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DOV FOX ON *REPRODUCTIVE NEGLIGENCE*: A COMMENTARY

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INTRODUCTION

The best laid plans of mice and men go oft astray.[1]

For many years, John and Mary have carefully used birth control in order to pursue their joint careers as rising academics, and at the same time, realize (in summertime getaways) their major passions for exploring ancient civilizations and sites of Renaissance art and architecture. As time passed, they reached the decision that this lifestyle best fulfills their deepest, long-term desires. And so, they decided that John would undergo a vasectomy. Alas, John's doctor botched the procedure and Mary became pregnant—eventually giving birth to a healthy baby. Because of their religious beliefs, abortion was out of the question, and moral compunctions precluded giving the child up for adoption. Their life plans have been radically altered, not by fate (and certainly not by choice), but by an unforeseen mishap—professional negligence.

From the time they wed, Philip and Cristina cherished the ideal of a large family, mirroring their own upbringings. Shortly after they married, Cristina contracted endometriosis,[2] which was treated with a prescription drug that was filled in double the prescribed dosage—because of negligence on the part of the pharmacist. As a consequence, Cristina contracted primary pulmonary hypertension, a serious condition that can

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1. Robert Burns, To a Mouse (1785):

   . . .
   But, Mousie, thou art no thy lane,
   In proving foresight may be in vain:
   The best laid schemes o' mice an' men
   Gang aft a-gley
   An leave us nought but grief and pain
   For promised joy . . . .

See Robert Burns, To a Mouse (1785), reprinted in The Best Laid Schemes: Selected Poetry and Prose of Robert Burns 47, 48 (Robert Crawford & Christopher MacLachlan eds., 2009).

2. Endometriosis is a condition in which displaced tissue grows outside the uterus.

lead to death if the victim becomes pregnant. She is, in effect, sterile and their life plans are shattered.[3]

Tom and Martha have spent frustrating years in unsuccessful efforts to conceive. On the advice of friends and family, they eventually decided in favor of in vitro fertilization (IVF) and made arrangements with a fertility clinic. Subsequently, doctors successfully implanted an embryo in Martha, who went to term and delivered a healthy child. But in an unexpected turn of events, the infant was not from the embryo that was fertilized in the clinic. Rather, the clinic inadvertently misidentified embryos; the child remains theirs (despite what amounts to involuntary surrogacy) but is not blood related as they had anticipated.

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In *Reproductive Negligence*, Professor Dov Fox identifies these three scenarios, categorically, as imposition of unwanted parenthood, deprivation of wanted parenthood, and confounding of efforts to have expected traits.[4] Drawing on these circumstances, Fox argues the case for a newly recognized tort of reproductive negligence that embraces all of these categories.[5]

He is not unaware of the distinct interests that these discrete claims promote. But in Fox's view, a broader conception of reproductive rights will counter the systematic undervaluation of the harms imposed in each of the respective categories. Thus, in the case of imposed parenthood, the courts have, at best, viewed the harm as compensable for economic outlays to cover the costs of upbringing.[6] In the cases involving precluded natural parenting, which lack any realized economic loss, the courts have been reluctant to provide any recovery in tort.[7] And in the wide variety of misplaced identity scenarios, entailing no physical injury, property damage, or out-of-pocket expenditures—the traditional groundings for tort

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3. This is an altered version of the facts in *Zuchowicz v. United States*, in which the victim did in fact become pregnant and give birth but died shortly thereafter. 140 F.3d 381, 384 (2d Cir. 1998).

4. Dov Fox, Reproductive Negligence, 117 Colum. L. Rev. 149, 153 (2017).

5. Id. at 161. The essay is replete with examples in each category, both from the case law and hypotheticals, but the scenarios above—offered for illustrative purposes—are mine.

