.com/Health/woman-sues-wrongful-pregnancy-failed-sterilization/story?id=22946272> [<https://perma.cc/SKQ4-A5ZB>].

3. *Id.*

4. See, e.g., Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 *Harv. C.R.-C.L. L. Rev.* 141, 143–45 (2005); Mark Strasser, *Yes, Virginia, There Can Be Wrongful Life: On Consistency, Public Policy, and the Birth-Related Torts*, 4 *Geo. J. Gender & L.* 821, 822 (2004); Sofia Yakren, *“Wrongful Birth” Claims and the Paradox of Parenting a Child with a Disability*, 87 *Fordham L. Rev.* 583, 588–90 (2018).

Professor Dov Fox's *Birth Rights and Wrongs: How Medicine and Technology Are Remaking Reproduction and the Law* offers the most comprehensive treatment to date of these issues and debates.<sup>5</sup> Fox puts a name to the phenomenon (which he calls "reproductive wrongs" or "reproductive negligence"<sup>6</sup>), schematizes it, and defends the position that the law ought to recognize claims involving reproductive plans that have been upended by the negligent acts of private actors<sup>7</sup>—all while wrestling with the thorny philosophical questions that have filled law reviews and bioethics journals since scientists first began developing assisted reproductive technologies (ART) in the 1960s and 1970s.<sup>8</sup>

The insights that Fox offers in *Birth Rights and Wrongs* are invaluable. But his primary interest is to define the contours, and defend the legitimacy, of a tort (or a bundle of torts) that would allow an individual to recover when a private actor's negligence dashes his reproductive desires.<sup>9</sup> Because Fox's focus is on the domain of torts—a domain that primarily concerns itself with regulating the behavior of private actors vis-à-vis one another and enabling one private actor to be made whole after another private actor injures her<sup>10</sup>—he does not focus on the significance of the phenomenon that he analyzes beyond the private sphere. This Book Review extends Fox's analysis by looking beyond the realm of private actors who upset an individual's reproductive plans and interrogating how the stakes change when *public actors*—that is, the state—foil the reproductive plans that individuals have set for themselves. Further, this Review deepens Fox's investigation by asking about the *social* significance of individuals' thwarted reproductive desires.

The analytical extension that this Review performs on Fox's work corresponds to the analytical extension that the reproductive justice framework performs on the reproductive rights framework. As the individual stripped of social context occupies the analytical center of the reproductive rights framework,<sup>11</sup> the individual stripped of social context, for the

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5. Dov Fox, *Birth Rights and Wrongs: How Medicine and Technology Are Remaking Reproduction and the Law* (2019).

6. E.g., *id.* at 160, 165.

7. See *id.* at 97.

8. See *id.* at 34 (noting "the scientific development of in vitro fertilization in 1969" and "the rise of commercial sperm banking in 1972").

9. See, e.g., *id.* at 165 (observing that the "American legal system protects against professional negligence" when "auto crashes are traced to defective brakes[] or food poisoning to unsanitary farming," and arguing that "[r]eproductive medicine and technology shouldn't be any different").

10. See Kenneth S. Abraham, *The Forms and Functions of Tort Law 1* (5th ed. 2017) (noting that tort law "mainly concerns the right of private parties to obtain monetary compensation from those who have caused them injury or damage").

11. To be precise, the error that the reproductive rights framework makes is its failure to consider that people with the capacity for pregnancy have *different* social contexts. Some are wealthy, while some are poor. Some enjoy race privilege, while others do not. Some are

most part, occupies the analytical center of Fox's analysis. Because Fox's central concern is with the formulation and defense of a tort that can make individuals whole when they find themselves victims of reproductive negligence, the social context in which individuals are embedded—as well as the social significance of the phenomena that he describes—largely falls away from his analysis. But the reproductive justice framework requires that one consider individuals as they are embedded in their environments. Indeed, the reproductive justice framework warns that essential aspects of the phenomenon being examined are missed when the analysis does not center individuals' social, historical, and political contexts. The framework cautions that without this attention to inequality along the lines of race, class, ability, sexuality, immigration status, etc., one may misapprehend the full extent of the harms that have been imposed, and one may fail to understand why those harms have been imposed on some, but not others.<sup>12</sup> So cautioned, this Review views the phenomena that Fox investigates through a reproductive justice-informed lens.

Looking beyond torts—and guided by the reproductive justice framework when contemplating reproductive wrongs—one may see previously unseen insights about the reproductive coercion that states impose on their citizens. To be precise, applying Fox's analysis to the public sphere reveals that there are multiple ways in which the state harms individuals when it comes to matters related to procreation.<sup>13</sup> Further, analyzing the reproductive coercion that states impose on their citizens reveals previously unseen insights about the reproductive negligence that is Fox's concern in *Birth Rights and Wrongs*.<sup>14</sup> The goal of this Review is to excavate these previously invisible features.

Part I of this Review describes the interventions that Fox makes in *Birth Rights and Wrongs*. It focuses on Fox's schematization of reproductive

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born within the borders of the United States, while others are immigrants. Some are members of groups whose procreation society values; others are members of groups whose procreation society considers to be a social problem and, as such, works hard to prevent. In its failure to consider the different social contexts in which individuals with the capacity for pregnancy are embedded, the reproductive rights framework centers one set of individuals—class-privileged, white, cisgender women—in its analysis. Thus, the rights for which reproductive rights advocates have fought only really “work” for class-privileged, white, cisgender women. See Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 *Ann. Rev. L. & Soc. Sci.* 327, 336 (2013) (stating that the “legal rights” on which “traditional reproductive advocacy focused” failed “to benefit all the people the women’s movement claimed to represent”).

The other error that the reproductive rights framework makes is its insistence upon focusing on the right to an abortion and the ability to terminate a pregnancy, to the exclusion of other concerns that people with the capacity for pregnancy face. See *id.* at 338–39.

12. See generally Loretta J. Ross & Rickie Solinger, *Reproductive Justice: An Introduction* (2017) (providing a comprehensive description of the reproductive justice framework).

13. See *infra* Part II.

14. See *infra* Part III.

negligence into three broad types: procreation *deprived*, procreation *imposed*, and procreation *confounded*. While Fox is concerned with identifying and calculating the appropriate level of damages for the harms that result when private actors deprive, impose, and confound procreation, Part II asks about the harms that result when *public* actors deprive, impose, and confound procreation. How do state-inflicted harms in this domain compare to private actor-inflicted harms? How does the nature of the harm change when it is the state that deprives, imposes, and confounds reproduction? Part III then returns to the arguments that Fox makes in *Birth Rights and Wrongs* and expands Fox's project by centering social context in the analysis of the reproductive negligence that private actors inflict on other private actors. To be precise, this Part reconsiders the harm caused by private actors' reproductive negligence in light of inequality along the lines of race and class. A brief conclusion follows.

### I. SCHEMATIZING REPRODUCTIVE WRONGS

*Birth Rights and Wrongs* has two overarching goals. The first is to make the case that individuals who are victims of reproductive negligence suffer an injury that American law ought to recognize and compensate; the second is to provide a framework for determining the amount of compensation that victims of reproductive negligence should receive.<sup>15</sup>

Fox observes that the landscape is such wherein we should expect that reproductive negligence will occur with some degree of frequency.<sup>16</sup> The assisted reproductive technology industry is a multibillion-dollar one that offers hope to those whose desires for parenthood might go unfulfilled without medical intervention.<sup>17</sup> The industry, however, is stunningly underregulated. Although the federal government has made some overtures about regulating assisted reproductive technologies and their providers through the CDC and the FDA, "no governmental agency or authority seriously polices reproductive negligence in the United States" at the federal level.<sup>18</sup> Regulation by the states is also limited.<sup>19</sup> The result is that the industry has been left to police itself. As one might expect, it has largely failed to do this, with the professional organizations that set industry standards, like the American Society for Reproductive Medicine, having no "authority to sanction members that violate its guidelines[] or auditing

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15. See, e.g., Fox, *supra* note 5, at 9, 53, 97.

16. See *id.* at 28–31 (noting the "breakneck pace" of advances in reproductive technologies and the "regulatory vacuum" within which these advances take place).

17. See *id.* at 29.

18. *Id.* at 26.

19. *Id.* at 27 ("At the state level, laws are mostly limited to embryonic stem cell research, insurance coverage for infertility treatment, and surrogacy rules that govern gestational agreements and carrier compensation.").

power required to detect such violations.”<sup>20</sup> Market forces have not prompted the practitioners of reproductive medicine to police themselves. Again, assisted reproductive technologies have become a multibillion-dollar industry: Individuals have not boycotted the industry’s goods and services even though their safety is not ensured. Thousands of people elect to roll the dice every year. And, as we might expect, sometimes things go wrong.<sup>21</sup>

Fox is interested in those occasions when things go wrong *because a provider has acted negligently*—as when a doctor negligently misreads the results of a prenatal diagnostic test and incorrectly informs the pregnant person that the fetus she carries has a severe impairment, leading the individual to terminate a pregnancy that she would have carried to term if given accurate information.<sup>22</sup> Or when a pharmacist negligently fills a prescription for contraception with prenatal vitamins, leading the individual to become pregnant when she had done her best to avoid that very result.<sup>23</sup> Or when a sperm bank fails to screen its donors, causing a client to be impregnated by sperm from a person who purported to have no mental health impairments, but who actually suffers from a debilitating—and inheritable—mental illness.<sup>24</sup> The variations of reproductive negligence boggle the mind.

Fox observes that most victims of reproductive negligence have an extraordinarily difficult time recovering for the harm they suffered. Breach of contract suits usually fail, as only the most foolish providers would *promise* a particular result or fail to include a liability waiver in any agreement between herself and the patient.<sup>25</sup> Claims that sound in property also typically fail, as courts understandably have had a difficult time conceptualizing reproductive materials—like sperm, egg, or embryos—as an

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20. *Id.* at 28.

21. ART Success Rates, CDC, <https://www.cdc.gov/art/artdata/index.html> [<https://perma.cc/3CUP-MS4P>] (last updated Dec. 31, 2020) (noting the 284,385 ART cycles and 306,197 ART cycles at reporting U.S. clinics in 2017 and 2018, respectively).

22. See Bridget Freeland, *Woman Claims Misread Test Led to Abortion*, Courthouse News Serv. (Oct. 23, 2009), <https://www.courthousenews.com/woman-claims-misread-tested-to-abortion> [<https://perma.cc/5LSF-8X53>] (describing a case involving a woman who terminated a pregnancy after her doctor incorrectly informed her that her fetus had a genetic anomaly and her child would be born with a disability).

23. See *Wis. Couple Can’t Collect in Birth Control Mix-Up*, TwinCities Pioneer Press (Jan. 30, 2015), <https://www.twincities.com/2013/01/30/wis-couple-cant-collect-in-birth-control-mix-up-2> (on file with the *Columbia Law Review*) (last updated Nov. 6, 2015) (describing such a case).

24. See Fox, *supra* note 5, at 3–4 (describing a case in which fertility clinic patients sued after the clinic failed to ascertain the medical history of a donor who did not disclose that he suffered from “schizophrenia, bipolar disorder, and narcissistic personality disorder with ‘significant grandiose delusions’”).

25. See *id.* at 38.

individual's personal *property*.<sup>26</sup> Medical malpractice claims have also largely failed, as courts have typically found that providers—even when they make devastating errors—nevertheless followed “their discipline’s standard operating procedures.”<sup>27</sup>

And then there are the torts of “wrongful birth” and “wrongful life”—the form that many claims for medical malpractice involving reproductive negligence assume.<sup>28</sup> On the whole, courts have been hostile to these claims, discomforted by the way in which they appear to declare that it was wrong for a child to have been born.<sup>29</sup> Indeed, these claims appear to ask courts to declare that a child’s life is an injury. All but four states prohibit claims of wrongful life, in which a health-impaired child seeks damages for the missed opportunity to terminate the pregnancy that produced him.<sup>30</sup> Half of the states prohibit claims of wrongful birth, in which parents seek damages for the lost chance to terminate the pregnancy.<sup>31</sup>

Fox argues that American law is getting it wrong. His claim is that people deserve remedy when a provider’s negligence dashes their hopes for having biologically related children, or makes them parents when they sought to avoid parenthood, or gives them a child that has characteristics that are different from the ones that they used expensive reproductive technologies to ensure.<sup>32</sup> He concedes that these claims pose vexing philosophical questions:<sup>33</sup> For example, how does one calculate the *loss* experienced by a parent who wanted a hearing child, but whose child is deaf because a provider implanted the wrong embryo? Should we subtract the value of the deaf child from the value of the coveted hearing child? How do we calculate those values? Indeed, how do we calculate the value of a coveted child who has never existed?<sup>34</sup> He accepts that these cases

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26. See *id.* at 47–51 (finding that courts have been reluctant to recognize reproductive materials as property).

27. *Id.* at 41.

28. See *id.* at 43.

29. See *id.* (“Statutes bar wrongful birth suits in a dozen states, while courts in another dozen reject them by common law—all of these prohibitions have survived constitutional challenge. ‘Wrongful life’ actions, meanwhile, are forbidden in every state except California, Maine, New Jersey, and Washington.”).

30. See *id.*

31. See *id.*

32. See *id.* at 165 (observing that “[t]he American legal system protects against professional negligence in other inherently risky activities” and that “[r]eproductive medicine and technology shouldn’t be any different,” as “the stakes are high, and important interests hang in the balance”).

33. See *id.* at 22–23 (explaining the “non-identity problem” by which a child with a disability “couldn’t herself have been born without the condition that she has, not while remaining the same individual she is” and “[a]ny able-bodied child who might have existed in her place . . . would be a different person altogether”).

34. For a more detailed discussion of these examples, see *id.* at 91.

present hard causation questions,<sup>35</sup> such as: If a fertility clinic negligently destroys frozen embryos, is a client's subsequent failure to have a genetically related child caused by the destruction of the embryos or by her preexisting infertility? Does allowing a client to recover under those circumstances problematically assume that she would have given birth to a child produced by one of those frozen embryos—a result that was not at all guaranteed? Fox argues that, despite these hard questions and the difficult philosophical, moral, and legal dilemmas they present, American law is still perfectly capable of divining appropriate material remedies for individuals.<sup>36</sup>

Fox contends that the law ought to provide remedies for reproductive negligence because the agony that individuals suffer when providers breach their duties of care can be excruciating.<sup>37</sup> Fox explains that reproductive injuries are incredibly painful to those who experience them.<sup>38</sup> He notes that “[m]ost people who decide to have children are hoping for intimate relationships that reward, challenge, and fulfill them. They may long to love unconditionally, to share in a child's sense of wonder, and to play again for the sheer fun of it.”<sup>39</sup> So, when a freezer malfunction destroys an individual's last chance to have a biological child, that loss can truly be devastating. Similarly, one can imagine the devastating harm that an individual might experience after trying her hardest to avoid parenthood, only to have it thrust upon her by a provider's negligence. Fox quotes the Iowa Supreme Court: “When chosen voluntarily, becoming a parent can be an important act of self-definition. Compelled parenthood, by contrast, imposes an unwanted identity on the individual, forcing her to redefine herself, her place in the world, and the legacy she will leave after she dies.”<sup>40</sup> Indeed, the U.S. Supreme Court has long recognized the importance of reproduction to individuals—interpreting the Constitution

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35. See *id.* at 93 (observing that cases of reproductive negligence involve difficult causation questions, but that the “answer to all these questions can be found in ‘loss of chance’ doctrine, which apportions awards according to the defendant's level of fault for the plaintiff's injury”).

36. See *id.*

37. See *id.* at 67–68.

38. See *id.* at 46–47.

39. *Id.* at 19.

40. *Id.* (quoting *In re Marriage of Witten*, 672 N.W.2d 768, 778 (Iowa 2013)).



to protect a person's rights to have children,<sup>41</sup> not to have children,<sup>42</sup> and to parent the children that one has in the way that one sees fit.<sup>43</sup>

Fox maintains that the injuries occasioned by reproductive negligence demand remedy, and he proposes that tort law—a system that concerns itself with compensating individuals who have been harmed by the wrongful conduct of others<sup>44</sup>—is well suited to the task. Fox observes, however, that “[d]ifferent kinds of reproductive wrongs call for different kinds of rights.”<sup>45</sup> Accordingly, he offers a clear schematization of different kinds of reproductive wrongs:

1. There are occasions when procreation is *deprived*. This occurs when a private actor's negligence leaves an individual unable to become pregnant and/or have a child. A fertility clinic's wrongful destruction of frozen eggs and embryos, which results in a person's inability to have a child that is genetically related to her, is an example of procreation deprived.<sup>46</sup>

2. There are occasions when procreation is *imposed*. This occurs when a private actor's negligence thwarts an individual's intention to avoid pregnancy and childbearing. A botched tubal ligation, which results in a patient experiencing an unexpected and unwanted pregnancy, is an example of procreation imposed.<sup>47</sup>

3. There are occasions when procreation is *confounded*. This occurs when a private actor's negligence foils an individual's plans about the *type* of child that she would like to have. A physician's negligent failure to diagnose a fetus's genetic anomaly during an amniocentesis, which results in a person's carrying a

41. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding that procreation is “one of the basic civil rights of [hu]man[kind]”).

42. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (affirming “the right of the woman to choose to have an abortion before viability”); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the right to privacy included a woman's right to choose whether to terminate her pregnancy).

43. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that a law requiring parents and guardians to send school-aged children to public school in their school district “unreasonably interfered” with the liberty of parents to direct their children's education); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (striking down a statute aimed at barring foreign-born parents from teaching their children their native language).

44. Fox observes that although scholars and observers usually describe tort law as a system that seeks to “mak[e] the victim whole,” this inaccurately describes the place of tort law in the realm of reproductive negligence. Fox, *supra* note 5, at 84. He writes that “[c]ash awards could never pretend to fully or adequately restore the setbacks that fetal misdiagnoses or embryo mishandlings incur to plaintiff's autonomy, equality, and well-being.” *Id.* According to Fox, awarding a victim of reproductive negligence damages in tort does not make her “whole,” but rather simply helps her “to get her life back on the track that it was before she was subjected to reproductive injury.” *Id.*

45. *Id.* at 165.

46. See *id.* at 6.

47. See *id.* at 6–7.

pregnancy to term that she would have terminated otherwise, provides an example of procreation confounded.<sup>48</sup>

Different claims pose different questions, and Fox outlines questions that courts should ask when confronted with each type of claim.

According to Fox, when procreation is deprived, plaintiffs must show that the defendant's negligence substantially contributed to the failure of their efforts to become parents. When calculating the size of damages awards, juries should consider "the demonstrated reasons why plaintiffs had wanted to be parents, and the consequences of their not getting to be. It might also matter whether they already have kids, or even how many, and whether they might still be able to."<sup>49</sup> Defendants can always argue that plaintiff's parental desires were thwarted not by the defendants' conduct, but rather by some other phenomenon—like "preexisting infertility, a natural disaster, or any other cause that defendants aren't responsible for."<sup>50</sup>

When procreation is imposed, plaintiffs must show that they intended to avoid pregnancy and parenthood, but the defendant's negligence—and not, for example, the failure to use contraception as directed—thwarted those efforts.<sup>51</sup> Juries should be instructed to engage in a highly individualized inquiry when determining the amount of damages, interrogating "why plaintiffs had sought to abstain from having offspring, and what followed from having parenthood foisted upon them."<sup>52</sup> Of course,

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48. See *id.* at 7.

49. *Id.* at 75. Fox recognizes that there is no guarantee that a plaintiff would have become a parent if the defendant had not been negligent and, instead, had provided exceptional medical care. Accordingly, he proposes a formula for calculating damages that considers this. He gives the example of a couple who stores six embryos in a freezer that later malfunctions due to owner negligence, with four out of the six embryos being destroyed. He writes:

Suppose the full-blown injury of deprived procreation is valued at \$100,000—that is, if pregnancy and parenthood were rendered hopeless, after having been previously assured . . . . Say this couple's age and health gave them a 30 percent chance of having a child with their six initial embryos. Losing them all would have represented a loss of three-tenths that total (\$30,000), while the actual loss of four (leaving the two remaining) still gave them a one-tenth shot (valued at \$10,000). The resulting 66 percent loss of chance—from 30 percent down to 10 percent—translates into a \$20,000 award for the loss of this particular couple's four embryos.

