

COLUMBIA LAW REVIEW ONLINE

VOL. 118

APRIL 11, 2018

PAGES 94–117

MAKING THINGS RIGHT WHEN REPRODUCTIVE MEDICINE GOES WRONG:

REPLY TO ROBERT RABIN, CAROL SANGER, AND GREGORY KEATING

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INTRODUCTION

Academic life is rarely quite so rewarding. Thanks to the editors of the *Columbia Law Review* for this opportunity to engage with scholars as gifted as Professors Robert Rabin, Carol Sanger, and Gregory Keating.¹ I have long admired their insights on law, ethics, and institutions. I am grateful and privileged for their trenchant responses to *Reproductive Negligence*.²

For people willing to move heaven and earth to have a child or avoid one, (in)fertility treatment is the medicine of miracles. But mishaps by sperm banks, surrogacy agencies, and OB/GYN offices can turn these dreams into nightmares.³ Some result in unplanned pregnancies. Others, in lost chances for parenthood. Shortly before this Piece went to press, for example, two major clinics—one in San Francisco, the other outside Cleveland—announced that storage tank malfunctions destroyed

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1. See Gregory C. Keating, Response to Fox: Impaired Conditions, Frustrated Expectations, and the Law of Torts, 117 Colum. L. Rev. Online 212 (2017), <http://columbialawreview.org/content/response-to-fox-impaired-conditions-frustrated-expectations-and-the-law-of-torts/> [http://perma.cc/T9VL-EQXF]; Robert L. Rabin, Dov Fox on Reproductive Negligence: A Commentary, 117 Colum. L. Rev. Online 228 (2017), <http://columbialawreview.org/content/dov-fox-on-reproductive-negligence-a-commentary/> [http://perma.cc/E7X6-7HDZ]; Carol Sanger, The Lopsided Harms of Reproductive Negligence, 118 Colum. L. Rev. Online 29 (2018), <http://columbialawreview.org/content/the-lopsided-harms-of-reproductive-negligence/> [http://perma.cc/W5MD-27RC].

2. Dov Fox, Reproductive Negligence, 117 Colum. L. Rev. 149 (2017) [hereinafter Fox, Reproductive Negligence].

3. See Ellen Trachman, Time for a New Tort: Reproductive Negligence, Above the Law (Apr. 4, 2018), <http://abovethelaw.com/2018/04/time-for-a-new-tort-reproductive-negligence/> [http://perma.cc/T3L7-QQS6].

thousands of cryopreserved eggs and embryos.⁴ These incidents left hundreds of affected families asking how something like this could have happened and what if anything can be done.

My essay documented scores of unredressed errors, from pharmacists who fill birth control prescriptions with prenatal vitamins to surrogacy agencies that implant one couple's embryos into someone else, from sperm banks whose donor profiles hide mental illness and criminal history to ultrasound technicians who tell expecting parents that their healthy fetus would be stillborn.⁵ We cannot know how frequently mistakes like these take place in the United States because there is no tracking system. But available data points are jarring. A 2008 survey of nearly half of all U.S. fertility clinics found that more than one in five had misdiagnosed, mislabeled, or mishandled reproductive materials.⁶ And it stands to reason that mishaps are probably at least as common in the U.S. as the 500+ reported each year in a rigorously regulated country like the United Kingdom.⁷

I analyzed hundreds of U.S. statutes and cases to show how family planners are left to proceed at their own risk and steel themselves against the repercussions of reproductive negligence. Regulators, insurers, and professional societies do not require sound practices or fail-safe protections. Governments, review platforms, and medical boards decline to record mistakes. There is no systematic reporting, even of transgressions like embryo mix-ups and freezer failures that resemble so-called never events. These are the most serious and preventable kind of patient harms—surgery on the wrong body part or patient, for example—that most states track by legislative mandate elsewhere in health care delivery.⁸ And courts rarely deter or compensate for such errors either. My inquiry began with this puzzle: Why does the American legal system turn a blind eye to the wrongful frustration of efforts to pursue or avoid procreation—however egregious the misconduct or devastating the injury?

Public law is part of the story. Congressional refusal to fund research involving human embryos freed the fertility industry since its

4. See Kate Snow, Rich Gardella & Erika Edwards, University Hospitals Fertility Clinic Says Human Error Caused Embryo, Egg Failure, Today (Mar. 28, 2018), <http://www.today.com/health/university-hospitals-fertility-clinic-failure-caused-human-error-t125910> [http://perma.cc/86RY-MRNC].

5. See, e.g., *id.* at 153.

6. See Susannah Baruch, David Kaufman & Kathy L. Hudson, Genetic Testing of Embryos: Practices and Perspectives of U.S. In Vitro Fertilization Clinics, 89 *Fertility & Sterility* 1053, 1055 (2008).