6. This assumes a child free of congenital defects. See, e.g., Fassoulas v. Ramey, 450 So. 2d 822, 824 (Fla. 1984) (allowing recovery for emotional distress and for a child with congenital defects); Emerson v. Magendantz, 689 A.2d 409, 414 (R.I. 1997) (allowing recovery for emotional distress for the birth of a child with congenital defects when the physician had actual or implied notice of the probability of such birth); cf. Simmerer v. Dabbas, 733 N.E.2d 1169, 1174 (Ohio 2000) (holding the plaintiff could not recover medical expenses or emotional distress damages when the physician was not on notice of the risk).

7. Fox, supra note 4, at 195.

recovery—the courts have similarly been hesitant to recognize any foundation for a claim in tort.[8]

In Fox's view, there is a leitmotif here that the courts have simply been unwilling to recognize—a version of protecting individual autonomy, but with a distinctive twist. He contends that in the intensely personal area of familial succession, one should be free to plan a lifestyle of one's own making—free of fault-based disruptions of decisions about family planning.[9] Recovery limited to imposed economic outlays, let alone no-duty rules that deny recovery altogether, simply miss this core harm. Correlatively, recognition of these claims would provide a measure of recompense for these losses and create incentives for service providers to exercise optimal care—thus, recognizing the traditional goals of the tort system.[10]

This Piece begins with some observations in Part I on historical context. Part II turns to the issue of whether there is a case to be made for a unitary tort, rather than continuing refinements of liability law in the subcategories that Fox delineates. And finally, Part III offers some thoughts on the measurement of damages and related public policy concerns.

I. HISTORICAL CONTEXT: PERSONALITY-BASED TORTS

Where would the claim for a new tort of reproductive negligence reside in the broader sweep of personality-based tort protections, that is, stand-alone tort protections apart from any accompanying physical injury? The following discussion addresses this question.

With the exception of defamation, the common law of tort failed to address personality-based torts in the modern sense until the onset of the twentieth century.[11] To be sure, one finds redress for nonphysical torts long before the Industrial Revolution; in particular, assault and false imprisonment.[12] But these torts reflect a different perspective on protecting personality interests from those that came to be recognized in the modern era. In both cases, fear and anxiety about the prospect of physical harm served as the foundation for tort claims: in the case of assault, the prospect of battery; and in the case of false imprisonment, concern

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8. Id. at 201.

9. Id. at 176–77.

10. Id. at 211–13.

11. See Robert L. Rabin, Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss, 55 DePaul L. Rev. 359, 367 (2006) [hereinafter Rabin, Pain and Suffering].

12. See Charles O. Gregory & Harry Kalven, Jr., Cases and Materials on Torts 804 (1st ed. 1959) ("False imprisonment, like assault and battery, is another example of a traditional tort of intent which for centuries has served as a means of protecting against subtle indignities and emotional unpleasantness.").

over having one's freedom of movement constrained. The common theme is looming threats to physical security.[13]

The twentieth century marked a turning point, commonly associated with the publication of the landmark article *The Right to Privacy* by Samuel Warren and Louis Brandeis.[14] Sharply diverging from concerns about physical security, the authors expressed dismay over a development that has a familiar ring more than a century later:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.[15]

Although at first rejected as straying too far from settled precedents, the privacy tort eventually took hold and indeed ripened into four loosely related separate torts: public disclosure of private facts (PDPF), intrusion, false light, and appropriation.[16]

Reception of the privacy torts came to be only the opening act in the twentieth century: By the latter half, intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED) were well recognized torts, similarly based on stand-alone intangible harm rather than physical injury.[17] What these torts share in common—reflecting dramatic cultural change in the twentieth century—is an explicit recognition of societal obligations to respect, to a certain degree, the emotional security of the individual, apart from protection of physical security. Concededly, these protections operate within sharply demarcated boundaries: Newsworthiness has seriously constrained the

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13. A narrow exception, in the Victorian era, is the recognition of alienation of affections and criminal conversation torts, arguably based on protection of emotional rather than physical security. But even in these narrow instances, there is a foundation in eliminating the prospect of physical violence; in particular, the resort to dueling as an alternative to the courthouse.