*Id.* at 94.

50. *Id.* at 75.

51. See *id.* at 122 (observing that, in the case of birth control pills that the manufacturer had improperly labeled, "it's also possible that [plaintiff who became pregnant after taking the mislabeled pills] didn't take the pills as directed"); see also *id.* (noting that "it's only fair to hold defendants liable for whatever portion of the reproductive injury their negligence caused, or the corresponding chance that their misconduct is to blame for causing it").

52. *Id.* at 76.

“defendants might try to argue that plaintiffs weren’t harmed anyway, because even an unplanned child is a blessing not a burden”<sup>53</sup>—an argument that, if believed, would preclude an award of damages.

Finally, when procreation is confounded, courts should consider the characteristics plaintiffs were attempting to ensure that their child would have. Damages should be greater, for example, when a defendant’s negligence foils a plaintiff’s attempt to ensure that her child would be born without a debilitating condition; damages should be smaller when a defendant’s negligence foils a plaintiff’s attempt to ensure that her child would be tall, for example.<sup>54</sup> Further, there is a question about the likelihood that a condition will actually manifest. If there is, say, only a twenty-five-percent chance that a child will develop an impairment, then the damages award should reflect that.<sup>55</sup> Fox also proposes that reductions in damages awards should be based on any benefits that are produced by reproductive misconduct.<sup>56</sup>

Importantly, Fox’s examination of the policy implications of allowing recovery in cases of confounded reproduction constitutes the book’s most in-depth exploration of race. He contends that, in some cases, it may violate public policy to provide remedies for reproductive negligence that confounds reproduction.<sup>57</sup> He describes the case of Jennifer Cramblett, a white woman, who sued after a fertility clinic mistakenly gave her the sperm of a black man instead of the white man that she had requested; she subsequently gave birth to “an ‘obviously mixed race[] baby girl.’”<sup>58</sup>

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53. See *id.*

54. See *id.* at 128 (“Foiled offspring selection can yield more or less serious harms, depending on its foreseeable impact on people’s lives. Injury severity is an objective inquiry that begins by asking what kind of child the plaintiffs wanted and why.”).

55. Fox tells the story of a couple who purchased sperm from a sperm bank after being told that the donor of the specimen was a taller, more brilliant version of Tom Cruise who had a gorgeously clean bill of health. See *id.* at 166–69. Indeed, that is precisely how the donor had described himself. Had the facility actually checked the medical records of the donor, it would have discovered that most of what he had said about himself was a lie. Most relevantly, the donor failed to disclose that he suffered from schizophrenia. Any child conceived with his sperm had a one-in-eight chance of developing the mental illness. See *id.* Fox proposes that, should a jury choose to award damages in a case like this, it should value the magnitude of the harm represented by schizophrenia and divide it by eight. See *id.* at 138 (“Damages should reflect his chances of developing the disease and the relative role of professional wrongdoing in bringing it about. That percentage would trim the award total from what it would be if negligence alone made it all but certain that the condition would materialize.”).

56. See *id.* at 135 (“Recovery for that harm of thwarted selection should be reduced by foreseeable benefits of the reproductive kind that parents had sought out.”).

57. See *id.* at 141 (“When negligence thwarts parental efforts to select for socially salient traits like sex, race, and disability, compensation risks cutting against public safety or morality.”).

58. *Id.* at 155 (alteration in original) (quoting Complaint at 6, *Cramblett v. Midwest Sperm Bank, LLC*, No. 2014-L-010159 (Ill. Cir. Ct. filed Sept. 29, 2014), 2014 WL 4853400).

Cramblett claimed that the fact that her child was not white alienated her from her family and friends. She and her partner ultimately moved out of a racially segregated white enclave that had been their home and into a neighborhood where more people of color lived. This more racially integrated neighborhood had “worse” schools and was far away from people who could act as a support system for the new family, “but at least they could find someone to cut their daughter’s hair, and the three of them wouldn’t be made to feel so unwelcome all the time.”<sup>59</sup> Should Cramblett be able to recover for the reproductive negligence that left her with a nonwhite child instead of the white child that she sought? Would providing a remedy in a case such as this send a problematic message about the differential values assigned to black and white babies? As such, should courts refuse to allow plaintiffs like Cramblett to recover, as allowing recovery would violate public policy?<sup>60</sup>

Fox answers that providing a significant remedy to Cramblett and similarly situated plaintiffs would be contrary to public policy and, for that reason, is inadvisable. He argues that her petition is problematic because “it sounds in the register of racial division.”<sup>61</sup> He contends that Cramblett “sought to offset the very harms that millions of black families endure every day without any legally recognized cause to quarrel . . . . What makes her complaint so remarkable is how explicit it makes the social tax of being black in America—a tax that white people like Cramblett don’t pay.”<sup>62</sup> Fox argues that Cramblett should be allowed to recover to some extent, as disallowing recovery would have the effect of immunizing the assisted reproductive technology industry from liability for these types of errors.<sup>63</sup> Nevertheless, Fox contends, the recovery should be extremely limited, as to do otherwise would problematically work to vindicate Cramblett’s desire to “affirm the residential, educational, and other privileges she had hoped

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59. *Id.* at 157.

60. Fox also weighs whether allowing recovery in cases in which reproductive negligence results in the birth of a health-impaired child, when a nonimpaired child was hoped for, violates public policy. See *id.* at 141–47. Does recovery in these cases stigmatize people with disabilities and suggest that their lives are worth less than others? While Fox is sympathetic to an argument in the affirmative, he nevertheless concludes that recovery should be allowed in cases such as this. See *id.* at 143 (noting that, instead of barring recovery, “[t]here are better ways to blunt the expressive sting of judicial insults”). He observes that although ruling in a plaintiffs’ favor in these cases may problematically denigrate people with disabilities, the risk that such an expressive message will be sent does not “warrant closing the courthouse door to these parents’ . . . any more than it justifies ‘immuniz[ing] those in the medical field from liability for their performance’ [in the areas of] prenatal care and genetic counseling.” *Id.* (first alteration in original) (quoting *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 407, 408 (Iowa 2017)).

61. *Id.* at 157.

62. *Id.*

63. See *id.* at 159–60.

to enjoy by parenting a child whose shared whiteness would have made it easier for her to assimilate and prosper.”<sup>64</sup>

Fox’s analysis in *Birth Rights and Wrongs* is as nuanced as it is astute. Yet, because Fox views the reproductive wrongs that he analyzes through the lens of torts—a system that predominately regulates the behavior of private actors<sup>65</sup>—he does not contemplate how the state can produce the same reproductive injuries as does a fertility clinic that fails to properly maintain the freezer that stores frozen embryos, a physician who fails to competently perform a tubal ligation, or a doctor who misreads the results of a prenatal diagnostic test. That is, the *state* can also deprive procreation, impose procreation, and confound procreation. The next Part analyzes the stakes of reproductive wrongs when the government is the actor that perpetrates them.

## II. REPRODUCTIVE WRONGS AND PUBLIC ACTORS

This Part extends Fox’s investigation by querying the various ways in which public actors inflict reproductive wrongs on individuals. This Part analyzes contexts in which the state wrongly *deprives* individuals of the ability to become parents, *imposes* parenthood on individuals, and *confounds* individuals’ reproduction by impairing the children that they birth.

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64. *Id.* at 157. Notably, other legal scholars have described the significance of Cramblett’s claim in much stronger terms and within much more damning frameworks than those that Fox uses. Fox observes that

[I]legal scholars have tied Cramblett’s lawsuit to the vestiges of American slavery and Jim Crow. Professors Suzanne Lenon and Danielle Peers argue that what Cramblett is really claiming is that the mix-up denied her “the spoils of these inherited structural violences.” Professor Patricia Williams contends that Cramblett is asserting “racial deviance as a breach of birthright.” To Professor Dorothy Roberts, her suit implies that the “genetic trait (or taint) of race . . . overwhelm[s] the kinship bond that these mothers and their babies have in common.” Roberts maintains the Cramblett dispute evinces a “reproductive caste system” that seeks to keep the “white bloodline free from Black contamination.”

*Id.* at 159 (alteration in original) (first quoting Suzanne Lenon & Danielle Peers, ‘Wrongful’ Inheritance: Race, Disability and Sexuality in *Cramblett v. Midwest Sperm Bank*, 25 *Feminist Legal Stud.* 141, 160 (2017); then quoting Patricia J. Williams, *The Alchemy of Race and Rights* 186–87 (1991); then quoting Dorothy E. Roberts, *Why Baby Markets Aren’t Free*, 7 *U.C. Irvine L. Rev.* 611, 617 (2017); then quoting Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 277 (1997)).

65. Public actors can also be subject to tort liability. See, e.g., Federal Tort Claims Act, 28 U.S.C. § 2674 (2018) (holding the United States liable to tort claims “in the same manner and to the same extent as a private individual under like circumstances” except for interest prior to judgment or for punitive damages).

A. *State-Inflicted Procreation Deprived*

While Fox's analysis of procreation deprived investigates private actors who negligently destroy embryos or who perform tubal ligations on patients who had not requested as much, an analysis of state-inflicted procreation deprived would investigate the various ways in which governments thwart individuals' chances to become parents. The examples explored in this section involve states' failures to protect individuals from the affronts that render them infertile and states' refusal to help these individuals regain some of their lost fertility.<sup>66</sup>

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66. Recent reports that state actors have been forcibly sterilizing women detained in ICE detention centers represent a glaring—and extremely disturbing—example of state-inflicted procreation deprived. See Project South, *Lack of Medical Care, Unsafe Work Practices, and Absence of Adequate Protection Against COVID-19 for Detained Immigrants and Employees Alike at the Irwin County Detention Center 18–19* (2020), <https://project.south.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf> [<https://perma.cc/H294-JSF6>].

An analysis of state-inflicted procreation deprived might also investigate state policies that act as disincentives to childbearing. The most obvious of these policies are “family caps” or “child exclusions,” which arrest the size of a cash grant that an indigent family receives from the state’s Temporary Assistance for Needy Family program. See Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 *Harv. J.L. & Gender* 151, 151 (2006) [hereinafter Smith, *Family Caps*]. Under these policies, the grant remains static even if the size of the family increases. *Id.* These policies are expressly intended to discourage low-income people who receive financial assistance from bearing children. See *Dandridge v. Williams*, 397 U.S. 471, 484–86 (1970) (upholding Maryland’s family cap program after concluding that the state’s endeavor to provide “incentives for family planning” was a legitimate state interest and the program had a rational relationship to this interest); *C.K. v. Shalala*, 883 F. Supp. 991, 1014 (D.N.J. 1995) (upholding a family cap program because it “sen[t] a message that recipients should consider the static level of their welfare benefits before having another child, . . . [which may ameliorate] the rate of out-of-wedlock births that only foster the familial instability and crushing cycle of poverty currently plaguing the welfare class”). Insofar as family cap programs seek to deter childbearing, they might be understood as a form of state-inflicted procreation deprived.

That said, empirical data reveals that family cap programs actually do not have the effect of reducing beneficiaries’ fertility rates. See Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 211–12 (1997) [hereinafter Roberts, *Killing the Black Body*] (noting that there was virtually no decrease in childbirth rates for women on the Aid to Families with Dependent Children program in New Jersey as a result of the “family cap” law); Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 *Mich. J. Gender & L.* 121, 171–72 (2002) (noting that empirical evidence suggests that the “family cap” may produce “an increase in abortion rates and a minor decrease, at most, in birth rates” and on the flip side, that the “availability of welfare benefits does not cause poor women to have more children”); see also Linda C. McClain, “Irresponsible” Reproduction, 47 *Hastings L.J.* 339, 383 (1996) (noting that “the initial evaluation of New Jersey’s family cap measure reveal[ed] no statistically significant difference between birth rates of women subject to the cap and those who are not”). Instead, the effect of family cap programs is to push poor families deeper into poverty and to *punish* poor women for allowing “poverty to intersect with pregnancy” and “for failing to produce households and families that fit into the middle-class model.”

There exists a persistent myth that poor people—especially poor people of color—have no trouble having children and that they take advantage of their easy fecundity by having *large* numbers of children.<sup>67</sup> For example, in the 1980s, then-President Ronald Reagan popularized discourse about the “welfare queen”—the implicitly black woman who becomes pregnant and has children for the sole purpose of increasing the size of her welfare check.<sup>68</sup> According to this racist myth, the welfare queen pragmatically deploys her relentless reproductive capacity and, in so doing, lives lavishly off of taxpayer dollars.<sup>69</sup> According to Reagan, the solution to the welfare queen was to reduce the size of the nation’s safety net programs—and government, generally.<sup>70</sup>

The legend of the welfare queen did not die when Reagan’s term as President ended. It lives on in family cap (also called child exclusion) policies. These policies, which twenty-two states currently have, seek to disincentivize people from becoming pregnant and bearing children while receiving welfare benefits by freezing the size of a beneficiary’s grant—making it unresponsive to increases in the size of the family.<sup>71</sup> It is apparent that these policies are premised on the assumption that the fertility of beneficiaries of cash assistance programs must be carefully regulated and under no conditions left to the individual to manage.

Contemporary rhetoric about “anchor babies” shares important similarities to discourses about the welfare queen. According to this rhetoric, poor, undocumented women of color, many of whom hail from

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Khiara M. Bridges, *The Poverty of Privacy Rights 189–90* (2017). Because family cap policies are unsuccessful at accomplishing their goal of preventing childbearing among low-income recipients of state benefits, they might be better understood as attempts at state-inflicted procreation deprived.

67. See Liza Mundy, *A Special Kind of Poverty*, *Wash. Post* (Apr. 20, 2003), <https://www.washingtonpost.com/archive/lifestyle/magazine/2003/04/20/a-special-kind-of-poverty/75d1ae95-72ab-49ba-951d-e4c25cbe07db> (on file with the *Columbia Law Review*) (“The myth is that the less money a person has, the more babies a person has: that the poor are unstoppably fertile, popping out baby after baby that they cannot afford to clothe or educate or feed.”).

68. Note, *Dethroning the Welfare Queen: The Rhetoric of Reform*, 107 *Harv. L. Rev.* 2013, 2019 (1994) (describing the image of “an urban, black, teenage mother, who continually has children to increase her benefits”).

69. See Thomas Byrne Edsall & Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics* 148 (1992) (stating that “[o]ne of Reagan’s favorite and most often-repeated anecdotes was the story of a Chicago ‘welfare queen’ with ‘80 names, 30 addresses, 12 Social Security cards’ whose ‘tax-free income alone is over \$150,000’” (quoting ‘Welfare Queen’ Becomes Issue in Reagan Campaign, *N.Y. Times*, Feb. 15, 1976, at 51, <https://www.nytimes.com/1976/02/15/archives/welfare-queen-becomes-issue-in-reagan-campaign-hitting-a-nerve-now.html> (on file with the *Columbia Law Review*))).

70. See Bridges, *supra* note 66, at 53–54 (describing Reagan’s use of the welfare queen myth to generate popular support for reducing the size of welfare programs and “big government”).

71. See Smith, *Family Caps*, *supra* note 66, at 151.

Central and South America, give birth to their babies within the borders of the United States in order to secure their babies' U.S. citizenship as well as the women's ability to make claims on the state.<sup>72</sup> We should recognize how the fable about "anchor babies," like the mythos of the welfare queen, rests on the assumption that, if left to their own devices, poor women of color will use their reproductive capacities as an improper means to an end.<sup>73</sup> Indeed, the lore about "anchor babies" is premised on the same time-worn trope that allowed the welfare queen to make sense to millions of people in the 1980s. Importantly, both the trope of the welfare queen and the trope of the anchor baby render invisible the reality that poor people disproportionately suffer from infertility.<sup>74</sup>

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72. See Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 *Harv. C.R.-C.L. L. Rev.* 257, 296 (2017) ("The mythological anchor baby is the product of a devious plan by undocumented, pregnant women who connive to enter the United States unlawfully just in time to give birth on American soil. Once born, the child . . . becomes the legal and sociological basis for legalization of an entire family . . ." (footnote omitted)); see also *infra* note 73 and accompanying text.

73. Ahmad, *supra* note 72, at 296 (discussing the "specter of a late-term pregnant Mexican woman crossing the border in order to unfairly avail herself and her family of the benefits of citizenship"). The term has been deployed against many immigrant groups, including immigrants from Latin America, the Middle East, and Asia. See Chris Fuchs, *Jeb Bush Draws Fire for Blaming Asians in 'Anchor Baby' Debate*, *NBC News* (Aug. 25, 2015), <https://www.nbcnews.com/news/asian-america/jeb-bush-draws-fire-blaming-asians-anchor-baby-debate-n415421> [<https://perma.cc/89GG-JW77>] (associating the term "anchor baby" with the assumption that Asians enter the United States to give birth to children in order to "tak[e] advantage of . . . birthright citizenship" (internal quotation marks omitted) (quoting Jeb Bush)).

74. See Ann V. Bell, *Misconception: Social Class and Infertility in America 2* (2014) (explaining that although poor women and women of color have slightly higher rates of infertility, infertility is nonetheless depicted as an issue affecting white, wealthy women); see also Madeline Curtis, Note, *Inconceivable: How Barriers to Infertility Treatment for Low-Income Women Amount to Reproductive Oppression*, 25 *Geo. J. Poverty L. & Pol'y* 323, 329 (2018) (noting that "infertility rates decline with increased educational attainment," a fact that suggests that the poor, who tend to have decreased educational attainment, have higher infertility rates).

It is also likely that many are unaware that low-income people have higher rates of infertility because they are *hyperaware* that many affluent, cisgender women delay childbearing, and delayed childbearing can make conceiving a baby much more difficult. That is, substantial attention has been paid to acknowledging and documenting the fertility struggles that older women have. See Barbara Ellen, Opinion, *The Suspension of Fertility Treatment Is a Tragedy for Many Couples*, *Guardian* (Apr. 25, 2020), <https://www.theguardian.com/commentisfree/2020/apr/25/the-suspension-of-fertility-treatment-is-an-all-too-real-tragedy-for-many-couples> [<https://perma.cc/W3NR-B2WA>] (noting that because of the abundant attention given to the correlation between advanced age and infertility, people may have inaccurate (and sexist) ideas about women who struggle with infertility, caricaturing them as "the central casting career bitch who put professional ambition first" and "women who . . . 'squandered' their fertility"); Mundy, *supra* note 67 ("In the modern American version of that myth [that only wealthier people suffer from infertility], infertility is the affliction (some would say, the comeuppance) of ambitious, upper-income working women who have delayed childbearing until their thirties and forties. The curse of the



There are many reasons for the high frequency of infertility among poor people.<sup>75</sup> Many common sexually transmitted infections, when untreated, lead to damage to the reproductive organs—which in turn causes infertility.<sup>76</sup> Poor people are less likely than their wealthier counterparts to be able to access the healthcare (i.e., a diagnosis and a round of antibiotics) necessary to treat such sexually transmitted infections.<sup>77</sup> Consequently, poor people are more likely to suffer infertility from this cause.

Some medical conditions, like polycystic ovarian syndrome (PCOS), increase the risk of infertility.<sup>78</sup> Because there is an association between PCOS and poverty during childhood,<sup>79</sup> poor people are more likely to encounter PCOS-related infertility.

The environments many are forced to live in are yet another contributor to infertility among low-income people. As section II.C explores, low-income people are more likely than their wealthier counterparts to live in

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female litigator, the high-powered woman broker.”). Because many women who decide to start their families when they are in their late thirties and forties are class-privileged, some may associate infertility and struggles to conceive with affluence—effectively obscuring the infertility suffered by those who are not affluent.