7. Human Fertilisation and Embryology Authority, State of the Fertility Sector: 2016–17, at 24–26 (2017), http://www.hfea.gov.uk/media/2437/hfea_state_of_the_sector_report_tagged.pdf [http://perma.cc/PW96-QRQ2].

8. See Dov Fox, Transparency Challenges in Reproductive Health Care, in *Transparency in Health and Health Care: Legal and Ethical Possibilities and Limits* (I. Glenn Cohen, Holly Fernandez Lynch, Barbara Evans & Carmel Shachar eds., forthcoming 2018), <http://ssrn.com/abstract=3116265> (on file with the *Columbia Law Review*).

emergence in the early 1980s to develop less as a medical practice than as a trade business. It is not just its free-market origins that insulate procreation-related services from meaningful state or federal oversight. Sterilization, surrogacy, and embryo selection—these all are mired in complex controversies about sex, pregnancy, and family life that cut across partisan divides.⁹ There ideological tensions obscure the electoral risks of regulation, even in jurisdictions that are reliably red or blue. For example, progressive feminists disalign with disability-rights advocates on abortion protections related to fetal misdiagnosis of genetic abnormality.¹⁰ Botched IVF, meanwhile, fragments much of the conservative coalition that celebrates the blessing of having children.¹¹

I focused less on the political economy of reproductive medicine, however, than on why our legal regime goes so easy on transgressions that disrupt this far-reaching domain of human life. I canvassed the constellation of reasons why reproductive negligence falls through the cracks of contract, property, and torts.¹² It goes beyond familiar suspicion of claims about intangible harm or fraudulent suits by parents who, having failed “to exercise restraint or take responsibility,” for example, might simply “invent an intent to prevent pregnancy.”¹³ Private law refuses to recognize reproductive injuries as real or serious. Indeed, it lacks even a practical way to think or talk about them.¹⁴

I introduced a comprehensive framework of reproductive wrongs.¹⁵ Some *impose* unwanted procreation.¹⁶ Others *deprive* parenthood from those who long for it.¹⁷ Others still *confound* plans not just for any child, but for one born with or without particular genetic traits.¹⁸ I proposed corresponding causes of action that peg damages for successful claims to two factors.¹⁹ First is how badly the injury harms the parents or prospective parents. Severity depends on the reasons they sought treatment and the repercussions of its defeat.²⁰ The second asks the extent to which transgressions were to blame. The greater chances that the reproductive loss can

9. See June Carbone & Naomi Cahn, *Embryo Fundamentalism*, 18 Wm. & Mary Bill Rts. J. 1015, 1032 (2010).

10. See Marsha Saxton, *Disability Rights and Selective Abortion*, in *The Disability Studies Reader* 105, 112 (Lennard J. Davis ed., 2006).

11. See Henry T. Greely, *The End of Sex and the Future of Human Reproduction* 167–68 (2016).

12. See *id.* at 164–75.

13. *Nell v. Froedtert & Cnty. Health*, 829 N.W.2d 175, 181 (Wis. Ct. App. 2013).

14. Fox, *Reproductive Negligence*, *supra* note 2, at 156.

15. See *id.* at 176–80.

16. See *id.* at 184–90; see also *id.* at 191–93 (explaining that the duty-mitigation doctrine holds that it is unreasonable to insist that women try having an abortion or giving a child up for adoption to make them eligible for recovery otherwise owed).

17. See *id.* at 193–200.

18. See *id.* at 200–09.

19. See *id.* at 209–24.

20. See *id.* at 224–26.

be chalked up to user error, preexisting infertility, or genetic uncertainty, the lower the awards.²¹ I also spelled out circumstances under which judges should void compensation on policy grounds as a violation of public interest or morality.²²

The commentaries by Professors Sanger, Rabin, and Keating refine and elevate these themes that I had sought to develop. I focus here on three of the hardest questions they tackle. First, Professor Sanger asks, what is the central harm when doctors or scientists upset people's plans about having children? Does negligence rob them of whatever measure of autonomous choice or control competent care would have let them exercise over whether, when, how, or with whom to reproduce? Or is the real injury the more workaday ways in which those thwarted decisions encroach on a life that is either free of childrearing's unwanted burdens or enriched by its sought-after blessings?