Defamation reflects an altogether different set of interests: reputational harm in a community of third parties. It was initially bound up in the preoccupation with loss of status in a regimented English society but certainly reflected a dignitary concern as well. See Robert C. Post, The Social Foundations of Defamation Law: Reputation and the Constitution, 74 Calif. L. Rev. 691, 715 (1986).

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

15. Id. at 196.

16. William L. Prosser, Privacy, 48 Calif. L. Rev. 383, 389 (1960).

17. Rabin, Pain and Suffering, supra note 11, at 369–70.

initially recognized privacy tort, PDPF;[18] zone-of-danger limitations have circumscribed NIED;[19] and a requirement of "outrageousness" has limited IIED.[20] But these torts have nonetheless gained a foothold as expressions of civility norms and corresponding protection from affronts to emotional equilibrium.[21]

Fox is travelling down a different pathway in proposing recognition of the concept of reproductive negligence. In this regard, it comes as no surprise that his principal references are not to the personality torts just discussed but to the protections afforded to rights of abortion and conception.[22] In essence, the now-established personality torts reflect protection against laser-like, focused incursions into the web of equanimity that has come to be identified as foundational to psychic security. By contrast, the concept of reproductive negligence is grounded in lifestyle decisions—the disruption of planning related to how the individual aspires to define oneself generationally. On this score, it can be seen as akin to loosening constraints on abortion and birth control planning.[23]

From a related perspective, the concept of reproductive negligence seems to be a close cousin to the loss of consortium claim—as it has come to be understood in the modern-day setting. Shedding their anachronistic, sexist, and property-based origins, loss of consortium claims are now grounded in severance of sustained emotional intimacy in the nexus of the family.[24] What is at stake in this contemporary view of consortium is disruption of an individual's core familial relationship. Likewise, a majority of states now recognize the loss of companionship as compensable in wrongful death actions—reflecting an understanding that psychic loss of closely related survivors is a core component of negligently caused fatalities.[25]

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18. For an early leading case limiting PDPF on the basis of newsworthiness, see Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809 (2d Cir. 1940) (holding that intimate details of a former public figure's private life are not entitled to immunity from press coverage).

19. See, e.g., Metro-North Commuter R.R. v. Buckley, 521 U.S. 424, 444 (1997) (rejecting a railroad pipefitter's stand-alone emotional distress claim for asbestos exposure).

20. Restatement (Second) of Torts § 46 (Am. Law Inst. 1965) ("The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous.").

21. See Robert C. Post, The Social Foundations of Privacy: Community and Self in the Common Law Tort, 77 Calif. L. Rev. 957, 968–74 (1989).

22. Fox, supra note 4, at 218–19 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) and Eisenstadt v. Baird, 405 U.S. 438 (1972)).

23. See id. at 222 (arguing that "courts might extend protections, beyond efforts to avoid or pursue procreation").

24. Dan B. Dobbs et al., Hornbook on Torts 718–21 (2d ed. 2016).

25. See id. at 692–93 (noting "many jurisdictions permit nonpecuniary recovery for [a] survivor's loss of companionship, society, advice, and guidance").

So, the conception of reproductive negligence builds on a more embracing perspective on individual autonomy than twentieth-century privacy and emotional distress–related harms—a perspective on individual autonomy that recognizes a core value in realizing one's familial aspirations. But granting the intellectual foundation of a reproductive negligence concept, does it necessitate unitary staging apart from the three categories that it embraces? To put it another way, is the whole greater than the sum of its parts? Part II turns next to that question.

II. A UNITARY TORT?

This Part discusses whether reproductive negligence is best viewed as a single pathway rather than three distinct routes to recognizing new tort rights.