75. It is important to note that there are many causes of infertility, which medical authorities define as the inability to conceive after one year of unprotected sexual intercourse between people of different sexes. Infertility, Mayo Clinic, <https://www.mayoclinic.org/diseases-conditions/infertility/symptoms-causes/syc-20354317> [<https://perma.cc/MT9T-VHWL>] (last visited Oct. 29, 2020). Some common causes include dysfunctions with respect to sperm production and motility, enlarged veins in the testes that reduce the quality and quantity of sperm, problems with ovulation, endometriosis (a condition involving the growth of uterine tissue outside of the uterus), uterine fibroids, and blockages in the fallopian tubes. *Id.*

76. See, e.g., Emily Galpern, *Assisted Reproductive Technologies: Overview and Perspective Using a Reproductive Justice Framework* 7 (2007), <https://www.geneticsandsociety.org/sites/default/files/ART.pdf> [<https://perma.cc/52FM-4WWE>] (noting that sexually transmitted infections, such as chlamydia, play a major role in infertility because they can cause damage to reproductive tissues and lead to infertility if left untreated).

77. See *id.* at 8 (“Women of color experience a disproportionately high rate of infertility, due to lack of access to health care and health education (and therefore have higher rates of [sexually transmitted infections] and lower rates of treatment) . . .”).

78. See Infertility FAQs, CDC, <https://www.cdc.gov/reproductivehealth/infertility> [<https://perma.cc/A28S-TQY5>] (last visited Oct. 29, 2020) (“PCOS is a condition that causes women to not ovulate, or to ovulate irregularly . . . PCOS is the most common cause of female infertility.”); see also Mundy, *supra* note 67 (noting that “[t]he poor frequently suffer from morbid obesity and diabetes, both of which create hormonal imbalances that can lead to infertility”).

79. Curtis, *supra* note 74, at 330 (“Research has found that women who had a low socioeconomic status during childhood were at an increased risk of PCOS.”); see also Sharon Stein Merkin, Ricardo Azziz, Teresa Seeman, Ronit Calderon-Margalit, Martha Daviglius, Catarina Kiefe, Karen Matthews, Barbara Sternfeld & David Siscovick, *Socioeconomic Status and Polycystic Ovary Syndrome*, 20 *J. Women’s Health* 413, 418 (2011) (concluding that while there is “an association between low childhood [socioeconomic status] and PCOS,” this association is limited to “those who later achieve high personal education”).

environments that compromise their health.<sup>80</sup> They are more likely to live close to highways, factories, mining facilities, landfills, and other locally unwanted land uses that emit toxins and pollute surrounding communities.<sup>81</sup> Infertility is one of the variety of harms caused by exposure to toxic air, water, and land.<sup>82</sup> Moreover, low-income people are less able to take measures—like drinking bottled water instead of tap water or staying indoors when the air quality outside is poor<sup>83</sup>—that are available to wealthier people to avoid the harms of these environmental hazards.<sup>84</sup> Thus, environmental injustice contributes to higher rates of infertility among the poor.

Additionally, there is some research that supports the notion that stress negatively impacts the ability to conceive.<sup>85</sup> It may be stating the obvious to observe that poverty increases the amount of stress an individual endures.<sup>86</sup> Indeed, it may not be hyperbole to assert that being stressed is

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80. See *infra* notes 157–161 and accompanying text.

81. See *infra* notes 157–161 and accompanying text.

82. See Catheryne Chiang, Sharada Mahalingam & Jodi A. Flaws, *Environmental Contaminants Affecting Fertility and Somatic Health* 2–8 (May 2017) (unpublished manuscript) (on file with the *Columbia Law Review*) (indicating that several environmental toxicants are significantly associated with reduced fertility parameters in men and women).

83. See Sarah Mizes-Tan, *Wildfire Smoke Poses Greatest Risk to Low-Income Residents, People of Color, Experts Say*, CapRadio (Aug. 20, 2020), <https://www.capradio.org/articles/2020/08/20/wildfire-smoke-poses-greatest-risk-to-low-income-residents-people-of-color-experts-say> [<https://perma.cc/9L8P-ETXD>] (describing health officials' warnings to avoid inhaling smoke from the wildfires in Washington, Oregon, and California in September 2020 and explaining that "lower-income residents [were] more susceptible to wildfire smoke 'because they have greater exposure due to . . . substandard housing or [having] . . . jobs that require them to be outside'" (quoting Anne Kelsey Lamb, Director of Regional Asthma Management and Prevention)).

84. See Curtis, *supra* note 74, at 331–32 (“[F]or many low-income women, it is extremely difficult to evade contact with these toxins because [they] are more likely . . . to work in a job where they are regularly exposed to chemical contaminants . . . that may adversely affect fertility.”). Curtis goes on to note that low-income women are also less likely to be able to afford organic foods without pesticides or to live in a home not contaminated with lead paint. *Id.* at 332.

85. See *id.* (noting a study that “found that women who reported feeling more stressed than usual during their ovulatory window were forty percent less likely to become pregnant that month”); NIH Study Indicates Stress May Delay Women Getting Pregnant, NIH (Aug. 11, 2010), <https://www.nih.gov/news-events/news-releases/nih-study-indicates-stress-may-delay-women-getting-pregnant> [<https://perma.cc/3XAE-VNTG>] (documenting an association between high levels of a substance indicative of stress and a reduced chance of becoming pregnant). It is important to note, however, that the relationship between stress and infertility—specifically, whether stress causes infertility—is far from established. See Kristin L. Rooney & Alice D. Domar, *The Relationship Between Stress and Infertility*, 20 *Dialogues Clinical Neurosci.* 41, 42 (2018) (noting that “[i]t has been hypothesized since biblical times that stress can hamper fertility” and stating that “the relationship between distress and infertility may not have a clear cause and effect direction”).

86. See generally Carol Graham, *The High Costs of Being Poor in America: Stress, Pain, and Worry*, Brookings (Feb. 19, 2015), <https://www.brookings.edu/blog/social->

the existential condition of the impoverished person. When impoverished, one has a host of things to worry about—including the ability to ensure one’s physical safety, the ability to attain basic necessities (i.e., food, clothing, shelter, healthcare) for oneself and one’s dependents, the ability to find and retain a job, the ability to make ends meet despite having a job, etc. If stress has a negative effect on the ability to conceive, there should be little doubt that low-income people experience these stress-induced effects much more frequently, and to a much more profound degree, than their more affluent counterparts.

At the same time that low-income people are more likely to encounter infertility, the federal government and state governments have refused to include infertility services and treatment among the benefits covered in the health insurance program designed to help the poor access healthcare. That is, the Medicaid program—intended to provide free or low-cost healthcare to low-income people—largely does not cover infertility treatments and services.<sup>87</sup>

The Medicaid program is jointly funded by both the federal government and state governments.<sup>88</sup> While states administer their own Medicaid programs, they must design and deliver their programs in line with federal rules in order to receive federal funds.<sup>89</sup> Similarly, while the federal government requires states to offer certain mandatory benefits, states also

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mobility-memos/2015/02/19/the-high-costs-of-being-poor-in-america-stress-pain-and-worry [https://perma.cc/ZM7U-RBXU] (describing how, on average, low-income individuals experience more “pain, worry, sadness, and anger” and feel less satisfaction with life as whole than their wealthier counterparts).

87. In truth, even private health insurance plans seldom cover infertility treatments. Only fourteen states require insurers to cover infertility treatments in all of the plans that are sold in the state. State Laws Related to Insurance Coverage for Infertility Treatment, Nat’l Conf. of State Legislatures (June 12, 2019), <http://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx> [https://perma.cc/9LVJ-439Q]. Another two require insurers to do no more than offer plans that provide coverage of infertility treatments. *Id.* This means that in thirty-four states, people who wish to have the costs of their infertility treatments covered by their health insurance plans are left to hope that insurance providers will determine that providing that coverage is worthwhile, i.e., that covering infertility treatments will generate a profit or will not eat into profits substantially. As it turns out, that hope is often dashed. As Curtis notes, “A study conducted in 2013 found that . . . forty-one percent [of businesses with more than 500 employees] will cover drug therapies, while just twenty-seven percent cover IVF.” Curtis, *supra* note 74, at 328.

While it is true that the coverage of infertility treatments in private health insurance programs is patchy and parsimonious, this coverage is still more generous than that found in Medicaid programs.

88. See Financial Management, Medicaid.gov, <https://www.medicaid.gov/medicaid/financial-management/index.html> [https://perma.cc/796E-X7GP] (last visited Oct. 29, 2020).

89. See Policy Basics: Introduction to Medicaid, Ctr. on Budget & Pol’y Priorities, <https://www.cbpp.org/research/health/policy-basics-introduction-to-medicaid> [https://perma.cc/VN5Q-LQK9] (last updated Apr. 14, 2020).

have the option to offer other, additional benefits.<sup>90</sup> The federal government will then cover some portion of the costs of both mandatory and optional benefits.<sup>91</sup>

Included in the itemization of optional benefits are other “[d]iagnostic, screening, preventive, and rehabilitative services.”<sup>92</sup> This has been interpreted to include testing that will identify the cause of infertility in an individual.<sup>93</sup> Although the federal government is willing to share some of the costs associated with helping individuals discover the medical reasons for their infertility, states have not jumped at the chance to include diagnostic services pertaining to infertility among the benefits that they offer in their Medicaid programs. In a recent survey intended to identify the variations in family planning benefits among the states, only five of forty-one responding states reported providing coverage of diagnostic testing to both men and women.<sup>94</sup>

Importantly, infertility *treatments* are neither included among mandatory benefits nor optional benefits.<sup>95</sup> Consequently, if states choose to offer benefits in their Medicaid programs related to *treating* infertility, they do so without the help of federal funds. This may explain why *no* state, with

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90. See *id.*

91. See *id.* There is a last category of benefits: those to which the federal government refuses to contribute any funds even when offered in state programs. Relevantly, the Hyde Amendment prohibits federal funds from being used to cover abortion care—including when that care is medically indicated—except when the pregnancy is the result of rape or incest, or when continuation of the pregnancy threatens the life of the pregnant person. See *Harris v. McRae*, 448 U.S. 297, 302, 326–27 (1980) (describing the history and context of the Hyde Amendment and upholding it). Accordingly, if states do choose to cover abortion services in their Medicaid programs, they bear those costs entirely on their own. As one would expect, the states that cover abortion services in their Medicaid programs are largely wealthier states. See *State Funding of Abortions Under Medicaid*, Kaiser Fam. Found., <https://www.kff.org/medicaid/state-indicator/abortion-under-medicare> [<https://perma.cc/3CLX-VX2R>] (last updated Sept. 1, 2020) (showing that states such as Alaska, California, Montana, New York, and Illinois all cover abortion in their Medicaid programs).

92. 42 C.F.R. § 440.130 (2019).

93. See Jenna Walls, Kathy Gifford, Usha Ranji, Alina Salganicoff & Ivette Gomez, *Medicaid Coverage of Family Planning Benefits: Results from a State Survey*, Kaiser Fam. Found. (Sept. 15, 2016), <https://www.kff.org/report-section/medicaid-coverage-of-family-planning-benefits-results-from-a-state-survey-fertility-services> [<https://perma.cc/MEB2-EADG>] (“States may cover diagnostic services to detect the underlying medical reasons for infertility.”).

94. *Id.* (“Overall, five states provide the coverage for both genders in all of their eligibility pathways: Arkansas, Hawaii, Massachusetts, Maryland, and Nebraska.”).

95. *Id.* (“There are no federal requirements for state Medicaid programs to cover fertility testing or treatment such as medications, intrauterine insemination, or in-vitro fertilization for individuals enrolled in Medicaid. States may cover diagnostic services to detect the underlying medical reasons for infertility.”).

one slight exception, has elected to offer benefits related to infertility treatments.<sup>96</sup> While Nebraska's Medicaid program covers infertility treatments, this treatment is only available "when infertility is a symptom of a separate medical problem."<sup>97</sup> Moreover, the treatment that Nebraska covers does not extend to the most expensive interventions, like intrauterine insemination or in-vitro fertilization.<sup>98</sup>

The policy choice not to cover infertility treatments in state Medicaid programs means that this treatment, for the most part, is out of reach for low-income individuals. Indeed, even many *affluent* people find the costs associated with overcoming infertility to be overwhelming:<sup>99</sup> Many class-

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96. See *id.* Interestingly, "family planning services and supplies" are included among the benefits that states are mandated to offer in order to participate in the Medicaid program. Social Security Act, 42 U.S.C. § 1396d(a)(4)(C) (2018). The mandatory family planning benefit provides coverage for services and supplies to prevent or delay pregnancy and may include education and counseling in the method of contraception desired or currently in use by the individual and a medical visit to change the method of contraception. See Letter from HHS to State Health Off. 1 (June 14, 2016), <https://www.medicaid.gov/federal-policy-guidance/downloads/sho16008.pdf> [<https://perma.cc/V568-AA2B>]. When one reads the government's insistence upon ensuring that low-income people have access to the contraception that they need to prevent pregnancy together with the government's refusal to ensure that low-income people can overcome health-related impediments to pregnancy, the profoundly antinatalist stance that the government has taken vis-à-vis low-income people becomes apparent. See Mundy, *supra* note 67 (observing that Medicaid patients "are offered a spectacular variety of contraceptive devices, but no fertility treatment" and quoting a midwife who noted that the state is not going to "pay for someone to get pregnant who can't even afford health care"). We may wonder how discourses about the poor—discourses that imagine them to be lazy, immoral, and bad for the nation—inform this antinatalism. See Bridges, *supra* note 66, at 179–205 ("We, as a society, do not trust poor women and poor mothers . . . . We believe that poor women and poor mothers are not good enough for liberalism—that, if they are left to their own devices, they will not lead a moral life. Hence, state intervention, coercion, and regulation.").

97. Walls et al., *supra* note 93.

98. See *id.* (noting that Nebraska's coverage only extends to "medication[s] such as clomid and hCG," both of which stimulate ovulation in individuals experiencing infertility).

99. For example, the cost to conceive a child through IVF ranges from \$44,000 to \$211,940 in 1992 dollars, which could amount to the entire annual income of an affluent American family. See Marissa A. Mastroianni, Note, Bridging the Gap Between the "Have" and the "Have-Nots": The ACA Prohibits Insurance Coverage Discrimination Based upon Infertility Status, 79 Alb. L. Rev. 151, 156–59 (2015) (documenting the varying types of infertility treatments and the costs associated with each treatment). The *New York Times* published an article offering advice to its readership—which tends to be middle- to high-income—on how to manage the exorbitant costs of IVF. See Amy Klein, I.V.F. Is Expensive. Here's How to Bring Down the Cost., *N.Y. Times* (Apr. 18, 2020), <https://www.nytimes.com/article/ivf-treatment-costs-guide.html> (on file with the *Columbia Law Review*); see also Alex Pareene, Here's a Better Reason to Unsubscribe from the *New York Times*, *New Republic* (Aug. 9, 2019), <https://newrepublic.com/article/154726/heres-better-reason-unsubscribe-new-york-times> (on file with the *Columbia Law Review*) (reporting that readers of the *New York Times* print and website editions have "median household income[s] of \$191,000 . . . and \$96,000" respectively); Pew Rsch. Ctr., Trends in News Consumption: 1991–2012: In Changing News Landscape, Even Television Is Vulnerable 38 (2012),

privileged people go into debt in order to overcome infertility.<sup>100</sup> Because of the incredibly cost-prohibitive nature of infertility treatments, it is no wonder that most studies show incredibly low rates of usage of infertility services among low-income people.<sup>101</sup>

The states' failures to help indigent individuals recoup some of their lost fertility by covering infertility services and treatments in Medicaid programs is appropriately understood as a species of state-inflicted

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<https://www.pewresearch.org/politics/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable> (on file with the *Columbia Law Review*) (showing that only twenty-six percent of the readership of the *New York Times* had an annual income under \$30,000 while thirty-eight percent of its readership had incomes over \$75,000).

100. According to Melissa Jacoby, "A review of case law, scholarly commentary, and the media reveals . . . references to paying for fertility treatments . . . with home-equity loans, credit cards, or general loans." Melissa B. Jacoby, *The Debt Financing of Parenthood*, 72 *Law & Contemp. Probs.* 147, 158–59 (2009) (citations omitted). Some people who incur debt to overcome fertility barriers are pushed into bankruptcy. In response to a question about the source of financial turmoil, one bankruptcy filer reported:

Our problems mainly stemmed from infertility. My husband [and] I both had two surgeries and insurance covered very little. We have spent the last five years trying to figure out why we couldn't have a baby. I went through numerous procedures [and] nothing worked. We got in over our heads because [it's] something I wanted so badly. We ended up finding out 2 m[on]ths after we first talked to the bankruptcy lawyer that we we[re] pregnant.

*Id.* at 159 (alterations in original) (internal quotation marks omitted) (quoting Case # W3-0938H, 2007 Consumer Bankr. Project).

101. See, e.g., J. Farley Ordovensky Staniec & Natalie J. Webb, *Utilization of Infertility Services: How Much Does Money Matter?*, 42 *Health Servs. Rsch.* 971, 974 tbl.1 (2007) (showing that 9.8 percent of infertile people whose incomes were less than 150 percent of the federal poverty level sought help for their infertility, while 47.1 percent of infertile people whose incomes were more than 400 percent of the federal poverty level did the same). Staniec and Webb's study also shows that while 14.3 percent of infertile people with public health insurance or no health insurance at all reported seeking help for their infertility, 85.7 percent of infertile people with private health insurance or health insurance provided through the military reported the same. *Id.*

Staniec and Webb ultimately conclude that "[n]either income nor insurance influences the likelihood of seeking advice, a relatively low cost but similarly low yield activity," but that "the choice to pursue ART—a much more expensive but potentially more productive option—is highly influenced by income." *Id.* at 985. Thus, their research serves as a caution: Even advice-seeking may fall within the category of "infertility services." This should be kept in mind when one confronts statistics that purport to show that poor people utilize infertility services in significant numbers—they may simply be seeking advice. See, e.g., Anjani Chandra, Casey E. Copen & Elizabeth Hervey Stephen, *Infertility Service Use in the United States: Data from the National Survey of Family Growth, 1982–2010*, 73 *Nat'l Health Stat. Rep.* 1, 13 tbl.2 (2014) (showing that from 2006 to 2010, 12.9 percent of women between the ages of fifteen and forty-four who lived below the poverty line reported using infertility services, compared to 20.8 percent of women whose incomes were more than 400 percent of the poverty level). These numbers do not mean that poor people are accessing medications, surgeries, or other interventions that could help them overcome their infertility. It is much more likely that these numbers mean that some significant portion of indigent people seek counsel from a doctor when they encounter trouble getting pregnant.

procreation deprived. Depriving procreation in this way seems even more cruel when read in light of the fact that infertility is often the result of untreated sexually transmitted infections.<sup>102</sup> This is to say that many poor people who cannot turn to Medicaid to help them recoup some of their lost fertility would not have lost their fertility in the first instance had the state ensured that basic healthcare—in the form of a physician, nurse, or other healthcare provider who could prescribe antibiotics for a simple, easily cured infection—was available to its poorest citizens.

Depriving procreation through the refusal to offer Medicaid coverage of benefits related to infertility appears even more brutal when we understand that environmental hazards can lead to infertility, and the state is in the best position to prevent these environmental harms from ever coming to pass.<sup>103</sup> Thus, the state fails its citizens by failing to protect them from infertility-causing pollution, and then it fails its citizens by refusing to help them overcome the infertility that pollution has caused. We see that state-inflicted procreation deprived oftentimes is the result of a series of state failures.