Interestingly, Fox devotes only a couple of pages to the question of whether his proposed unitary tort of reproductive negligence is preferable to fashioning a more robust, discrete tort protection of "distinct interests in pregnancy, parenthood, and particulars."[26] And in fact, he expresses some degree of ambivalence on the question—noting that "differentiating this tort into bundles of sticks sharpens its conceptual focus."[27] In the end, however, he opts for a consolidated approach as a better "[facilitator of] adaption to changing conditions and norms within such a rapidly evolving context."[28]

At a theoretical level, I am persuaded that the conception of reproductive negligence is a coherent organizing principle for the family planning aspirations that are undone by negligent conduct in Fox's three categories. But I have reservations about how the conception plays out "on the ground"—by which I mean in the elements of a tort claim. To elaborate, let me refer back to the privacy torts and then revisit Fox's three scenarios.

Warren and Brandeis might have been more prescient than they perhaps realized. Referenced above, publication aimed at satisfying "a prurient taste [for] the details of sexual relations" falls squarely within the domain of PDPF; publication of "idle gossip" can easily embrace the false-light tort; and procurement "by intrusion upon the domestic circle" bears the markings of the intrusion privacy tort.[29]

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26. Fox, supra note 4, at 210–11. More broadly, he argues persuasively from a comparative institutional vantage point that "[t]he negligent performance of reproductive services from test tubes to tube ties generates harms that have outpaced the law's ability or willingness to police them." Id. at 210. But the need for a more robust tort treatment is a separate question from the desirability of a unitary tort concept in reproductive negligence.

27. Id. at 211.

28. Id.

29. See Warren & Brandeis, supra note 14, at 196. Appropriation, the fourth privacy tort, does not in fact protect a true privacy interest. Principally, it is a protection of

Nonetheless, the privacy torts, as they have developed, resist broadside claiming. PDPF is inextricably bound up with the balancing of dignitary protections and newsworthiness—the latter turning on the social value attached to information about political, cultural, and entertainment affairs. In contrast, the intrusion tort turns on the intrinsic offensiveness of the *process* of fact gathering: Invasive technologies, overzealous surveillance, and duplicitous prying are the touchstones to recovery. In turn, the false-light privacy tort rests on a rendered mismatch between the victim's personae and the image conjured up by the alleged wrongdoer's manner of presentation. Each of these interests is distinct, as are the corresponding defenses.

Success or failure in litigation turns on attentiveness to these particularized issues, among others. Privacy as a more abstract conception is the foundation beneath the surface rather than the superstructure of courthouse claiming, which is based on quite singular harms.[30]

Similar observations are pertinent to cases falling within Fox's three scenarios. Consider initially the imposition of unwanted parenthood. Deciding against child-bearing (and rearing) is itself an embracing category: Some couples, as in my opening John and Mary hypothetical, simply relish the sociocultural opportunities that can be fully realized only by retaining the fulsome autonomy of a lifestyle free of child-rearing obligations; others opt for a childless lifestyle to fulfill career aspirations; and still others, out of concerns about economic hardship.[31] These multiple pathways are distinct in the core decision to abstain from parenting—and correspondingly, give singular shape to the framework of the prima facie case for liability, and just as importantly, the character of the damages claim.

Next, consider the about-face second scenario involving *deprivation* of wanted parenthood. Philip and Cristina, in my second hypothetical, might well regard the experience of parenting one's own offspring—not just during childhood but over a lifetime—as the central meaning of fully realizing a couple's dreams and aspirations. These aspirations may stem from religious principles, wholly secular values, or deeply rooted wishes to replicate the happiness and contentment of childhood. Once again, the motivation may be mixed. Or, it might be an expression of quite

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publicity rights in one's name or likeness. See, e.g., Cal. Civ. Code § 3344 (2017) (protecting a person's right in one's name and likeness); Restatement (Second) of Torts § 652(c) (Am. Law Inst. 1977) (explaining that although protection from emotional distress is an important consideration, the tort of appropriation principally protects one's property right over her name or likeness).

30. See Restatement (Second) of Torts §§ 652(b)–(e) (differentiating various privacy tort actions); Prosser, supra note 16, at 389 (arguing that the law of privacy comprises four distinct kinds of invasion of four different interests of a plaintiff).