#### B. *State-Inflicted Procreation Imposed*

The state imposes procreation in a breathtaking number of ways. It imposes procreation when it adopts a “global gag rule,” which prohibits nongovernmental organizations that receive funds from the federal government from providing abortion services or engaging in any advocacy for expanding abortion access.<sup>104</sup> The state imposes procreation when it fails to adequately fund its Title X program—which is designed to provide family planning services to low-income people—thus making it more difficult for low-income people to access contraception.<sup>105</sup> The state imposes procreation by preventing providers who receive Title X funds from informing their patients about the full range of reproductive options available to them, including abortion.<sup>106</sup> The state imposes procreation

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102. See *supra* note 75 and accompanying text.

103. For a more detailed discussion of this, see *infra* section II.C.

104. See Planned Parenthood, *Assessing the Global Gag Rule: Harms to Health, Communities, and Advocacy* 7–8, [https://www.plannedparenthood.org/uploads/filer\\_public/81/9d/819d9000-5350-4ea3-b699-1f12d59ec67f/181231-ggr-d09.pdf](https://www.plannedparenthood.org/uploads/filer_public/81/9d/819d9000-5350-4ea3-b699-1f12d59ec67f/181231-ggr-d09.pdf) [<https://perma.cc/U6KU-4SSS>] (last visited Oct. 29, 2020) (exploring the creation, expansion, and impacts of the global gag rule).

105. It is worth noting that “the gap between the funds appropriated and the funds needed has . . . grown in recent years. From 2010 to 2016, the number of women in need of publicly funded family planning services increased by 1.5 million, but Congress cut Title X’s funding by \$31 million over that period.” Title X Family Planning Program, Nat’l Med. Ass’n (May 22, 2020), <https://www.nmanet.org/news/507898/Title-X-Family-Planning-Program.htm> (on file with the *Columbia Law Review*).

106. In March 2019, the Trump Administration finalized a “domestic gag rule” mandating that Title X funding “not support programs where abortion is a method of family planning.” Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714,

when it refuses to allow state Medicaid programs to use federal funds to cover abortion care, even when continuing the pregnancy would endanger the pregnant person's health.<sup>107</sup> Similarly, the state imposes procreation when it prohibits the use of federal funds to cover abortion care through the Indian Health Services.<sup>108</sup> The state also imposes procreation when it refuses to provide its young citizens comprehensive sex education in public schools.<sup>109</sup>

And, of course, the state imposes procreation when it acts to limit—or eliminate—abortion care in the state.<sup>110</sup> Louisiana recently attempted this last technique of state-inflicted procreation imposed. In 2014, Louisiana passed Act 620, which both required physicians who perform abortions in the state to have admitting privileges at a nearby hospital and

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7715 (Mar. 4, 2019) (codified at 42 C.F.R. § 59 (2019)). President Reagan proposed a version of the domestic gag in 1988, which the Supreme Court upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991), but this rule was never implemented and was rescinded under President Clinton in 1990. See Center for Reproductive Rights Denounces Trump Administration's Attack on Title X Family Planning Program, Ctr. for Reprod. Rts. (May 5, 2018), <https://reproductiverights.org/Center-Denounces-Trump-Administration-Attack-Title-X-Family-Planning-Program> [<https://perma.cc/2Q5S-WSD4>].

107. See *Harris v. McRae*, 448 U.S. 297, 302, 326 (1980) (upholding the “Hyde Amendment” to the Medicaid Act, Title XIX of the Social Security Act, which bars the use of federal funds, including federal Medicaid, to cover abortion care except in the case of rape, incest, or physical danger to the life of the mother).

108. The Hyde Amendment has a profound impact on Indian Health Services (IHS), which relies exclusively on federal funds for its operating budget. See Rebecca A. Hart, *Federal Reservations: Assault, Access to Abortion, and the Federal Government's Failure to End Violence Against Native American Women 23* (2009) (unpublished manuscript) (on file with the *Columbia Law Review*). In response to the Hyde Amendment, the IHS announced regulations stating that no IHS facility may provide a woman with an abortion unless her pregnancy is a result of rape or incest, or the life of the mother is in danger. *Id.*

109. For example, sex education in Louisiana public schools must “emphasize abstinence” as a “way to avoid unwanted pregnancy,” leaving young people who could become pregnant at a disadvantage when it comes to acquiring accurate information about contraception. See La. Stat. Ann. § 17:281(A)(4)(a)–(b) (2020). The lack of comprehensive sex education in the state's public schools may help to explain why Louisiana's rates of teenage pregnancies and teenage births are some of the highest in the nation. See Sexual Health Education, Lift La., <https://liftlouisiana.org/issues/sexual-health-education> [<https://perma.cc/8Y95-9SZP>] (last visited Oct. 29, 2020).

Fox helpfully divides cases involving procreation imposed into those that concern “post-conception errors that prevent people from ending an unwanted pregnancy” and those that concern “pre-conception ones that force them into pregnancy to begin with.” Fox, *supra* note 5, at 113 (emphasis omitted). In this way, we may understand the refusal to provide comprehensive sex education in public schools as constituting a pre-conception means to impose procreation. Meanwhile, regulations that restrict abortion access, like those that seek to close abortion clinics or prohibit providers from informing pregnant people about the existence of abortion care, are a postconception means by which procreation is imposed.

110. See Fox, *supra* note 5, at 113.



required facilities in which abortions are performed to meet the specifications of an ambulatory surgical center. This would have resulted in the closure of two out of the state's three abortion clinics.<sup>111</sup> The Court struck down the regulation in 2020 in *June Medical Services L.L.C. v. Russo*.<sup>112</sup> Had the law been upheld, it would have worked to impose procreation on women and other people with the capacity for pregnancy in the state.

There is no doubt that Fox's description of privately inflicted procreation imposed also accurately describes the harms that Louisiana sought to inflict on people of reproductive age in the state. Fox writes:

The injury of imposed procreation isn't a baby's birth or a fetus's existence. Nor is that harm the fact that only women get pregnant,<sup>113</sup> or that parenthood necessarily oppresses them. "The loss lies in how [a third party's] misconduct foreseeably displaces a person's plans and prospects for a life without a fetus to carry or child to raise."<sup>114</sup>

What Fox recognizes as the harm of procreation imposed is just as applicable when a private actor inflicts the harm as when the state commits the reproductive wrong. Moreover, since Fox's analysis is grounded in torts—a domain that attempts to make *individuals* who have been injured whole—Fox does not theorize the harms of procreation imposed that look beyond the individual who has had parenthood foisted upon her. In truth, Fox's analysis deepens when we interrogate the *social* significance of imposing procreation on individuals.

In Louisiana—as well as nationally—the individuals on whom the state imposes procreation through abortion restrictions do not come equally from all walks of life. The individuals who are victims of state-inflicted procreation imposed through abortion restrictions are disproportionately black.<sup>115</sup> Further, states committed to limiting or eliminating

111. See *June Med. Servs., L.L.C. v. Gee*, 913 F.3d 573, 577 (5th Cir. 2019) (Dennis, J., dissenting) (per curiam) (noting that, if the law went into effect, "[t]wo of the three remaining abortion clinics would be forced to close as they would have no physician with legally sufficient admitting privileges"); *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 805–06 (5th Cir. 2018) (noting that "the Act brings the requirements regarding outpatient abortion clinics into conformity with the preexisting requirement that physicians at ambulatory surgical centers . . . must have privileges at a hospital within the community" (emphasis omitted)), rev'd sub nom. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

112. 140 S. Ct. at 2113.

113. Fox acknowledges that cisgender women are not the only people with the capacity for pregnancy. See Fox, *supra* note 5, at 17 ("Women gestate and give birth. Men don't. If they're not transgender, they can't."). Nevertheless, throughout the book, he uses "women" to refer to those who can become pregnant.

114. *Id.* at 118.

115. See La. Dep't of Health State Registrar & Vital Recs., *Induced Terminations of Pregnancy by Weeks of Gestation, Race, Age, and Marital Status Reported Occurring in Louisiana*, 2018, at 1 (2018), [http://ldh.la.gov/assets/oph/Center-RS/vitalrec/leers/ITOP/ITOP\\_Reports/Ap18\\_T21.pdf](http://ldh.la.gov/assets/oph/Center-RS/vitalrec/leers/ITOP/ITOP_Reports/Ap18_T21.pdf) [<https://perma.cc/F8HJ-F5Z7>] (revealing that black

abortion access have put black people's disproportionate reliance on abortion care to anti-choice ends. Race-selective abortion bans, which are on the books in several states, prohibit doctors from performing an abortion when the pregnant person is terminating her pregnancy because of the fetus's race.<sup>116</sup> The purported motivation behind race-selective abortion bans is black people's overrepresentation among those who acquire abortions.<sup>117</sup> Legislators who have supported these bans have suggested that black people's disproportionate reliance on abortion care is evidence that eugenicists are plotting to decimate the black race—and they are succeeding.<sup>118</sup> In essence, legislators have used the demographics of those who turn to abortion services to support laws that would restrict abortion and, in so doing, impose procreation.

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women made up sixty-one percent of abortion patients in the state in 2018). A summary report of abortion data provided to the CDC in 2014 found that non-Hispanic black women had the highest abortion rate (26.6 abortions per 1,000 women aged fifteen to forty-four years) and ratio (417 abortions per 1,000 live births) compared to all other racial groups. See Tara C. Jatlaoui, Jill Shah, Michele G. Mandel, Jamie W. Krashin, Danielle B. Suchdev, Denise J. Jamieson & Karen Pazol, *Abortion Surveillance—United States, 2014*, *Morbidity & Mortality Wkly. Rep.*, Nov. 2017, at 1, 8 (documenting the number and characteristics of women obtaining legal, induced abortions in the United States).

The stakes of imposing reproduction on black women are made even higher by the fact that, nationally, black women are three to four times more likely than white women to die during pregnancy, childbirth, or shortly thereafter. See *Reproductive Health: Pregnancy-Related Deaths*, CDC, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-relatedmortality.htm> [<https://perma.cc/5XTZ-FGUE>] (last updated Feb. 26, 2019). Thus, when the state restricts abortion access and thereby compels individuals to carry their pregnancies to term, they are compelling black women to engage in an endeavor that is much deadlier to them than it is to their white counterparts.

116. See, e.g., Ind. Code § 16-34-4-8 (2020); see also *id.* §§ 16-34-4-6 to 16-34-4-7 (codifying the prohibition of disability-selective abortions). It is worth noting that these laws defy simple logic. It is difficult to imagine that, of all the reasons that inform a pregnant person's decision not to carry a pregnancy to term, the fetus's race is one of them. Having recognized this, the text of laws that ban abortions on the basis of race makes clear that what they anticipate is not that a person will terminate a pregnancy because her fetus is black or multiracial, but rather that third parties will encourage a pregnant person to terminate a pregnancy because that person is black. See Mary Ziegler, *Roe's Race: The Supreme Court, Population Control, and Reproductive Justice*, 25 *Yale J.L. & Feminism* 1, 5–6 (2013) (“Concerns about race and abortion also helped to motivate the first law in the nation, passed in Arizona, to ban race-selection abortions. Debate on that bill turned on whether or not there was evidence that abortion providers associated with or were themselves racists . . .” (footnotes omitted)).

117. See April Shaw, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40 *N.Y.U. Rev. L. & Soc. Change* 545, 567–69 (2016).

118. See *id.* at 568 (noting that proponents of race-selective abortion bans cite “the higher rate of abortion among black women” as justification for the laws). Congressman Trent Franks, who proposed a race-selective abortion ban at the federal level, argued that the bill was needed because “far more of the African American community is being devastated by the politics of today than were devastated by the policies of slavery.” *Id.* (internal quotation marks omitted).

In *Box v. Planned Parenthood of Indiana and Kentucky*, the Court declined to review the constitutionality of Indiana's ban on race-, sex-, and disability-selective abortions.<sup>119</sup> While Justice Thomas concurred in the Court's decision to deny certiorari, he used the occasion to recount the close relationship that Planned Parenthood's founder, Margaret Sanger, once had with the eugenics movement.<sup>120</sup> The thrust of his intervention was to argue that the disproportionate number of black people who rely on abortion care today reveals that Sanger's genocidal plot to annihilate the black race is working.<sup>121</sup> He writes:

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119. 139 S. Ct. 1780, 1782 (2019). The Court explained that it would follow its usual practice of deciding a legal question only after a number of circuit courts have considered the question. *Id.* At the time of *Box*, only the Seventh Circuit had spoken on the constitutionality of reasons-based abortion bans, concluding that they were unconstitutional under existing precedent. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300, 302 (7th Cir. 2018). Of note, the Sixth Circuit granted a rehearing en banc to decide the constitutionality of Ohio's disability-selective abortion ban. *Preterm-Cleveland v. Himes*, 944 F.3d 630, 631 (6th Cir. 2019). A Sixth Circuit decision—especially one that concludes that the ban is constitutional—will set the stage for the Court to rule on the constitutionality of these types of abortion regulations.

120. See *Box*, 139 S. Ct. at 1783–74 (Thomas, J., concurring).

121. Most historians who have weighed in on Justice Thomas's concurrence have concluded that his opinion is historically inaccurate. See Eli Rosenberg, Clarence Thomas Tried to Link Abortion to Eugenics. Seven Historians Told the *Post* He's Wrong, *Wash. Post* (May 30, 2019), <https://www.washingtonpost.com/history/2019/05/31/clarence-thomas-tried-link-abortion-eugenics-seven-historians-told-post-hes-wrong> (on file with the *Columbia Law Review*); see also Mary Ziegler, What Clarence Thomas Gets Wrong About the Ties Between Abortion and Eugenics, *Wash. Post* (May 30, 2019), <https://www.washingtonpost.com/outlook/2019/05/30/what-clarence-thomas-gets-wrong-about-ties-between-abortion-eugenics> (on file with the *Columbia Law Review*). Justice Thomas endeavors to impeach the legitimacy of birth control and abortion by linking them both to the eugenics movement. But historians have explained that while the eugenics and the birth control movements were contemporaries, they were not one and the same. See Adam Cohen, Clarence Thomas Knows Nothing of My Work, *Atlantic* (May 29, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/clarence-thomas-used-my-book-argue-against-abortion/590455> (on file with the *Columbia Law Review*). In fact, many eugenicists were wary of birth control because they were afraid that wealthy, nonimmigrant white women would use it and, in so doing, reduce the rates at which “genteel” white babies would be born. Notably, Charles Davenport, a biologist and famous eugenicist of the early 1990s, was against birth control, fearing that “birth control would only be used by wealthy women and thus have the opposite effect of promoting the genetic proliferation of the people that many eugenicists” thought were problematic. See Rosenberg, *supra*.

As the eugenics movement cannot be linked to the birth control movement, the birth control movement cannot be linked to abortion rights advocacy. Many birth control advocates, including Margaret Sanger, opposed abortion. See *id.* (“[L]eading eugenicists and organizations of the day were largely opposed to abortion and birth control.”). Indeed, Sanger described abortion as a “horror.” See Margaret Sanger, Address at the International Congress of the World Fellowship of Faiths: Woman of the Future (Sept. 3, 1933), <https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=236121.xml> [<https://perma.cc/RFH7-BNZZ>]. Thus, Thomas gets it wrong when he links birth control advocacy to abortion rights advocacy. And he gets it wrong when he links both to the eugenics movement.

Sanger herself campaigned for birth control in black communities. In 1930, she opened a birth-control clinic in Harlem. Then, in 1939, Sanger initiated the “Negro Project,” an effort to promote birth control in poor, Southern black communities . . . . In a report titled “Birth Control and the Negro,” Sanger and her coauthors identified blacks as “the great problem of the South”—“the group with ‘the greatest economic, health, and social problems’”—and developed a birth-control program geared toward this population. She later emphasized that black ministers should be involved in the program, noting, “We do not want word to go out that we want to exterminate the Negro population, and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members.”

Eight decades after Sanger’s “Negro Project,” abortion in the United States is . . . marked by a considerable racial disparity. The reported nationwide abortion ratio—the number of abortions per 1,000 live births—among black women is nearly 3.5 times the ratio for white women. And there are areas of New York City in which black children are more likely to be aborted than they are to be born alive—and are up to eight times more likely to be aborted than white children in the same area.<sup>122</sup>

Perhaps intentionally, Thomas misses the actual significance of black people’s disproportionate reliance on abortion care. The reality is that black people across the country are living within breathtakingly constrained social conditions. They are poor.<sup>123</sup> They are uninsured.<sup>124</sup> They have little to no access to contraception.<sup>125</sup> They have attended schools

122. *Box*, 139 S. Ct. at 1788–91 (Thomas, J., concurring) (citations omitted).

123. “The official poverty threshold for a family of four with two children in 2014 was \$24,008; in 2014, a quarter of Black women (24.6 percent) aged 18 and older had family incomes below this threshold.” Asha DuMonthier, Chandra Childers & Jessica Milli, *Inst. for Women’s Pol’y Rsch.*, *The Status of Black Women in the United States* 74 (2017), <https://iwpr.org/wp-content/uploads/2020/08/The-Status-of-Black-Women-6.26.17.pdf> [<https://perma.cc/2RW8-76AG>]. Additionally, “Black women experience high levels of poverty across age groups. More than three of ten Black women millennials live below the poverty line (31.5 percent) . . . . About one-fifth of Black women aged 65 and older live below poverty (19.5 percent).” *Id.* (footnote omitted).

124. In 2014, 24.5 percent of black women and 18.9 percent of black men were uninsured in America. *Id.* at 67. Being without health insurance, of course, makes accessing effective contraception much more difficult—thereby increasing the likelihood of an unintended pregnancy and the consequent need to turn to abortion services. See Brief of Amici Curiae Reproductive Justice Scholars Supporting Petitioners—Cross-Respondents at 14, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460), 2019 WL 6609232 [hereinafter *June Medical* Amicus Brief].

125. Black women’s higher rate of unintended pregnancy is due, in significant part, to their encountering barriers to obtaining safe and effective contraception. See Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 *Guttmacher Pol’y Rev.* 2, 2–4 (2008). Factors that make safe and effective contraception difficult for black women to

that failed to provide them with factual information about pregnancy and how to prevent it.<sup>126</sup> They face violence in a multiplicity of forms.<sup>127</sup> For black people, then, abortion is a tool that helps them navigate poverty, violence, vulnerability, and the state's abdication of its basic responsibilities to its citizens. To suggest—as have Justice Thomas, supporters of race-selective abortion bans, and others seeking to limit abortion access<sup>128</sup>—

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acquire include the scarcity of geographically accessible reproductive healthcare, the financial inaccessibility of more reliable, but “usually more expensive,” prescription contraceptives, and a basic unavailability of general medical care. *Id.* at 4.

126. Thirty-nine states and Washington, D.C., require provision of information on abstinence in public schools. Of those thirty-nine states, twenty-nine require that abstinence be *stressed*. Sex and HIV Education, Guttmacher Inst., <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> [<https://perma.cc/3D46-H7BK>] (last updated Mar. 1, 2021). These abstinence requirements can prevent students from receiving adequate information about contraception. For example, “Because reproductive health education instruction in Louisiana public schools must ‘emphasize abstinence’ [sic] as a ‘way to avoid unwanted pregnancy,’ black women and girls who are educated in public schools in the state may not get accurate information about contraception and pregnancy prevention from their schools.” See *June Medical* Amicus Brief, *supra* note 124, at 15–16 (quoting La. Stat. Ann. § 17:281(A)(4)(b) (1993) (misquotation)).

127. “Because black women disproportionately live in poverty, they experience intimate partner violence at higher rates than women of other races.” *June Medical* Amicus Brief, *supra* note 124, at 16 (footnote omitted) (citing DuMonthier et al., *supra* note 123, at xix; Carolyn M. West, *Black Women and Intimate Partner Violence: New Directions for Research*, 19 *J. Interpersonal Violence* 1487, 1487 (2004) (finding that when controlling for income levels, “racial differences in rates of partner abuse frequently disappear, or become less pronounced”). Further, scholars have noted that black women are also more likely than women of other races to be victims of rape during their lifetimes. *Id.* (citing DuMonthier et al., *supra* note 123, at 120–21). Scholars such as Charvonne Holliday and others have also noted that black women also experience “reproductive coercion”—that is, where their (usually male) partners actively attempt to impregnate them regardless of whether they want to get pregnant, “interfere with contraceptive use,” pressure their partners not to use contraception, or interfere with condom use—at higher rates than white women. *Id.* (citing Charvonne N. Holliday, Elizabeth Miller, Michele R. Decker, Jessica G. Burke, Patricia I. Documet, Sonya B. Borrero, Jay G. Silverman, Daniel J. Tancredi, Edmund Ricci & Heather L. McCauley, *Racial Differences in Pregnancy Intention, Reproductive Coercion, and Partner Violence Among Family Planning Clients: A Qualitative Exploration*, 28 *Women’s Health Issues* 205, 206 (2018)). Of course, all of these issues—the higher rate of intimate partner violence, sexual assault, and reproductive coercion among black women—when combined with a lack of safe and effective contraception lead to black women having higher rates of unintended pregnancies. See *id.* at 16–17. Higher rates of abortion directly follow from that fact.

128. Of course, Justice Thomas is not the only person making this argument. Prior Republican presidential candidates Herman Cain, Ted Cruz, and Ben Carson have long claimed the same. Becca Andrews, *How Anti-Abortion Advocates Are Co-Opting and Twisting Calls for Racial Justice*, *Mother Jones* (Aug. 14, 2020), <https://www.motherjones.com/politics/2020/08/abortion-reasons-ban-race-justice-language> [<https://perma.cc/284D-56HJ>]. People have sought to associate the argument with the Black Lives Matter movement. In 2015, conservative activist Star Parker told the *Washington Examiner*, “We can talk all day about ‘black lives matter,’ but if we exclude abortion from this discussion, we’ve excluded the fundamentals of this discussion.” *Id.*; see also *Frontline: Anti-Abortion*

that abortion today recalls the eugenic practices of yesteryear is to disregard the *will* of the pregnant person. Eugenics was about *coercion*; abortion in the twenty-first century is the product of a *choice*. Black people are choosing a form of healthcare that helps them negotiate the profound constraints that limit the fullness of their lives.

In fact, *denying* abortion access to black people is most akin to the eugenic practices of the early twentieth century. Abortion restrictions and eugenic sterilization both deny individuals the ability to control the direction that their reproductive lives will take.<sup>129</sup> As eugenicists sought to dictate the direction of people's reproductive capacities (away from parenthood), proponents of abortion restrictions seek to dictate the direction of people's reproductive capacities (toward parenthood).

Now, it may be tempting to describe the statistics documenting black people's disproportionate reliance on abortion care in terms of "autonomy" and "agency"—especially when we endeavor to distinguish the receipt of abortion in modern times from the eugenics movement of yesteryear. We may want to propose that while eugenicists trampled upon individual autonomy and agency in pursuit of a more "perfect" society, people who are having abortions today are engaged in a very different exercise: They are acting *autonomously* and with *agency* when they decide to terminate a pregnancy.<sup>130</sup> We may assert that statistics documenting black people's disproportionate reliance on abortion simply describe black people's autonomous and agential acts.

But while autonomy and agency may be important elements to the story behind black people's disproportionate turn to abortion care, it is important not to be too sanguine about how freely black people are electing to terminate pregnancies. As described above, black people elect to terminate their pregnancies within profound social constraints—i.e., within poverty, with a dearth of reproductive healthcare, while lacking

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Crusaders: Inside the African-American Abortion Battle (PBS television broadcast Dec. 15, 2017) (examining the way anti-abortion movements have capitalized on black people's marginalization to bolster arguments against abortion).

129. See Dorothy Roberts, Dorothy Roberts Argues that Justice Clarence Thomas's *Box v. Planned Parenthood* Concurrence Distorts History, U. Pa. Carey L. Sch. (June 6, 2019), <https://www.law.upenn.edu/live/news/9138-dorothy-roberts-argues-that-justice-clarence> [<https://perma.cc/P6T8-Y22J>] (arguing that eugenicists and proponents of abortion restrictions "both seek to control reproductive decision making for repressive political ends").

130. Indeed, the jurisprudence leads us toward using this language when speaking about those who have abortions, with abortion rights being described in the case law as instruments that ensure an individual's "reproductive autonomy." See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (stating that abortion "involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy").

information about contraception and the medical facts of sex and pregnancy, and amid violence.<sup>131</sup> We may wrongly elide the profundity of the structural violence under which black women live if we say that their choices around abortion are a product of their “autonomy” and “agency.”

The danger is that the language of “autonomy” and “agency” may suggest that we ought to celebrate the fact that tens of thousands of black people are undergoing abortions across the nation—at rates that far outstrip their nonblack counterparts. The truth, however, is that the number of black people getting abortions is not a cause for celebration. Those numbers are not triumphs. Instead, those numbers reflect profound marginalization.

This, of course, is a controversial argument to make. It is controversial because it problematizes black women’s disproportionate turn to abortion. And any argument that problematizes abortion in any way could easily be (mis)heard as claiming that abortion is wrong—that abortion, if it can be defended, is a “necessary evil.”<sup>132</sup> Framed in this way, abortion becomes a tragic thing that, unfortunately, must be tolerated.<sup>133</sup> Consequently, any argument that is critical of black women’s higher abortion

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131. See *supra* notes 96, 127–128 (discussing poverty as a cause of imposed procreation).

132. The Democratic Party’s shift away from insisting that abortion should be “safe, legal, and rare” is instructive here. Bill Clinton is credited with introducing the phrase in 1992 in his efforts to gain the political sympathies of those who “supported the right to an abortion in principle but still felt morally conflicted about the procedure.” Anna North, *How the Abortion Debate Moved Away from “Safe, Legal, and Rare”*, *Vox* (Oct. 18, 2019), <https://www.vox.com/2019/10/18/20917406/abortion-safe-legal-and-rare-tulsi-gabbard> (on file with the *Columbia Law Review*). Abortion rights supporters, however, resisted the framing of abortion as something that should be “rare,” arguing that it “implies that getting an abortion is something that ‘you should be apologetic for.’” *Id.* (quoting Renee Bracey Sherman, a reproductive justice activist); see also Caitlin Flanagan, *Losing the Rare in ‘Safe, Legal, and Rare’*, *Atlantic* (Dec. 6, 2019), <https://www.theatlantic.com/ideas/archive/2019/12/the-brilliance-of-safe-legal-and-rare/603151> (on file with the *Columbia Law Review*) (“Young feminists living in the age of dwindling access to abortion aren’t interested in a mantra that implies there is something shameful about the procedure, even if it has kept many people in the pro-choice tent.”). By 2016, Hillary Clinton, the Democratic candidate for the presidency, had dropped the “rare” on the campaign trail, stating instead that abortion should be “safe and legal.” See North, *supra*. By 2020, most of the Democratic presidential candidates had expressed similar sentiments. See Maggie Astor, *On Abortion Rights, 2020 Democrats Move Past ‘Safe, Legal, and Rare’*, *N.Y. Times* (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/us/politics/abortion-laws-2020-democrats.html> (on file with the *Columbia Law Review*).

133. See Debate Transcript, *The Third McCain–Obama Presidential Debate*, Comm’n on Presidential Debates (Oct. 15, 2008), <https://www.debates.org/voter-education/debate-transcripts/october-15-2008-debate-transcript> [<https://perma.cc/L7H7-PMYR>] (quoting then-Senator Obama, the Democratic candidate for the presidency, as arguing that “nobody’s pro-abortion” because “it’s always a tragic situation”); Flanagan, *supra* note 132 (explaining that, during her 2008 campaign for presidency, Hillary Clinton stated that abortion should be “safe, legal, and rare” and explaining that when Clinton “was coming up, the assumption among abortion supporters was that it was the better of two bad decisions” and “inherently a bit sad”).

rates is controversial, in part, because it could be (mis)understood as suggesting that these rates are disturbing because they reveal that black women are being forced to commit “tragic,” “necessary evils” more frequently than nonblack women.

This is not at all what I am arguing here. Instead, I am asking us to conceptualize black women’s need for abortion as a symptom of their vulnerability and marginalization. The higher rates at which black women receive abortions relative to their nonblack counterparts reveal that they are more vulnerable and more marginalized than their nonblack counterparts. The language of “autonomy” and “agency” elides this fact.

This suggests that it *is* possible to believe that abortion is not a bad thing—that there is nothing fundamentally immoral about abortion; that abortion does not kill a tiny baby or end the existence of a morally significant entity; that abortion is not shameful. In fact, it is possible to believe that people should exercise their abortion rights *unapologetically*—that people ought to feel good (indeed, relieved!) after terminating an unwanted pregnancy—while simultaneously believing that there is something disturbing about the rates at which black people undergo abortions. We can believe all these things about abortion while still understanding that there is an injustice (and, likely, multiple injustices) underlying black people’s abortion rates. We can believe all these things about abortion while simultaneously becoming enraged and being heartbroken by the rates at which black people find it necessary to terminate pregnancies.

Others have expressed similar sentiments. Four decades ago, Angela Davis understood that the motivations behind black people’s decisions to terminate their pregnancies in more contemporary times were not appreciably different from their motivations to do the same under chattel slavery.<sup>134</sup> She wrote that enslaved black people turned to abortion not because they “had discovered solutions to their predicament, but rather because they were desperate. Abortions . . . were acts of desperation, motivated not by the biological birth process but by oppressive conditions of slavery.”<sup>135</sup>

The argument presented here is similar to Davis’s, but it is not identical. I do not conceptualize black people’s reliance on abortion care in contemporary times as “acts of desperation.” I resist conceptualizing black

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134. Angela Y. Davis, *Women, Race & Class* 172 (Vintage Books ed. 1983) (1981).

135. *Id.* Davis finishes the thought by stating that enslaved black people who had abortions “would have expressed their deepest resentment had someone hailed their abortions as a stepping stone toward freedom.” *Id.* This argument somewhat captures my resistance towards using the language of “autonomy” and “agency” to describe marginalized black people’s turn to abortion care. As abortion did not represent a path towards “freedom” for enslaved black people, it does not presently represent an “autonomous” and “agential” act for vulnerable black people today.



people's acts in these terms inasmuch as "desperation" implies hopelessness, despair, and distress.<sup>136</sup> Nevertheless, I agree with Davis inasmuch as I conceptualize abortion for subordinated black people to be a product of "oppressive conditions."<sup>137</sup> Marginalized black people understand the social, economic, political, and interpersonal constraints under which they operate—constraints that likely contributed to their being saddled with an unintended and unwanted pregnancy in the first instance—and conclude that it is best not to carry the pregnancy to term. The problem is that the language of "autonomy" and "agency" obscures the fact of these oppressive conditions. If marginalized black people are engaging in acts of autonomy when they terminate a pregnancy, the self-governing act occurs within a context that has stripped the actor of her ability to govern the course and content of her life. If marginalized black people are acting with agency when they have an abortion, the agential act is made necessary by the lack of agency that they have in other areas of their lives.

The short of it is that understanding black people's reliance on abortion as exercises of "autonomy" and "agency" conceals that their need to turn to abortion is due to racism. Black people's abortion rates reflect racism not because nefarious actors with genocide on their minds are duping black people into terminating their pregnancies; nor do black people's abortion rates reflect racism because abortion clinics are targeting black people and black communities for abortion care. Black people's abortion rates reflect racism because structural racism has led black people to face

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136. I also resist Davis's argument to the extent it suggests that, in a perfect world, people of color who terminate pregnancies would carry every pregnancy that they have to term. She writes, "When Black and Latina women resort to abortions in such large numbers, the stories they tell are not so much about the desire to be free of pregnancy, but rather about the miserable social conditions which dissuade them from bringing new lives into the world." *Id.* at 171; see also *id.* at 172 (stating that "the early abortion rights campaign . . . often failed to provide a voice for women who wanted the right to legal abortions while deploring the social conditions that prohibited them from bearing more children" (emphasis omitted)). Davis might be taken to argue that absent "miserable social conditions," people of color would not hesitate to have children. *Id.* at 171. This might be a problematic suggestion inasmuch as it ignores that even in a perfect world, many people of color would not choose to become mothers. That is, not every person with the capacity for pregnancy desires motherhood. Many people with the capacity for pregnancy consider motherhood undesirable under any circumstance.

Additionally, Davis fails to note that while it may be true that absent "miserable social conditions," many people of color would carry their pregnancies to term, it is also true that absent "miserable social conditions," many people of color would not become pregnant in the first instance. That is, "miserable social conditions" are responsible for their unintended and unwanted pregnancies. *Id.* at 171.

137. *Id.* at 205.

higher rates of unintended and unwanted pregnancies.<sup>138</sup> Structural racism has led people of color to bear a disproportionate share of poverty<sup>139</sup>—leading them to have to rely on governmental programs and public benefits for their economic and physical survival. Further, structural racism has taken the form of an incompetent social safety net (upon which people of color disproportionately rely) that fails to provide basic necessities—including contraception and health insurance—to those who cannot acquire them in the market.<sup>140</sup> Structural racism has taken the form of a

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138. See Zoe Dutton, *Abortion's Racial Gap*, Atlantic (Sept. 22, 2014), <https://www.theatlantic.com/health/archive/2014/09/abortions-racial-gap/380251> (on file with the *Columbia Law Review*).

139. This should not be taken to argue that the large-scale, macro processes that immiserate people and communities are always, and in every case, attributable to racism. For example, scholars have shown that the U.S. economy has undergone a polarization whereby there are fewer middle-skill, middle-wage jobs and many more high-skill, high-wage jobs as well as low-skill, low-wage jobs. See David Autor, *The Polarization of Job Opportunities in the U.S. Labor Market 1* (2010), <http://economics.mit.edu/files/11631> [<https://perma.cc/6HGX-5LJH>]. The result of this polarization is to push many of those who once held middle-skill, middle-wage jobs into low-skill, low-wage jobs—that is, poverty. It would be inaccurate to describe this phenomenon as “racist”—even if it has immiserated people of color disproportionately.

Nevertheless, other processes and policy choices that have impoverished people and communities are, in part, a product—and an example—of systemic racism. For example, the practice of funding public schools through property taxes—which results in the underfunding of public schools in low-income neighborhoods of color—is fairly described as racist. See, e.g., Jeff Raikes, *We Can Challenge Systemic Racism One School District at a Time*, Forbes (Sept. 19, 2019), <https://www.forbes.com/sites/jeffraikes/2019/09/19/we-can-challenge-systemic-racism-one-school-district-at-a-time/?sh=6853dd837e42> [<https://perma.cc/67LP-W9NA>] (finding that school districts attended predominantly by students of color receive \$23 billion less funding than white districts, and that inequitable school funding is a systemic barrier for people of color). The Court, of course, disagrees. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (holding that the school's financing system was not a violation of the Fourteenth Amendment because the Equal Protection Clause did “not require absolute equality or precisely equal advantages”).

Similarly, the policy choice to pursue mass incarceration as the tool with which to address the nation's social ills—a policy choice that functions to further impoverish already impoverished people and communities—is fairly described as racist. See Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 Calif. L. Rev. 1023, 1027, 1037 (2010) (describing how over the past forty years—fifty since the article was published—racial politics “continually contributed” to the expanse of the American crime control system). Additionally, the embrace of immigration policies that work to make migrant workers from Central and South America deportable—and, consequently, exploitable—could be appropriately described as racist as these policies mostly burden migrant workers of color. See, e.g., Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 *Compar. Lab. L. & Pol'y J.* 125, 135–38 (2009) (describing some of the “formidable barriers” migrant workers face, such as having H-2A and H-2B visas expire after one year, with limited extensions, and not having the opportunity to seek permanent residency or citizenship in the United States nor the opportunity to switch employers during their visa terms). The list certainly goes on.

140. Scholars have argued that the United States' failure to erect an adequate social safety net—making it an outlier among the high-wealth, industrialized nations that it

policy choice not to educate students in public schools, who are disproportionately nonwhite,<sup>141</sup> about the medical facts of sex and pregnancy—even though the known consequence of failing to provide that education is high rates of unwanted and unintended pregnancy.

The above underscores the need to refuse resorting to a description of abortion as a “necessary evil.” Such a framing concedes that abortion is evil—a concession that fundamentally misaligns with most people’s experience of terminating an unwanted pregnancy. For poor black people across the country, *abortion is necessary because of the evils of structural racism.*

In conclusion, the abstract language that we have always used to describe the stakes of abortion—“autonomy,” “agency,” “choice,” “liberty,” etc.—inadequately describes what happens when abortion rights interface with racial inequality. This is the exploration into which we are led when we engage with the question of state-inflicted procreation imposed.

### C. *State-Inflicted Procreation Confounded*

In Fox’s formulation, confounded procreation occurs when a parent desires a particular type of child, yet a private actor’s negligence leaves the parent with a child of a different type. A mother may want a child whose sex assigned at birth will be “boy”; but an obstetrician implants her with an embryo whose sex assigned at birth likely will be “girl.” A white woman, desiring a baby that will be raced as white, asks to be inseminated with a white man’s sperm; a fertility clinic inseminates her with a nonwhite man’s sperm, leaving her with a baby who likely will be raced as nonwhite. A couple desires a child that does not have a genetic anomaly; an obstetrician incorrectly reads the results of an amniocentesis and fails to inform the couple that the fetus that the woman carries has Down syndrome. The woman carries the pregnancy to term, although the couple would have decided to terminate the pregnancy had they known that the baby would have a disability.<sup>142</sup> This last example—involving an actor whose negligent

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typically considers its peers—is due to race and racism. See, e.g., Jill Quadagno, *The Color of Welfare: How Racism Undermined the War on Poverty 191* (1994) (“Among the distinctive features of American state formation, none is more salient than the failure to extend full citizenship to African Americans. It is this characteristic, more than any other, that has influenced the development of the welfare state.”).

141. White and Asian students enroll in private schools at two times the rate of black and Latinx students. See Sean F. Reardon & John T. Yun, *Private School Racial Enrollments and Segregations 11* (June 26, 2002) (unpublished manuscript), <https://files.eric.ed.gov/fulltext/ED467108.pdf> [<https://perma.cc/3JRM-VXUX>].

142. This is not an unusual circumstance. Studies estimate that somewhere between two-thirds to nine-tenths of all pregnancies involving a fetus with Down syndrome are terminated. See Carole J. Petersen, *Reproductive Justice, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities*, 28 *J.L. & Health* 121, 133 (2015) (citing studies showing that between sixty-seven to eighty-five percent of people terminate their pregnancies following a diagnosis of Down syndrome); Hayley White, *A*

behavior leads an individual to give birth to a child with a health impairment, thwarting her desires to have a child without an impairment—prompts the foregoing analysis of state-inflicted procreation confounded. That is, the investigation here is concerned with actions that governments and public actors take that increase the likelihood that an individual will give birth to a child with a disability.<sup>143</sup>

Fox's investigation of procreation confounded is primarily centered on assisted reproductive technologies. He seeks to answer questions about the politics and ethics of using ART to produce children—and avoid the birth of children—with certain characteristics.<sup>144</sup> His project, ultimately, is

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Critical Review of Ohio's Unconstitutional "Right to Life Down Syndrome Non-Discrimination" Bill, 29 Geo. Mason U. C.R.L.J. 87, 88 (2018) (stating that ninety percent of people choose to terminate a pregnancy following a diagnosis of Down syndrome in the fetus).