31. Clearly, there are still other motivations, such as psychological roots in a debilitating childhood experience, or concern about passing on bad genetic tendencies. And of course, there may be mixed motivations. This Piece does not claim to be exhaustive.

different sources, such as having offspring rise above all of the straitening experiences that have confined one's own potential. On its face, it is clear that the loss here—as potentially translated into a claim for damages—would bear virtually no resemblance to the courthouse claims in the preceding scenario, which is based on a defeated commitment to remain childless. Nor, correspondingly, would the pleading of the prima facie case for liability cover similar ground.

Finally, the third scenario, in which Tom and Martha have been presented with the "wrong" child, has its own singular meaning. Here, the crux of the claim is that the child is not "theirs." The lack of a genetic connection defeats the parents' deepest desires to see an embedding of themselves in their offspring: Blood relation is a powerful drive to passing on some semblance of oneself beyond the finite limit of earthly existence, as well as to a corresponding "mirroring" experience during one's life. There is an embracing underpinning of "foreignness"—present and future—that is central to the claim of loss in this category. Pleading the subtle character of both the basis for liability and the translation into damages is arguably most elusive in this third category. And it is surely distinct from the other categories of cases.

Again, I do not mean to devalue the intellectual respectability of taking an overarching view of these claims as cohesive expressions of reproductive negligence—distinct, in that regard, from the invasions of emotional security in earlier recognized emotional distress torts. But courthouse claiming is another matter. And that, in turn, raises correlative questions of damage assessment and public policy constraints that Part III next addresses.

III. DAMAGES AND PUBLIC POLICY CONSTRAINTS

This Part draws on themes in other areas of compensation for stand-alone recognition of intangible harm that might prove suggestive in assessing the case for recognizing damages for reproductive negligence. Correlatively, it raises some of the public policy constraints discussed by Fox.

Fox is clearly sensitive to the challenge of translating reproductive harms into compensatory damages—the traditional remedy in tort:

> There are several reasons why recovery for intangible injuries like these is vulnerable to charges of arbitrariness, unfairness, and abuse: the lack of any clear way to translate imprecise, case-specific harms into determinate fiscal terms; the lack of any objective test to measure the severity of injuries the appraisal of which tends to depend heavily on subjective testimony; the lack of obvious mechanisms to channel legislative or judicial

> deliberations about corresponding awards; and the lack of market value to confine damages within a ceiling or floor.[32]

Let it be noted that Fox's reservations apply with equal force to *all* of the twentieth-century settings in which stand-alone intangible harm has been recognized. In this regard, he responds to the challenge by pointing out that courts do, as a matter of course, grant recovery for intangible loss in a variety of circumstances—"humiliation of the privacy intrusion, the betrayal of fiduciary breach, and the lost choice of uninformed consent," among others.[33] Highlighting reproductive negligence, however, Fox concludes:

> The severity of these injuries is not a function of how much distress it caused the plaintiffs. It is instead about the extent to which the wrongful frustration of efforts to have or avoid having a child of a certain type can be expected to impair their lives, from the perspective of their own (not illegitimate) values and circumstances.[34]

In my view, Fox could have built productively on this notion of impaired life circumstances by unpacking the traditionally recognized category of pain and suffering damages—the classic instance of recognizing intangible harm as a foundational element of tort recovery. In particular, consider a focus on its most durable element: loss of enjoyment of life.[35] While there is no touchstone for monetizing loss of enjoyment of life, it is a readily intelligible concept. The plaintiff's life has been diminished by defendant's negligence in a sense that will reverberate as time unfolds—rather than in the spur-of-the-moment fashion associated with most forms of recognized emotional distress.

Loss of consortium, another well-recognized category of intangible harm, shares the same distinctive temporal dimension. The harm has a similar continuing character in its more modern guise, as loss of companionship. Lifestyle has been disrupted: A breach has been introduced into an embraced pattern of personal relations.