143. In analyzing—and problematizing—state actions that increase the likelihood that a child will be born with a disability, this Review should not be read as arguing that children and people with disabilities are undesirable and never should have been born. The ableism undergirding such a claim is quite repulsive. Rather, the argument here is that there is something unfair and unjust about governments acting in ways that ensure that people and communities of color will disproportionately bear the burden of disability. This is to say, we can recognize that disabilities are a normal feature of human variation—and ought to be celebrated for that reason—while also critiquing the state for disabling its citizens of color. Critical disability studies scholar Alison Kafer powerfully captures this tension when she writes:

As much joy as I find in communities of disabled people, and as much as I value my experiences as a disabled person, I am not interested in becoming more disabled than I already am. I realize that position is itself marked by an ableist failure of imagination, but I can't deny holding it. Nor am I opposed to prenatal care and public health initiatives aimed at preventing illness and impairment, and futures in which the majority of people continue to lack access to such basic needs are not futures I want. *But there is a difference between denying necessary health care, condoning dangerous working conditions, or ignoring public health concerns (thereby causing illness and impairment) and recognizing illness and disability as part of what makes us human.*

Alison Kafer, *Feminist, Queer, Crip* 4 (2013) (emphasis added).

144. Of the characteristics parents seek to ensure that their children have, the characteristic of "health"—in the form of an absence of disability—raises the thorniest moral, ethical, and legal questions. Fox acknowledges the discursive harm that is inflicted on people with disabilities when individuals do everything within their power to avoid becoming parents to a child with disabilities, and he queries whether the law would ratify that harm if it were to allow individuals to recover in tort after they, despite their best efforts, find themselves parents to a health-impaired child. See Fox, *supra* note 5, at 142 (arguing that a legal system that "specially protect[s] reproductive strivings to prevent certain conditions" and offers "judicial recovery for thwarted preferences" risks "demeaning people who take pride in or identify with having" such conditions and "denying them equal respect"). Fox's analysis is not cabined to questions of disability. He also considers the moral, ethical, and legal questions posed by individuals' use of ART to determine less fraught characteristics of children, i.e., height, hair color, or intelligence. See *id.* at 160, 164 (querying the ethics of parents choosing "a smart donor," an "athletic donor," or a donor with a "perfect pitch," and concluding that despite the concerns raised by allowing parents to recover when their

to determine what ought to be the legal consequences of the negligent deployment of these technologies. Now, ART, for the most part, has been the domain of the class-privileged, inasmuch as the technology can be incredibly expensive (a single cycle of IVF costs between \$12,000 and \$17,000, and individuals who successfully conceive through IVF typically undergo between three and six rounds<sup>145</sup>). Plus, as section II.A discusses, insurance coverage of ART is limited.<sup>146</sup> Because white people disproportionately occupy the socioeconomic ranks of those with the ability to absorb the incredible out-of-pocket costs of ART, white people are disproportionately represented among the population that has used ART.<sup>147</sup> Thus, Fox's exploration of procreation confounded—centered as it is on ART and, to a lesser extent, prenatal diagnostic tests—can be understood as one that, at the end of the day, is about an issue that largely affects white people.<sup>148</sup>

But, the racial stakes of Fox's analysis change dramatically when we turn our attention to *state-inflicted* procreation confounded. That is, when we analyze behaviors and choices of public actors that increase the likelihood that a child will be born with a disability, we see that the issue becomes one that greatly impacts people of color.

1. *Environmental Injustice and Health Impairments in Fetuses*. — While health impairments in fetuses have a variety of causes,<sup>149</sup> it is indisputable that toxins in polluted environments are responsible for some congenital “abnormalities.”<sup>150</sup> For example, lead is widely known to harm fetuses, with

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efforts to choose these particulars are thwarted, “for now, courts shouldn't hesitate to remedy confounded procreation”).

145. Klein, *supra* note 99.

146. See *id.*

147. As Anjani Chandra, Casey E. Copen, and Elizabeth Hervey Stephen note: [W]omen who use infertility services are significantly more likely to be married, non-Hispanic white, older, more highly educated, and more affluent than nonusers. Reasons for the disparities in use of infertility services may include access barriers such as the significant cost of medical services for infertility and the lack of adequate health insurance to afford the necessary diagnostic or treatment services.

Chandra et al., *supra* note 101, at 2.

148. See Fox, *supra* note 5, at 154 (“Though Latin [sic] and African Americans suffer from higher rates of infertility, it's whites who predominantly access donor and IVF services—by and large, they want babies who are also white.”).

149. Causes of fetal health impairments include viruses (i.e., rubella, Zika), nutritional deficits in the gestating person, and genes. See Congenital Anomalies, WHO, [https://www.who.int/health-topics/congenital-anomalies#tab=tab\\_2](https://www.who.int/health-topics/congenital-anomalies#tab=tab_2) [https://perma.cc/A6BG-6XLT] (last visited Oct. 29, 2020).

150. See *id.* (noting that “environmental teratogens” can cause health impairments in fetuses). A “congenital abnormality” is a condition that exists prior to the birth of a child. See *id.* (“Congenital anomalies can be defined as structural or functional anomalies that occur during intrauterine life . . . [T]hese conditions develop prenatally and may be iden-

prenatal lead exposure resulting in musculoskeletal disorders, heart defects, and other impairments in children.<sup>151</sup> While most are aware that lead can be found in the paint of older housing, it is also emitted from facilities engaging in smelting and recycling.<sup>152</sup> Mercury—which is released into the air when fossil fuels are burned and subsequently cycles between the air, water, and soil—is also harmful to fetuses, causing microcephaly, cerebral palsy, and intellectual disabilities in children who were exposed to it prenatally.<sup>153</sup> Air pollution causes fetal impairments as well. One study showed that “[p]regnant women living in areas with higher levels of ozone and carbon monoxide pollution were [almost] three times more likely to have had babies with serious birth defects.”<sup>154</sup> Similarly, the greater a mother’s exposure during the “critical second month of pregnancy, the greater the chance that the baby would have a serious cardiac defect.”<sup>155</sup> Another more recent study showed that “women who breathed the highest levels of carbon monoxide were nearly twice as likely to have a baby with spina bifida or anencephaly as those with the lowest carbon monoxide exposure.”<sup>156</sup> The study also found that “women with the highest nitrogen oxide exposure had nearly three times the risk of having a pregnancy affected by anencephaly than those with the lowest exposure.”<sup>157</sup> The chemicals found in pesticides are also known to harm fetuses. A study released by the National Research Council reported that “exposure to neurotoxin compounds [found in pesticides] at levels believed to be safe for adults could result in permanent loss of brain function if it occurred during the prenatal and early childhood period of brain development.”<sup>158</sup> Further, there is evidence that pesticides harm fetuses even before they

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tified before or at birth, or later in life.”). I use quotation marks with the term “abnormalities” because it implies that people with health impairments are not “normal.” If it is true that people with health impairments are not “normal,” it is only because they deviate from a norm that society has established, not because there is something inherent about their condition that makes them aberrant.

151. See Helen Dolk & Martine Vrijheid, *The Impact of Environmental Pollution on Congenital Anomalies*, 68 *Brit. Med. Bull.* 25, 33 (2003).

152. See Bernice Schaddelee-Scholten & Joanna Tempowski, WHO, *Recycling Used Lead-Acid Batteries: Health Considerations 8–9* (2017), <https://apps.who.int/iris/bitstream/handle/10665/259447/9789241512855-eng.pdf> [<https://perma.cc/4P9A-98GK>].

153. See Dolk & Vrijheid, *supra* note 151, at 39.

154. See Paul A. Locke, Sudha Koduru, Margo Edmunds, Ellis Yingvorapant, Anna Dillingham & Amy Goffe, *Tr. for Am.’s Health, Birth Defects Tracking and Prevention: Too Many States Are Not Making the Grade 8* (2002), <https://www.tfah.org/wp-content/uploads/archive/reports/birthdefects02/bdreport.pdf> [<https://perma.cc/L6EG-TTR8>].

155. See *id.*

156. Erin Digitale, *Air Pollutants Linked to Higher Risk of Birth Defects*, *Researchers Find*, *Stan. Med. News Ctr.* (Mar. 28, 2013), <https://med.stanford.edu/news/all-news/2013/03/air-pollutants-linked-to-higher-risk-of-birth-defects-researchers-find.html> [<https://perma.cc/E2SK-VENT>].

157. *Id.*

158. *Nat’l Rsch. Council, Pesticides in the Diets of Infants and Children* 61 (1993).

are conceived. The data suggests that pesticides cause changes in the ova and sperm of people of reproductive age who are exposed to high doses of them, i.e., farmworkers.<sup>159</sup> Additionally, studies have shown that maternal pesticide exposure during pregnancy as well as occupational exposure can produce congenital abnormalities, including neural tube defects (like spina bifida and anencephaly), heart defects, and musculoskeletal disorders in fetuses and, ultimately, children.<sup>160</sup>

Which is to say: Polluted environments can confound procreation.

2. *The Racial Geography of Confounded Procreation.* — It is undisputed that the environments in which people of color live are more polluted than those inhabited by their white counterparts.<sup>161</sup> As Robert Bullard, the father of the environmental justice movement, has observed, black people—and people of color more generally—are more likely than their white counterparts to live in close proximity to the smelting and recycling facilities that expose the surrounding communities to lead,<sup>162</sup> or the fossil fuel–

159. See Linda M. Frazier, Reproductive Disorders Associated with Pesticide Exposure, 12 J. Agromed. 27, 28–31 (2007) (noting that “[e]pidemiologic studies of agricultural workers . . . suggest that male exposures [to pesticides] are associated with a variety of adverse reproductive effects”); Rajnesh Kumar Sharma, Priyanka Singh, Aarzo Setia & Aman Kumar Sharma, Insecticides and Ovarian Functions, 61 Env’t & Molecular Mutagenesis 369, 370–72 (2020) (describing how insecticides induce reproductive disorders in women such as irregular estrous cycles, impaired folliculogenesis, follicular atresia, and endometriosis, among other disorders); see also Dolk & Vrijheid, supra note 151, at 37 (noting “growing evidence that occupational exposure to some pesticides may be teratogenic”).

160. See Charikleia Kalliora, Charalampos Mamoulakis, Eleni Vasilopoulos, George A. Stamatiades, Lydia Kalafati, Roza Barouni, Triantafyllia Karakousi, Mohammad Abdollahi & Aristidis Tsatsakis, Association of Pesticide Exposure with Human Congenital Abnormalities, 346 Toxicology & Applied Pharmacology 58, 63–73 (2018).

161. That fact that people of color are more likely than white people to live in polluted environments is the spark that lit the environmental justice movement. The movement formed as a response to the failure of traditional environmental protection efforts to consider the concerns of people of color. Traditional environmentalism, at its outset, seemed to be most interested in protecting wilderness and wildlife. See Jedediah Purdy, The Long Environmental Justice Movement, 44 Ecology L.Q. 809, 836 (2018). While important, conserving wilderness and saving wildlife were not the most pressing issues that people of color faced. Instead, people of color tended to be more concerned about the built environments—the cities, neighborhoods, and buildings—that they called home. Id. at 811. Further, they were disturbed by the fact that their built environments tended to be more polluted than the environments that people with race and class privileges called home. Thus, the environmental justice movement put the question of distributive justice on the agenda—inquiring into the unfair ways in which environmental benefits and harm were distributed. Notably, this question was wholly absent from the vision of traditional environmentalism. Id. at 814–15, 818–19.

162. See generally Robert D. Bullard, The Threat of Environmental Racism, 7 Nat. Res. & Env’t 23 (1993) [hereinafter Bullard, Environmental Racism] (outlining the risk and impact of lead poisoning on black children). It is also true that people of color are more likely to live in older housing with lead paint. See id.; Jasmine Bell, 5 Things to Know About Communities of Color and Environmental Justice, Ctr. for Am. Progress (Apr. 25, 2016), <https://www.americanprogress.org/issues/race/news/2016/04/25/136361/5-things-to->

burning power plants that expose nearby residents to mercury.<sup>163</sup> People of color are more likely than their white counterparts to live close to highways that dramatically reduce the air quality enjoyed by proximate communities.<sup>164</sup> People of color are more likely than their white counterparts to be the farmworkers who are exposed to dangerous doses of pesticides as part of their occupation.<sup>165</sup>

Notably, the increased likelihood that people of color will have to call a toxic environment home is not simply a function of the disproportionate poverty that people of color bear; rather, it is a function of people of color's *race*. That is, even if one controls for class, people of color are more likely to encounter pollution in the communities in which they live. One commentator explains, "[I]f one were to compare a middle-class community of color to a low-income white community, and look at which community is more likely to have a hazardous waste facility sited there, the middle-class community of color would have a greater chance of being targeted for such a facility."<sup>166</sup> Sociologists Liam Downey and Brian Hawkins have made a similar observation with respect to air quality, noting that "black households with incomes of \$50,000 to \$60,000 live in neighborhoods that are, on average, more polluted than neighborhoods of white households with incomes less than \$10,000."<sup>167</sup>

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know-about-communities-of-color-and-environmental-justice [<https://perma.cc/K9GY-V85B>] (describing how lead poisoning disproportionately affects children of color). In fact, the lead poisoning of children of color is so pervasive that it is not hyperbole to describe it as an epidemic. See Bullard, *Environmental Racism*, *supra*, at 23; see also Robert L. Jones, David M. Homa, Pamela A. Meyer, Debra J. Brody, Kathleen L. Caldwell, James L. Pirkle & Mary Jean Brown, Trends in Blood Lead Levels and Blood Lead Testing Among U.S. Children Aged 1 to 5 Years, 1988–2004, 123 *Pediatrics* e376, e376 (2009); Emily A. Benfer, Contaminated Childhood: The Chronic Lead Poisoning of Low-Income Children and Communities of Color in the United States, *Health Affs.* (Aug. 8, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20170808.061398/full> (on file with the *Columbia Law Review*).

163. See Craig Anthony (Tony) Arnold, Planning Milagros: Environmental Justice and Land Use Regulation, 76 *Denv. U. L. Rev.* 1, 3 (1998) (noting the "disproportionately higher amount of industrial and other non-residential land uses in census tracts where low-income people of color live").

164. See Robert D. Bullard, Building Just, Safe, and Healthy Communities, 12 *Tul. Env't L.J.* 373, 387 (1999) [hereinafter Bullard, *Building*].

165. See Jay Feldman, Race, Poverty and Pesticides 1–3, <https://www.beyondpesticides.org/assets/media/documents/documents/RacePovertyPesticides072009.pdf> [<https://perma.cc/GG9Y-DAZR>] (last updated July 20, 2009).

166. Mike Ewall, Legal Tools for Environmental Equity vs. Environmental Justice, 13 *Sustainable Dev. L. & Pol'y* 4, 4 (2012).

167. Liam Downey & Brian Hawkins, Race, Income, and Environmental Inequality in the United States, 51 *Socio. Persps.* 759, 778 (2008); see also Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality 42–43 (1990); Robert Bullard, Racism and COVID-19, Two Pandemics Threatening Black America, Dr. Robert Bullard: Father of Env't Just. (Aug. 19, 2020), <https://drrobertbullard.com/racism-and-covid-19-two-pandemics-threatening-black-america> [<https://perma.cc/DW3G-TXNT>].



That is, while white people, in the course of availing themselves of ART, may be more likely than people of color to experience procreation that has been confounded by the negligent acts of private actors, people of color—in the course of living their lives in toxic neighborhoods, homes, and workplaces—are more likely than white people to experience procreation that has been confounded by polluted environments.

A relevant question, though, is whether the pollution found in these environments can be attributed to state actors. If we answer this question in the negative—concluding that it is private actors (i.e., private businesses and corporations) who are responsible for polluting the environments that people of color call home—then the harms to fetal development that are a consequence of living and working in toxic environments cannot properly be understood as *state-inflicted* procreation confounded.

But an answer in the affirmative is appropriate. One does not err when one concludes that state actors are responsible for the environmental harms that people of color disproportionately encounter in their homes and neighborhoods. In some cases, governments are *directly* responsible for polluting communities of color, as is the case of lead poisoning in Flint, Michigan. In April 2014, the city stopped purchasing treated Lake Huron water from Detroit and started using the Flint River as its water source.<sup>168</sup> The Flint River, however, has a high chloride concentration, making its water more corrosive than Lake Huron water.<sup>169</sup> When Flint officials failed to add anticorrosive agents to the river water, the water leached lead from the lead service pipes that pump water into Flint homes.<sup>170</sup> Thousands of adults and children were exposed to dangerous levels of lead until the problem was made known to the public in January 2015.<sup>171</sup> Further, there is evidence that government actors were aware prior to January 2015 that Flint residents were being poisoned by lead in the city's drinking water but did nothing to protect them.<sup>172</sup> In cases like Flint, Michigan, it is undeniable that public actors are the parties who are responsible for polluting environments and, ultimately, confounding reproduction.

In other cases, public actors are less directly, but still undeniably, responsible for environmental harms. Researchers have documented that state actors are less likely to enforce environmental laws in neighborhoods

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168. Josh Sanburn, *The Toxic Tap*, *Time*, Feb. 1, 2016, at 36 (on file with the *Columbia Law Review*); see also Brie D. Sherwin, *Pride and Prejudice and Administrative Zombies: How Economic Woes, Outdated Environmental Regulations, and State Exceptionalism Failed Flint, Michigan*, 88 *U. Colo. L. Rev.* 653, 661 (2017) (describing the chronology of events in detail).

169. Sherwin, *supra* note 168, at 659.

170. *Id.* at 672.

171. *Id.* at 662.

172. See *id.* at 700–02.

that are disadvantaged along the lines of race and class.<sup>173</sup> One study examined penalties that had been assessed at over a thousand Superfund sites.<sup>174</sup> It revealed that the penalties that had been assessed at sites that were proximate to white communities were up to five times the size of penalties that had been assessed at sites that were proximate to nonwhite communities.<sup>175</sup> The study also concluded that for “all the federal environmental laws aimed at protecting citizens from air, water, and waste pollution, penalties in white communities were 46 percent higher than in minority communities.”<sup>176</sup> In this context, public actors may not have directly caused the air, water, and land pollution or contaminated a site so severely that it later becomes designated as a Superfund site. But public actors’ choices to inadequately enforce existing environmental laws render them responsible for the excessive pollution found in communities of color. When this pollution harms the fetuses being carried by these residents, we properly understand the phenomenon as one of *state-inflicted* procreation confounded.

Additionally, land use decisions are profoundly political. Which is to say, if the spaces in which people of color live have been zoned such that industries can set up shop, landfills can be sited there, or highways can bisect them, it is because local governments have zoned the land such that it can be used in such a health-damaging way.<sup>177</sup> In this way, public actors

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173. See Candice Youngblood, Put Your Money Where Their Mouth Is: Actualizing Environmental Justice by Amplifying Community Voices, 46 Ecology L.Q. 455, 471–72 (2019) (“[S]tudies show that enforcement of environmental laws is significantly lower in low-income communities and communities of color than in white or affluent communities.”).

174. See Tseming Yang, Melding Civil Rights and Environmentalism: Finding Environmental Justice’s Place in Environmental Regulation, 26 Harv. Env’t L. Rev. 1, 6 (2002) (citing Marianne Lavelle & Marcia Coyle, Unequal Protection: The Racial Divide in Environmental Law: A Special Investigation, Nat’l L.J., Sept. 21, 1992, at S2).

175. See Lavelle & Coyle, *supra* note 174 (“[P]enalties [sic] under hazardous waste laws at sites having the greatest white population were about 500 percent higher than penalties at sites with the greatest minority population. Hazardous waste, meanwhile, is the type of pollution experts say is most concentrated in minority communities.”); see also Yang, *supra* note 174, at 6.

176. Yang, *supra* note 174, at 6.

177. As Bullard explains:

African-American and other communities of color are often victims of land-use decision making that mirrors the power arrangements of the dominant society. Historically, exclusionary zoning, rezoning, and granting of variances have been used by government authority and power to foster and perpetuate discriminatory practices. The “put it across the tracks mentality” has turned many low-income and people of color communities into toxic havens.