Revealingly, the courts have increasingly come to recognize this lifestyle dynamic as an actionable harm. In a number of states, loss of enjoyment of life has now been recognized as a stand-alone element of pain and suffering damages in serious injury cases.[36] And in survival actions, in which recovery by the decedent's estate was traditionally limited to out-of-pocket loss in the window of time between injury and death, a handful of states now recognize the severance of the victim's

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32. Fox, supra note 4, at 224.

33. Id. at 225. Fox also discusses wrongful life claims here. Id.

34. Id. at 226.

35. See generally Dobbs et al., supra note 24, at 856 (noting that loss of enjoyment of life is as compensable as any other negative emotional state resulting from tortious injury).

36. Id.

"hedonic" existence as a legitimate element of damages.[37] Still more strikingly, the survivors' traditional claim for recovery in a wrongful death action—traditionally limited to pecuniary loss associated with the victim's untimely death—has now been extended in many states to intangible damage recovery to survivors for loss of companionship.[38]

Thus, commencing with the initial recognition of stand-alone emotional distress in the twentieth century, there has been a loosening of the bonds on recognizing the legitimacy of damages for nonpecuniary loss. But conceptions of damages and liability are inextricably bound together. Arguably, the linchpin to a broader acceptance of the reproductive negligence categories is not a radical restructuring of approaches to damages, but a more expansive notion of duty.[39]

On this score, the now-established emotional distress claims offer a cautionary note. While a right to recover for NIED is now widely accepted, the duty is sharply constrained: As mentioned earlier, with some exceptions, "direct" claims are hedged in by a requirement that the victim be in the zone of danger.[40] Bystander ("indirect") NIED claims are dependent on the plaintiff being a close relation to the physical injury victim; being physically present at the scene of injury; and directly viewing the primary harm.[41] IIED claims are recognized only when the defendant has engaged in "outrageous" misconduct;[42] and consortium claims are—in many states—limited to spouses.[43]

What accounts for these constrained notions of duty? Although no single explanation will suffice, a prominent thread that emerges is a judicial wariness of opening the floodgates to massive claiming; or, put otherwise, a concern about the capacity to hold the line at offensive

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37. Dorn v. Burlington N. Santa Fe R.R., 397 F.3d 1183, 1195 (9th Cir. 2005); Durham v. Marberry, 156 S.W.3d 242, 246 (Ark. 2004); Sander v. Geib, Elston, Frost Prof'l Ass'n, 506 N.W.2d 107, 119 (S.D. 1993).

38. Dobbs et al., supra note 24, at 692–93.

39. The other conventional elements in a negligence action, breach and causation, would be established in traditional fashion. Fox also advocates probabilistic loss-of-chance recovery for reproductive negligence when other factors such as "patient infertility, contraceptive user error, or genetic uncertainty" are contributing considerations. See Fox, supra note 4, at 227.

40. See Metro-North Commuter R.R. v. Buckley, 521 U.S. 424, 430 (1997).

41. The leading case is Dillon v. Legg, 441 P.2d 912z (Cal. 1968) (recognizing a duty owed to plaintiff mother who suffered emotional distress from eyewitnessing the death of her child caused by defendant's negligent driving).

42. See Restatement (Second) of Torts § 46 (Am. Law Inst. 1965).

43. See, e.g., Borer v. Am. Airlines, Inc., 563 P.2d 858, 860–61 (Cal. 1977) (rejecting children's consortium claim in a case arising out of grievous physical injuries to their mother). This limitation may be eroding. See, e.g., Campos v. Coleman, 123 A.3d 854, 857 (Conn. 2015) (rejecting the limitation to spouses).

conduct that rises above the threshold of routine risks and hardships that are an unavoidable feature of the matrix of everyday life.[44]

For Fox, the case for recognizing a duty to refrain from reproductive negligence invokes a higher order of intangible loss:

> Reproductive negligence inflicts a distinct and substantial injury . . . that goes beyond any bodily intrusion or emotional distress. The harm is being robbed of the ability to determine the conditions under which to procreate. Determinations about having children tend more than most decisions in life to shape who people are, what they do, and how they want to be remembered. Many people find profound meaning and fulfillment either in pregnancy and parenthood or else in the aims or attachments that freedom from those roles facilitates. That is why the wrongful frustration of reproductive plans disrupts personal and professional lives in predictable and dramatic ways.[45]

As my earlier discussion suggests, there is much to be said for this view of the singularly harmful character of the reproductive negligence categories. Moreover, Fox provides a thoughtful interpretive perspective in a final section of the essay that he labels "public policy concerns"—and that qualify a wholesale commitment on his part to protecting reproductive rights under all circumstances.[46]

These concerns fall predominantly in Fox's third category of confounded procreation cases—by way of illustration, infertility clinic selection errors in implementing a sperm donation or embryo emplacement that defeat the family planning aspirations of the plaintiffs.[47] These cases bring to the foreground an array of the most culturally conflicted issues on the contemporary scene (and on the horizon, as well): judicial receptivity to recognizing parental expectations regarding racial, ethnic, or gender selection and parental rights to opt for health-related, ability, or physical traits. Fox canvasses the arguments pro and con for extending reproductive negligence to these ethically fraught, socially divisive issues, and on balance comes down on the side of respectful regard for existing traditions in areas of unresolved conflict; in other words, he carves out no-duty exceptions to wholesale acceptance of his foundational concept.[48]

Like Fox, I do not think that general principles can—or should—resolve these hard cases. A generation ago, our courts tolerated anti-miscegenation, homophobia, and misogyny in decisional law that is now

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44. See Robert L. Rabin, Emotional Distress in Tort Law: Themes of Constraint, 44 Wake Forest L. Rev. 1197, 1198 (2009).

45. Fox, supra note 4, at 155 (footnotes omitted).

46. Id. at 231–40.

47. See supra notes 1–5 and accompanying text (providing the example of Tom and Martha).

48. Fox, supra note 4, at 231–40.

a remnant of the past.[49] But adoption of doctrinal change—in the tort context, as elsewhere in the legal order—followed in the train of evolving cultural consensus.[50]

CONCLUSION

This Piece has offered three basic observations about Fox's novel and illuminating conception of a new tort of reproductive negligence. From a historical perspective, Part I has attempted to locate his claim for recognition of a more expansive version of recovery for stand-alone intangible harm in currently accepted tort duties. From a liability perspective, while finding much to be admired in this proposed new theory of recovery, Part II has questioned whether it is workable to view reproductive negligence as a single pathway rather than three distinct routes to recognizing new tort rights. And finally, from a damages perspective, Part III has drawn on expansive themes in other areas of recovery for intangible harm to suggest additional foundational support for Fox's effort to push the frontier of recovery for intangible harm into new territory.

49. See, e.g., Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (upholding an antisodomy statute), overruled by Lawrence v. Texas, 539 U.S. 558, 567 (2003); Hoyt v. Florida, 368 U.S. 57, 61–62 (1961) (upholding automatic exemption from jury duty for women because "woman is still regarded as the center of the home and family life"), abrogated by Taylor v. Louisiana, 419 U.S. 522, 537 (1975) (finding *Hoyt*'s reasoning "no longer tenable"); Pace v. Alabama, 106 U.S. 583, 585 (1883) (upholding an antimiscegenation statute), overruled by McLaughlin v. Florida, 379 U.S. 184, 188 (1964).

50. An interesting illustration from the defamation area is the New York appellate court decision in Yonaty v. Mincolla, 945 N.Y.S.2d 774 (App. Div. 2012), rejecting the earlier decision in Matherson v. Marchello, 473 N.Y.S.2d 998 (App. Div. 1984), which had treated a false assertion that the plaintiff was gay as slanderous per se; the *Yonaty* court held that evolving social norms regarding homosexuality no longer supported allowing such claims on the earlier grounds of shamefulness and disgrace current twenty years earlier. *Yonaty*, 945 N.Y.S.2d at 777.