Bullard, *Building*, *supra* note 164, at 394. Even in the absence of discriminatory zoning decisions, communities of color often find themselves sites of locally unwanted land uses. Houston, Texas, a city without zoning, had a policy of “PIBBY (place in blacks’ backyard)”:

The all-white city council and private industry targeted garbage dumps, landfills, and incinerators for Houston’s black neighborhoods for more

are responsible—indirectly, but responsible nonetheless—for the environmental hazards that people of color encounter in their communities. Indeed, these actors have expressly permitted the hazards to be located there.

Further, some states have not only invited industries that are known for being environmentally hazardous into their borders but have also refused to competently regulate them once they have begun operating. For example, North Dakota has permitted hydraulic fracturing, or fracking, in the state—permission that has led the state to become the second largest crude oil-producer in the United States.<sup>178</sup> Fracking is an incredibly dirty process, producing a barrel of wastewater—which contains a smorgasbord of toxins, including radioactive materials, heavy metals, and hydrocarbons—for each barrel of crude oil produced.<sup>179</sup> In North Dakota, fracking generated nineteen billion gallons of wastewater in 2018 alone.<sup>180</sup> Importantly, North Dakota has refused to adequately regulate the industry. The state has “allow[ed] the spreading of wastewater on roads, on-site burial, and . . . storage in often-leaky pits rather than more secure holding tanks.”<sup>181</sup> The consequence, of course, is that the communities that are proximate to fracking sites have been burdened with contamination.<sup>182</sup> Thus, while North Dakota is not directly responsible for polluting its residents—the private companies engaged in fracking hold that title—it is indirectly responsible for the environmental hazards its residents face: It has permitted an environmentally appalling industry to do business within its borders, and it has neglected to ensure that the industry does not poison its residents as it engages in its enterprise. In this way, prospective parents whose pregnancies are negatively affected by fracking-produced toxins are victims of *state-inflicted* procreation confounded.

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than five decades. From the 1920s through the late 1970s, eight of every ten solid waste sites were located in mostly black Houston neighborhoods; although blacks never made up more than one fourth of the city’s population during this period.

Id. at 394–95.

178. Amy Mall & Melissa Troutman, Earthworks, North Dakota Frack Waste Report: The Failure to Safely Manage Oil and Gas Waste 4, 7 (2020), <https://www.earthworks.org/cms/assets/uploads/2020/06/ND-Waste-Report-2020-final-6-2020-2.pdf> [<https://perma.cc/V3QG-H2N4>].

179. Id. at 4, 8.

180. See id. at 8.

181. Press Release, Earthworks, New Report Finds Increased Threat from Radioactive Oil & Gas Waste in North Dakota (June 18, 2020), <https://www.earthworks.org/media-releases/new-report-finds-increased-threat-from-radioactive-oil-gas-waste-in-north-dakota> [<https://perma.cc/HYM6-U7UW>].

182. See id. (quoting a resident of a community that is proximate to a fracking site who reported that no one in her neighborhood “know[s] if [the] water is safe to drink” due to “many oil and gas production waste spills,” with one instance involving one million gallons of spilled wastewater).

Finally, the country's current approach to environmental protection, as a general matter, bears some responsibility for the pollution that communities of color disproportionately encounter. This is because environmental law, generally, is not engaged in the endeavor of stopping pollution altogether. Instead, it is engaged in the endeavor of limiting the amount of pollution that polluters release into the environment.<sup>183</sup> Thus, even if all environmental laws were perfectly obeyed and perfectly enforced, there would still be pollution. Further, even lawful pollution *harms* people. As environmental justice scholar Luke Cole puts it, "Pollution of our air, land, and water that is literally killing people is often not in violation of environmental laws."<sup>184</sup>

All of this suggests that even when private actors are those who pollute the air, water, and land, the state is answerable for failing to protect its citizens. Accordingly, when an environmental harm impairs the health of a fetus, we will be dealing, in most cases, with confounded procreation that can be traced to a state actor's act or failure to act. Further, because people of color are more likely than their counterparts with race privilege to encounter these environmental harms, the racial stakes of state-inflicted procreation imposed are such that people of color disproportionately are the losers.

Of note, states have recently begun to pass laws that prohibit individuals from terminating a pregnancy on account of a fetus's disability. These laws impose criminal liability on healthcare providers who provide abortion services to anyone whom they know is terminating the pregnancy because the fetus has been diagnosed with a health impairment.<sup>185</sup> The *Box* litigation, discussed above, concerns Indiana's ban on abortions sought because of a fetus's race, sex, or disability.<sup>186</sup> Moreover, this past term, the Sixth Circuit heard *Preterm-Cleveland v. Himes* en banc, which concerns the constitutionality of an Ohio law that prohibits a physician from performing an abortion on a woman who is seeking the abortion because the fetus has been diagnosed with Down syndrome.<sup>187</sup> Louisiana—the home of the stunningly polluted "Cancer Alley," now known as "Death

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183. For example, the Clean Air Act of 1990 simply calls for emission "limitation," not a ban on emissions altogether. See Clean Air Act of 1990, 42 U.S.C. §§ 7401–7431 (2018).

184. Luke W. Cole, Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 Ecology L.Q. 619, 643 (1992).

185. See, e.g., N.D. Cent. Code § 14-02.1-04.1 (2020) (prohibiting any provider from performing an abortion when she knows that the procedure is sought solely for purposes of sex selection or because the fetus has been diagnosed with a "genetic abnormality or a potential for a genetic abnormality").

186. 139 S. Ct. 1780 (2019). For a discussion of the *Box* litigation, see *supra* notes 119–122 and accompanying text.

187. See *Preterm-Cleveland v. Himes*, 944 F.3d 630, 631 (6th Cir. 2019) (mem.) (en banc); *Preterm-Cleveland v. Himes*, 940 F.3d 318, 320 (6th Cir. 2019); see also Verified Complaint for Declaratory and Injunctive Relief at 3, *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746 (S.D. Ohio 2018) (No. 1:18-cv-109), 2018 WL 914750.

Alley”<sup>188</sup>—as well as a number of other states (including Arizona, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Missouri, North Dakota, Ohio, Oklahoma, Tennessee, and Utah) have all passed such disability-selective abortion bans.<sup>189</sup>

Disability-selective abortion bans are a fascinating twist to the phenomenon of state-inflicted procreation confounded. They reveal that some states are not satisfied with simply producing—either directly or indirectly—an environment that confounds procreation and impairs the health of fetuses. Indeed, these states go further, endeavoring to *compel* the birth of children with impairments through abortion regulations. Because people of color disproportionately experience poverty, they are least able to avoid these regulations. Similarly, they are the least able to travel to another state that does not police people’s reasons for terminating their pregnancies.<sup>190</sup> Thus, people of color are more likely to have their reproduction confounded by environmental causes. And then they are least likely to avoid the constraints imposed by disability-selective abortion bans. We ought not to be surprised, then, if disabilities proliferate among people of color.<sup>191</sup>

### III. RECONSIDERING REPRODUCTIVE TORTS: CENTERING SOCIAL INEQUALITY

Fox’s analysis in *Birth Rights and Wrongs* succeeds in what it sets out to do: to schematize the reproductive wrongs that private actors commit, to make the case that tort law ought to provide a remedy for these harms, and to offer guidance to courts adjudicating such claims. Again, since Fox’s project focuses on torts and its effort to make individuals whole—that is, because theorizing the social significance of reproductive wrongs

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188. Our Coalition, Coalition Against Death Alley, <https://www.enddeathalley.org/our-coalition> [<https://perma.cc/4C49-SFWD>] (last visited Oct. 30, 2020).

189. See Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly, Guttmacher Inst., <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly> [<https://perma.cc/D83J-L2X4>] (last updated Mar. 1, 2021).

190. Abortion restrictions especially affect poor women’s ability to obtain an abortion by putting additional obstacles in their path and increasing costs and delays. For example, the Texas abortion restrictions that the Supreme Court struck down in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), would have closed the majority of Texas abortion clinics, forcing women to travel much farther for an abortion. For poor women, who often depend on public transportation, long-distance travel is a grave burden. In addition to transportation, many would need to cover hotel expenses and childcare costs. These cumulative costs can force poor women to carry an unwanted pregnancy to term. See Gretchen Borchelt, *The Impact Poverty Has on Women’s Health*, ABA, [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-state-of-healthcare-in-the-united-states/poverty-on-womens-health](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/poverty-on-womens-health) [<https://perma.cc/Z3YT-KL8D>] (last visited Oct. 30, 2020).

191. I intend to explore the intersection of environmental injustices and disability-selective abortion bans in future scholarship.

lies outside of the scope of Fox's project—he sometimes offers incomplete descriptions of what is at stake in the phenomena about which he is concerned. Which is to say: If we fully consider the social context within which reproductive negligence committed by private actors takes place—specifically, if we fully confronted *social inequality along the lines of race and class*—otherwise invisible aspects of the reproductive negligence committed by private actors may come into view.

For example, Fox discusses a case of procreation deprived in which a black woman, Glenda Ann Robinson, was admitted to a hospital in Maryland to give birth.<sup>192</sup> In the course of performing a caesarean section to deliver her child, doctors sutured her fallopian tubes, thereby preventing Robinson from becoming pregnant in the future—at least, not without the assistance of cost-prohibitive ART.<sup>193</sup> Robinson discovered that doctors had performed a tubal ligation on her two years later, when she asked to see her medical records.<sup>194</sup> She, of course, sued. Most of her claims were denied, however.<sup>195</sup> In ruling for the defendant, Fox notes that the District Court

suggested that Robinson, an African American mother of six, didn't need any more kids. The court didn't care that "she and her husband were planning on having a seventh child" (three "born out of wedlock," it went out of its way to mention). The court concluded that denying Robinson the "ability to have a seventh child after previously giving birth to six children is hardly something which would offend a reasonable sense of personal dignity."<sup>196</sup>

Fox argues that the court got it wrong in Robinson's case. He argues that the judge who wrote the opinion, Judge Alexander Harvey II, like so many judges who have come before and who have followed since, fails to appreciate how world-shattering it is to be denied the children you desire. Fox notes that individuals are willing to go to incredible lengths to have longed-for children: "They exhaust savings. They endure prying queries, onerous appointments, and risky medical procedures. They make professional and personal plans around the parenthood they anticipate—they pick names, prepare nurseries, scout preschools."<sup>197</sup> Fox argues that the court that heard Robinson's case, like other courts that deny recovery to

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192. Fox, *supra* note 5, at 101.

193. See *id.*

194. See *Robinson v. Cutchin*, 140 F. Supp. 2d 488, 490–91 (D. Md. 2001). Defendants disputed this, claiming that Robinson was aware of the tubal ligation "shortly after the procedure was performed." *Id.* at 493 n.5.

195. The court awarded summary judgment to the defendants on the claims involving battery and intentional infliction of emotional distress. *Id.* at 492–93. The court allowed the negligence claim to proceed, as there were disputed questions of fact about whether her doctors had secured her informed consent to be sterilized. *Id.* at 493–94.

196. Fox, *supra* note 5, at 101 (quoting *Robinson*, 140 F. Supp. 2d at 491 & n.1, 493).

197. *Id.* at 102.

similarly situated plaintiffs, “miss the centrality of procreation to aspiring parents and the magnitude of its wrongful deprivation.”<sup>198</sup> He asserts that individuals experience the devastating nature of the harm at the same level as a “divorce or diagnosis with a terminal illness.”<sup>199</sup> He contends that people carry the injury—the deprivation—around with them forever, “intrud[ing] on [their lives] like an unseen obstacle ‘in the middle of a crowded room.’”<sup>200</sup> He concludes that recovery is *right* in these cases, as “[p]rofessional negligence denies grieving individuals and couples a calling and intimacy whose value is impossible to substitute or at least very difficult to replace.”<sup>201</sup>

There is no doubt that everything Fox maintains is accurate. But, there is another looming element of Robinson’s story. First, her experience is like the experience of so many people of color, many of whom were low-income, who have been victims of nonconsensual sterilization.<sup>202</sup> Indeed, her story is almost identical to the circumstances that sparked the litigation that culminated in *Madrigal v. Quilligan*.<sup>203</sup> In that case, several low-income Latinx women sued a Los Angeles County hospital after they learned that the hospital, which predominately served poor, Medicaid-reliant people of color, had been coercively sterilizing patients who came to the hospital to give birth.<sup>204</sup> Some of those who had been sterilized had been told that they would be denied healthcare and would be left to labor and give birth without medical supervision if they did not “consent” to the sterilization

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198. Id. at 101.

199. Id. at 102.

200. Id.

201. Id.

202. Many different groups of nonwhite people have been targets of coerced sterilization. Healthcare providers performed nonconsensual sterilizations on black people with the capacity for pregnancy in the Jim Crow South so often that people began to call them “Mississippi appendectomies”—referring to doctors’ practice of nonconsensually sterilizing their black patients under the guise of a completely different medical procedure. See Roberts, *Killing the Black Body*, supra note 66, at 98. Researchers estimate that over a quarter of Puerto Rican women living on the island in the 1960s and 1970s were sterilized. See Davis, supra note 135, at 184. Studies have documented that more than forty-two percent of Indigenous women who received healthcare from the IHS had been forcibly sterilized between the 1970s and 1980s. See Lindsay Glauner, *The Need for Accountability and Reparations: 1830–1976 the United States Government’s Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 *DePaul L. Rev.* 911, 939 (2002). And, tragically, it appears that state actors have been forcibly sterilizing immigrants detained in ICE detention centers as recently as last year. See Project South, supra note 66, at 18–20.

203. 639 F.2d 789 (9th Cir. 1981) (unpublished table decision); see also Alexandra Minna Stern, *Sterilized in the Name of Public Health*, 95 *Am. J. Pub. Health* 1128, 1132–36 (2005); Maya Manian, *The Story of Madrigal v. Quilligan: Coerced Sterilization of Mexican-American Women 1* (Univ. of S.F. Sch. of L., Working Paper No. 2018-04, 2018).

204. See Antonia Hernandez, *Chicanas and the Issue of Involuntary Sterilization: Reforms Needed to Protect Informed Consent*, 3 *Chicano L. Rev.* 3, 4–9 (1976); see also *No Más Bebés* (PBS television broadcast Feb. 1, 2016).

procedure.<sup>205</sup> Others, like Robinson, discovered only after the fact that doctors had performed a tubal ligation on them during the course of delivering their babies.<sup>206</sup> Importantly, the hospital practices that were at issue in *Madrigal* are consistent with a history in which the fertility of poor people of color has been imagined to be a social problem that needs to be solved. President Ronald Reagan's deployment in the 1980s of the figure of the "welfare queen," discussed above, is just a moment in this history.<sup>207</sup> Preventing poor people of color from giving birth and raising children has been offered as the cure to many of society's ills—including "high" crime rates, unemployment, unbalanced budgets, "big" government, and poverty, generally.<sup>208</sup>

Relevantly, Robinson was giving birth to her sixth child when doctors sterilized her without her knowledge and consent.<sup>209</sup> Fox does not speculate why it is that Robinson's doctors made the specific mistake that they made. He simply describes the performance of an unwanted tubal ligation as the stuff of "negligence"—something a reasonable doctor would not have done.<sup>210</sup> Indeed, speculating about why negligence manifested in the particular shape that it did in Robinson's case is largely irrelevant to Fox's project. But, when one is as attentive to social context and social meaning as the reproductive justice framework advises one to be, it becomes *curious* that the mistake made by Robinson's healthcare providers took the form of an assumption that she—a black woman giving birth to her sixth child—did not desire to have any more children. It seems oddly coincidental that, in a social context in which limits on black women's reproduction have

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205. See Hernandez, *supra* note 204, at 5.

206. *Id.*

207. See *supra* notes 68–70 and accompanying text.

208. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. §§ 601–619 (2006) (instituting TANF)). When passing the PRWORA, Congress presented the lack of marriage, and the resultant necessity that mothers parent outside of the heteronormative family, as the reason that there are so many problems in the United States. Indeed, the first facts Congress "found" were that "marriage is the foundation of a successful society" and that "marriage is an essential institution of a successful society which promotes the interests of children." *Id.* § 101, 110 Stat. at 2110. Presumably, the parade of horrors that makes up the balance of the PRWORA's congressional findings stems from the absence of marriage. Congress's findings suggest that children born "out-of-wedlock" (1) are "3 times more likely to be on welfare when they grow up"; (2) have compromised "school performance and peer adjustment"; and (3) have "lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves." *Id.* § 101, 110 Stat. at 2111–12. Congress also claims that children born "out-of-wedlock" are "3 times more likely to fail and repeat a year in grade school than are children from intact 2-parent families"; "4 times more likely to be expelled or suspended from school"; living in neighborhoods with "higher rates of violent crime"; and overpopulating the "State juvenile justice system." *Id.*

209. Fox, *supra* note 5, at 101; see also *Robinson v. Cutchin*, 140 F. Supp. 2d 488, 491 (D. Md. 2001).

210. Fox, *supra* note 5, at 101.



been urged, Robinson's doctors would make a mistake that would limit her reproduction. Indeed, it is interesting that Robinson's doctors erred in a way that revealed that her desire to have a seventh child was completely outside of the realm of their imagination.

In reality, we will never know *why* Robinson's providers made the specific mistake that they made. But we do know that Judge Harvey, who heard the summary judgment motion, dismissed most of her claims in an opinion that takes an accounting of the number and status of the children she had. In a footnote, Judge Harvey observes that "Mrs. Robinson and her husband were married in 1985, and they have had three children since then, including the baby boy born in 1997. Before she was married to the co-defendant, she had three prior children who were born out-of-wedlock."<sup>211</sup> As Fox correctly observes, that Robinson was unmarried when she had her first three children is wholly irrelevant to the issues raised in the motion of summary judgment, i.e., whether the facts as alleged support a claim for battery or intentional infliction of emotional distress, whether sufficient questions of fact remain on the claim of negligence such that the claim should proceed to a jury trial.<sup>212</sup> That Robinson was unmarried when she had her first three children, however, is *entirely* relevant to the question of whether she was a person who rightly reproduces, i.e., whether she was a welfare queen. It does not take a leap of logic to conclude that the "problematic" nature of Robinson's fertility—its dangerous proximity to narratives about the welfare queen—informed Judge Harvey's conclusion that her inability "to have a seventh child after previously giving birth to six children is hardly something which would offend her reasonable sense of personal dignity."<sup>213</sup>

The point here is that it is likely that social context—race- and class-informed meanings that attach to an individual's reproduction—plays a role in the shape that reproductive negligence will take. Further, those same meanings play a role in the willingness of judges to recognize the claims and to allow victims of reproductive negligence to recover.

Moreover, those meanings play a role in how victims *experience* reproductive negligence. It would be strange indeed if Robinson was unaware of the discourses that problematize her fertility—discourses that would censure her for having children outside of marriage and would criticize her decision to have a large family. It would be truly bizarre if Robinson was oblivious to the fact that *as a black woman*, her fertility has figured as a social problem in political discourses since time immemorial. We should expect that the discursive problematization of the reproduction of women *like* Robinson—that is, black, unmarried—altered the quality of the injury that she suffered, making it different from other cases of procreation deprived. While Fox is right that negligence that results in individuals

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211. *Robinson*, 140 F. Supp. 2d at 491 n.1.

212. See Fox, *supra* note 5, at 101.

213. *Robinson*, 140 F. Supp. 2d at 493.

being unable to have children “denies grieving individuals and couples a calling and intimacy whose value is impossible to substitute,” this negligence is experienced in a particularly painful way when it continues a legacy of race-based reproductive oppression.<sup>214</sup> It is only by looking beyond torts and centering social context that we realize this.

A focus on social context—on social meanings, discourses, and hierarchies—reveals additional aspects of the injury of procreation imposed as well. To be precise, race and class undoubtedly alter the quality of the injury felt by the individual who must bear a child that she attempted to avoid. As Part I discusses, Fox describes compelled parenthood as imposing an “unwanted” and lasting “identity on the individual.”<sup>215</sup> This is certainly true. But compelled parenthood likely takes on additional meaning when the individual belongs to a racially unprivileged group whose members have never been able to control the content and trajectory of their reproductive lives. Compelled parenthood takes on additional meaning when the racial oppression of the group to which an individual belongs historically has taken the form of compelled parenthood.<sup>216</sup>

Moreover, the refusal of the law to recognize the injury of compelled parenthood or to provide a remedy for it might also take on additional, racially inflected meanings when the person who has had parenthood foisted upon her lacks racial privilege. That is, race might alter the experience of being denied recovery for reproductive negligence. Fox considers a 2015 case involving a plaintiff, Joseph Pressil, whose former partner surreptitiously collected his semen from a condom and paid a clinic to inseminate her with it.<sup>217</sup> After Pressil’s partner gave birth to twins, Pressil sued the clinic for using his sperm without his knowledge or consent. The court denied him recovery. Fox explains that judges in cases like Pressil’s insist that the plaintiff is not at all harmed even when they are made parents against their wishes. Fox goes on to say that, for many judges, “someone like Pressil isn’t really harmed at all by getting the very offspring he’d sought to avoid. To the contrary, he should be grateful for the gift of life and good fortune of parenthood. Never mind that he didn’t ask for or want it.”<sup>218</sup> And in Pressil’s case specifically, the court held that he “[could not] recover damages” associated with any “healthy child born as a result of the medical provider’s negligence . . . because the intangible benefits of parenthood far outweigh” the “burdens involved.”<sup>219</sup>

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214. See Fox, *supra* note 5, at 102.

215. *Id.* at 19 (quoting *In re Marriage of Witten*, 672 N.W.2d 768, 778 (Iowa 2013)).

216. See Roberts, *Killing the Black Body*, *supra* note 66, at 14 (“[R]egulating Black women’s reproductive decisions has been a central aspect of racial oppression in America.”).

217. See Fox, *supra* note 5, at 114.

218. *Id.*

219. *Id.* (quoting *Pressil v. Gibson*, 477 S.W.3d 402, 409–10 (Tex. App. 2015)).

The argument that the judge makes to justify denying Pressil recovery is not at all new. Indeed, lawmakers and advocates who seek to restrict abortion access often have claimed that every pregnancy is a blessing—even when unwanted and unintended—and that compelled parenthood results in a net benefit to the pregnant person.<sup>220</sup> But a racially disadvantaged person may *hear* the argument differently. She is likely aware that she exists in a society in which the reproduction of people of color always has been managed by state actors and private parties.<sup>221</sup> A judge’s declaration that a plaintiff of color is misapprehending the gift that has been given to her, and that he knows better than she what the trajectory of her reproductive life should be, continues a narrative that has stripped people of color of control in matters involving procreation and parenting. Moreover, we need to be sensitive to the possibility that these narratives may make judges feel more comfortable denying recovery to a plaintiff of color whose reproductive desires have been thwarted. The opinion in Glenda Ann Robinson’s case is unique not because it allowed racist narratives that problematize the procreation of people of color to inform the decision,

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220. In 2012, then-Senate candidate Richard Mourdock addressed the issue of abortion in the case of rape, saying, “I came to realize life is that gift from God, and I think even when life begins in that horrible situation of rape, that it is something that God intended to happen.” Adam Clark Estes, Republican Senate Candidate Says Rape Pregnancies Are a ‘Gift from God’, *Atlantic* (Oct. 23, 2012), <https://www.theatlantic.com/politics/archive/2012/10/republican-senate-candidate-says-rape-pregnancies-are-gift-god/322172> (on file with the *Columbia Law Review*). That same year, then-Republican presidential candidate Rick Santorum addressed the same topic with the words, “I think that the right approach is to accept this horribly created, in the sense of rape, but nevertheless, in a very broken way, a gift of human life, and accept what God is giving to you.” Peter Walker, Rick Santorum ‘Would Urge Daughter Not to Have Abortion Even After Rape’, *Guardian* (Jan. 24, 2012), <https://www.theguardian.com/world/2012/jan/24/rick-santorum-daughter-abortion-rape> [<https://perma.cc/XZW2-GG3T>].

221. One need not be aware of the particulars—that is, enslaved people were forced to reproduce; Latinx, Native, and black people were forcibly sterilized; the children of indigenous parents were removed from their care and placed in “boarding schools” in an effort to strip them of their heritage; children of color are overwhelmingly overrepresented in the nation’s foster care system—to be aware that the reproductive decisions of people of color have never been honored. See Davis, *supra* note 135, at 183–85 (describing the abusive sterilization of Puerto Rican women); Pamela D. Bridgewater, Reproductive Freedom as Civil Freedom: The Thirteenth Amendment’s Role in the Struggle for Reproductive Rights, 3 *J. Gender Race & Just.* 401, 410–15 (2000) (describing the breeding of enslaved people as an example of a reproductive abuse inflicted on black women); Sarah Deer, Relocation Revisited: Sex Trafficking of Native Women in the United States, 36 *Wm. Mitchell L. Rev.* 621, 665–69 (2010) (outlining the practice of boarding Native American children as an effort to remove them from their heritage and destroy Native American communities from the inside out); Glauner, *supra* note 202, at 939 (discussing the sterilization of indigenous women via IHS); Hernandez, *supra* note 204, at 4–9 (detailing the history of the sterilization of Chicana and Latina women); Child’s Bureau, HHS, Racial Disproportionality and Disparity in Child Welfare 3 tbl.1 (2016), [https://www.childwelfare.gov/pubpdfs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf) [<https://perma.cc/7B9U-JK3M>] (documenting the overrepresentation of African American and Native American children in the child welfare system).

but rather because those narratives were explicitly stated in a footnote.<sup>222</sup> Most judges do not leave behind such smoking guns. But we would be naïve to assume that simply because racist narratives are not explicitly articulated in written opinions, they do not inform judicial decisions.

Attentiveness to social context—specifically, attentiveness to the way that inequalities along the lines of race and class oftentimes make it impossible to make general declarations about reproduction—requires us to add nuance to some of the statements that Fox makes. For example, when defending parents’ interests in having a particular type of child and arguing in favor of a tort that allows recovery when a provider confounds procreation, Fox writes that “societ[ies] like the United States prize[] family pluralism and the cultivation of close, stable caregiver relationships from an early age. Interests in choosing offspring particulars are of a piece with the latitude that American constitutional and family law affords parents over ‘the care, custody, and control of their children.’”<sup>223</sup> While it is true that constitutional and family law give wide latitude to *class-privileged* parents to raise their children—protecting from state intervention and regulation the families that wealthier people create—the same deference is not afforded to poor parents. Indeed, there is a large literature detailing how the state, through the child-welfare system, illegitimately dismantles the families that poor people create under the banner of protecting children from abuse and neglect.<sup>224</sup> As such, not all families in the United States are “prized”; not all individuals are permitted the space to cultivate “close, stable caregiver relationships” with their children.

This nuance alters the significance of Fox’s conclusion that permitting individuals to recover when a private actor’s negligence confounds reproduction is apiece with the general tendency in the United States to protect parental rights and to defer to parents’ decisions regarding their children’s upbringing. In truth, the individuals who utilize ART to engineer a particular type of child are the same individuals whose families are prized and protected. That is, because most health insurance plans do not cover the costs of ART, wealth is the condition of possibility for accessing these technologies;<sup>225</sup> at the same time, wealth purchases a parent protection from

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222. For a refresher on the *Robinson* case, see *supra* notes 194–201 and accompanying text.

223. Fox, *supra* note 5, at 23 (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)).

224. See generally Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2002) (framing American child-welfare policy as a racially discriminatory institution, wherein endemic poverty and racial bias are an impetus for removing children from their families).

225. See Mastroianni, *supra* note 99, at 155–62 (explaining that the costs associated with ART have resulted in different “accessibility patterns to infertility treatment” between economically privileged and unprivileged groups); see also Staniec & Webb, *supra* note 101, at 971–72 (noting that because ART is generally not covered by insurance, access to the treatment depends on couples having sufficient disposable income).

the surveillance and regulation imposed by the child-welfare system.<sup>226</sup> As such, Fox is only partially correct when he writes that “[i]nterests in choosing offspring particulars are of a piece with the latitude that American constitutional and family law affords parents over ‘the care, custody, and control of their children.’”<sup>227</sup> If we excavate the class-based dimensions of both ART accessibility and strong parental rights in this country, we would have to qualify his statement such that it is clear that the interests of *wealthier* people who can afford ART in choosing offspring particulars are of a piece with the latitude that American constitutional and family law affords *wealthier* parents over the care, custody, and control of their children.

What does that mean for poor individuals and poor parents? Well, the failure of American constitutional and family law to respect poor people’s parent–child relationships and their desires to care for, have custody of, and control their children is reflected in their being shut out of ART. Which is to say: If Fox is right that the law’s deference to wealthier people’s parental rights suggests a legally protected interest in an ART-facilitated choice to select their children’s characteristics, then the law’s *refusal* to defer to low-income people’s parental rights suggests that they have no legally protected interest in choosing their children’s particulars—a result guaranteed by their class-based exclusion from the market for ART.

Not only does close attention to social inequality add nuance to Fox’s analysis of the constitutional basis for allowing recovery when procreation is confounded, but it also adds nuance to Fox’s conclusions about how damages might be calculated when procreation is deprived. Fox argues that when a private actor’s negligence functions to deprive an individual of procreation—as when a fertility clinic accidentally destroys frozen eggs and embryos—the amount of damages awarded should reflect the likelihood that a client whose reproductive materials have been destroyed would have been able to carry a pregnancy to term. Awards should be higher for those who had a greater chance of successfully using the destroyed reproductive materials to become pregnant and have a child; awards should be lower for those for whom success in that endeavor was less likely.

With regard to an individual’s likelihood of successfully carrying a pregnancy to term, Fox writes, “Reproductive health varies from couple to

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226. See Douglas J. Besharov, *Child Abuse Realities: Over-Reporting and Poverty*, 8 Va. J. Soc. Pol’y & L. 165, 183–84 (2000) (suggesting that the child-welfare system targets and surveils families who receive public assistance); see also Dana Mack, *The Assault on Parenthood: How Our Culture Undermines the Family* 67 (1997) (showing that families on public assistance are four times more likely than others to be investigated and have their children removed from the family home on the basis of child maltreatment); Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 Am. U. J. Gender, Soc. Pol’y & L. 1023, 1025 (2002) (arguing that low-income and minority parents are unjustly accused of child abuse and neglect due to their financial situations).

227. Fox, *supra* note 5, at 23 (quoting *Troxel*, 530 U.S. at 66).

couple, person to person. Age and sex are the most salient factors.”<sup>228</sup> This is true. But *class* has tremendous impacts on reproductive health, as section II.A explores. Thus, there is a danger in calculating damages awards in a way that reflects the likelihood of success in carrying a pregnancy to term. Essentially, should poor people manage to access ART, only to have their desires thwarted by a private actor’s negligence, the damages awards that they receive will be, on the whole, lower than those received by their counterparts with class privilege.

There is something disquieting about such an eventuality. A methodology for awarding damages that systematically provides low-income people smaller damages awards when they are denied the ability to become parents appears to suggest that their desires for parenthood are not as valuable as those held by people with class privilege. It appears to suggest that the poor are not as wounded as others when those desires are foiled. Indeed, it appears to reflect a societal sense—which we can witness in other areas of public life—that poor people *should not become parents*.<sup>229</sup> If pregnancy and parenthood ought *not* to intersect with poverty, then poor people who experience a reproductive wrong that deprives them of parenthood *should* receive less money in damages than their wealthier counterparts. While denouncing and condemning poor people’s fertility is not the intention behind Fox’s proposed methodology of calculating damages awards, his methodology produces results that certainly lend themselves to such an interpretation.

Additionally, there is evidence that people of color have higher rates of infertility.<sup>230</sup> This, of course, would mean that Fox’s methodology for calculating damages would lead, on the whole, to higher awards for white people and lower awards for people of color.<sup>231</sup> Again, this might be a

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228. *Id.* at 105.

229. Indeed, reasonable people may understand the failure of states to cover the costs of infertility treatments and services in their Medicaid programs as reflective of the sense that poor people should not become parents. See *supra* notes 87–101 and accompanying text. Additionally, we may understand the hyperregulation to which the pregnant poor are subjected, as well as the child-welfare system’s practice of dismantling poor families, as indicating a societal sense that poor people should not become parents. See Roberts, *Killing the Black Body*, *supra* note 66, at 168–71 (analyzing the child-protective-services system and describing the overrepresentation of poor families—especially poor families of color—within the system). See generally Bridges, *supra* note 66 (analyzing the various ways in which poor pregnant women and poor mothers are surveilled and regulated).

230. See Anjani Chandra, Casey E. Copen & Elizabeth Hervey Stephen, *Infertility and Impaired Fecundity in the United States, 1982–2010: Data from the National Survey of Family Growth*, 67 *Nat’l Health Stat. Reps.* 1, 2, 16 tbl.4 (2013) (showing that among married or cohabiting women between the ages of fifteen and forty-four, white women have lower rates of infertility than Asian, Latinx, and black women).

231. Fox certainly is sensitive to the possibility that some approaches to calculating damages might penalize disadvantaged groups and, for that reason, ought to be avoided. When discussing whether courts should reduce an award of damages when negligence deprives procreation to a person who already has a child or who may be able to have a child

result that one should take pains to avoid—especially insofar as it can be understood as sending a problematic message about the value of white reproduction and the nonvalue of nonwhite reproduction.

Although a robust consideration of how social inequality alters the experience of reproductive negligence is beyond Fox’s project, Fox does not shy away from discussions of social inequality.<sup>232</sup> As observed above, Fox explores how awarding damages to white individuals when reproductive negligence leaves them with nonwhite babies might devalue nonwhite lives.<sup>233</sup> He also analyzes the possibility that society may problematically legitimate and support ableism by allowing prospective parents to use ART to avoid the birth of children with impairments and awarding them damages when their techniques of avoidance are negated by a private actor’s reproductive negligence.<sup>234</sup> There is a moment, however, when Fox’s explicit attention to inequality reveals an interesting blind spot. After describing the harms of reproductive wrongs that result in imposed procreation entirely in terms of the individual who gives birth to, and ultimately raises, a child that she had endeavored to avoid, Fox writes:

Reproductive negligence implicates more than health and happiness. *Social equality also looms large.* Gendered expectations of pregnancy and parenthood trade on caretaker stereotypes of women as self-denying nurturers who should assume domestic roles as wives and mothers. Disproportionate demands on women’s bodies, time, and resources curtail their opportunities

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in the future—while giving larger awards to persons who do not have children nor are able to have them in the future—Fox is wary that such an approach may fail to appreciate the harm of deprived procreation when inflicted on people who already have children. Significantly, he notes that people of color may predominate in this group. He writes, “Hewing compensation levels too closely to family size undervalues the significance of parenthood for any child beyond the first. And it risks sanctioning injuries that disproportionately affect African Americans and Latinos, who are twice as likely as Caucasians or Asians to have four-plus children.” Fox, *supra* note 5, at 104. In essence, Fox is skeptical of an approach to calculating damages that disadvantages people of color. Thus, he likely would be receptive to the critique that this Review offers of his approach to calculating damages in light of the likelihood of successfully carrying a pregnancy to term, as such an approach would disadvantage low-income people and people of color.

232. For example, in his exploration of eugenics, Fox writes that while most states stopped sterilizing people against their will after World War II, “a few kept right on operating, mostly fixing their aim on poor immigrants and women of color . . . [F]rom 2006 to 2012, two California prisons paid doctors to tie the tubes of at least 144 black and brown inmates while sedated for post-partum surgery.” *Id.* at 14. Fox writes that the takeaway from this history is that “[r]eal reproductive autonomy is about clearing away barriers to choice, whether legal (e.g., state restrictions), economic (e.g., insurance coverage), or social (e.g., group pressure). These obstacles can often vary based on a person’s sex, age, race, class, sexual orientation, and immigration or relationship status.” *Id.* at 14–15.

233. See *supra* notes 58–64 and accompanying text.

234. See *supra* note 60 and accompanying text.

for school, work, and “equal citizenship stature,” as Justice Ruth Bader Ginsburg has argued since before she was a justice.<sup>235</sup>

Here, Fox posits that imposing procreation on people who have done everything within their power to dodge that very thing compels (cis-gender) women into motherhood, which limits their ability to participate equally in society.<sup>236</sup> Thus, Fox underscores that pregnancy and motherhood, even when wanted, exacerbate sex inequality. His claim is that the unfairness of this inequality is intensified when pregnancy and motherhood are unwanted.

Here, Fox is very much interested in inequality: *sex inequality*. But *racial* equality is also at stake in reproductive wrongs that impose procreation—and reproductive wrongs, more generally. When private and public actors force motherhood onto people without racial privilege, or deprive these same people of motherhood, or produce impairments in the children that these people birth, these acts represent a continuation of a long, sordid history in which others have controlled the reproductive lives of nonwhite people.

It may be intuitive to be aware of the way that pregnancy and parenthood—specifically motherhood—reflect and impact societal notions concerning sex and gender. An awareness of the way that pregnancy and parenthood reflect and impact societal notions concerning *race* may be much less intuitive.<sup>237</sup> But this is precisely the awareness that the reproductive justice movement and scholarly framework have attempted to foreground. That is, analyses of reproduction are incomplete without a close attention to race, class, ability, nationality, immigration status, etc. If one were to take this lesson to heart, one would see how an analysis of birth rights and wrongs is enriched by a sustained interest in how racial inequality and economic injustice complicate the issue at hand.

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235. Fox, *supra* note 5, at 15 (emphasis added) (footnote omitted) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting)).

236. See *id.* at 15–16.

237. One might recall Professor Kimberlé Crenshaw’s admonition in her early writings on intersectionality that the subject of feminism historically has been a white woman and the subject of antiracism historically has been a black man. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal Forum 139, 152 (“[B]oth feminist theory and antiracist politics have been organized, in part, around the equation of racism with what happens to the Black middle-class or to Black men, and the equation of sexism with what happens to white women.”); see also Roberts, *Killing the Black Body*, *supra* note 66, at 13–14 (recounting her experience at a civil rights forum where an audience member argued that “reproductive rights was a ‘white woman’s issue’” and advised her “to stick to traditional civil rights concerns, such as affirmative action, voting rights, and criminal justice”). As a consequence, the tendency has been to ignore the racial aspects of issues—like pregnancy and motherhood—that impact cisgender women. This may explain why it is not intuitive to many individuals to also think of race when considering pregnancy and motherhood.



## CONCLUSION

Fox's *Birth Rights and Wrongs* manages to schematize an area that, because of its complexity, has resisted schematization: the area of reproductive wrongs. Fox provides scholars, jurists, and observers a framework with which to think through negligence that frustrates the reproductive desires of individuals. He also defends and describes the contours of a tort that would remedy these wrongs. While Fox focuses his analysis on reproductive wrongs committed by private actors, his schema is helpful for thinking through reproductive wrongs that are committed by public actors. This Review has endeavored to supplement Fox's analysis by fitting a public lens on the issues that he so ably documents and investigates in his book.

Moreover, this Review has sought to extend Fox's analysis by investigating the social significance of reproduction. While the decision to have (or not to have) a child has immeasurable effects on the individual who makes the decision—a reality that would explain why the Constitution has long been interpreted to protect the right to make the decision—it is also true that individuals are embedded in social contexts. Consequently, race, class, and many other characteristics of an individual are all relevant in shaping reproductive decisions. Moreover, these characteristics are also important in understanding the trajectory that individuals' reproductive lives take—trajectories that are not always the product of the decisions that individuals have made. That is, the courses that people's reproductive lives take are oftentimes out of their hands. They are deprived of parenthood. They are forced into parenthood. They are compelled to become parents to a child with different characteristics than those they wanted. This Review has sought to broaden Fox's analysis by centering the role that race and class play in these reproductive events and how the stakes change when the state is the actor directing the course of a person's reproductive life.