Professor Rabin moves the ball from the injuries sustained to the remedies owed. He situates legal relief within the common-law evolution of personality torts that range from false imprisonment to intrusion on privacy. In light of this history, he interrogates whether courthouse claims for reproductive negligence should take form in one overarching cause of action—a single, unified right—or the multiple more specific sticks that its unbundling reveals. And, tackling the most provocative among these, he urges me to clarify how such right(s) should recognize and compensate confounded efforts to have offspring who share genetic ties or racial resemblance. Finally, Professor Keating explores whether defeated attempts at parenthood, or freedom from it, are the kinds of loss that our tort system is built to protect against. Is tort compensation limited, he asks, to the impairment of existing things of value to us that we had already come to enjoy? Or can torts redress the loss of future goods that it was reasonable for us to expect? The pages that follow address these issues and related ones that Professors Sanger, Rabin, and Keating raise along the way.

I. IDENTIFYING THE INJURY

Professor Sanger presses me to clarify "the nature of the harm" at stake when procreation is wrongfully imposed, deprived, or confounded.²³ She resists my "attempt to connect the proposal for this new tort to the idea of autonomy" that "is already vindicated in the abortion jurisprudence."²⁴ The rhetoric of choice carries political baggage, she points out. Autonomy talk is rife with pejorative "connotations of consumerism and self-satisfaction" that make it an "unsympathetic strategy."²⁵ More critically,

21. See *id.* at 226–30.

22. See *id.* at 231–40.

23. Sanger, *supra* note 1, at 36.

24. *Id.* at 37.

25. *Id.* at 38.

Sanger argues, the real harm that reproductive negligence causes has less to do with choices than consequences. This injury “is not the loss of control over [family] planning,” she explains, “but rather the loss of what the plan meant to produce.”²⁶ It is true that at times I referred to that harm in terms of choice or control.²⁷ But I never said that the individual’s ability to make central life decisions for herself is the only or best reason to guard against botched fertility or infertility treatment. The “interests in making . . . decisions about pregnancy, parenthood, and offspring particulars vindicate not just decisional autonomy (how freely she chooses),” I underscored, “but also individual well-being (how well such outcomes help her live).”²⁸ Reproductive negligence characteristically inflicts concrete harms to core life projects and relationships.

This is how my introduction had framed what Sanger calls the “spectral tangibleness” of that loss:²⁹

Determinations about having children tend . . . 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.³⁰

I did not mean to cast autonomy in a leading role. And I agree that it cedes center stage to the real-world impacts when people who enlisted professionals to have “no baby, a baby, and a special baby,” in Sanger’s terms, “instead received a baby, no baby, and the wrong kind of baby.”³¹ This “focus on well-being,” my essay concluded, “explains the privileged status that procreation holds in our constitutional tradition better than predominant accounts based on autonomy or equality alone.”³²

And yet autonomy deserves more than a cameo appearance. That value commands authority from its distinctive place in the jurisprudence of contraception and abortion.³³ The Supreme Court has laid emphasis on choice and control in affording fundamental-rights status to determinations as “private and sensitive”³⁴ as whether to initiate a pregnancy, and as

26. *Id.* at 36.

27. See *id.* at 36–38.

28. Fox, *Reproductive Negligence*, *supra* note 2, at 177 (“Whatever satisfaction a person gets from knowing that the reproductive experiences she prizes are of her own making, it matters at least as much the ways in which those experiences help her to live well . . .”).

29. Sanger, *supra* note 1, at 38.

30. Fox, *Reproductive Negligence*, *supra* note 2, at 155 (footnotes omitted); see also *id.* at 220 (arguing that “[f]ew practices” so gravely implicate “health, peace of mind, and livelihoods”).

31. Sanger, *supra* note 1, at 32.

32. Fox, *Reproductive Negligence*, *supra* note 2, at 241.

33. See *id.* at 37.

34. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977).

“intimate and personal”³⁵ as whether to keep it. There are limits to what we can learn from this constitutional emphasis on self-determination in matters of bodily integrity. It does not tell us, for example, whether procreation without sex (IVF) merits less protection than sex without procreation (the Pill),³⁶ or whether courts should redress foiled efforts to select donors or embryos based on sex, race, or disability.³⁷ But it does make autonomy a natural perch from which to build out the case for broader reproductive protections.

The tension that Professor Sanger spotlights between choices and consequences plays out in a pioneering decision abroad. A few months ago, a Singapore couple won their suit against the clinic that swapped the husband’s sperm with a stranger’s.³⁸ The case reached the highest level of the Supreme Court of Singapore. It held the clinic liable for having upended the couple’s plans to have a child with whom they would be “bound by ties of blood and share physical traits.”³⁹ The court called the case “one of the most difficult” in its history.⁴⁰ The unanimous opinion relied on *Reproductive Negligence* to establish a first-of-its-kind right to recover for the wrongful denial of “genetic continuity and biological lineage.”⁴¹

The court framed that injury in terms of both “the frustration of . . . decisional autonomy” as well as “the substantive impact that it has had on . . . well-being.”⁴² The mix-up “dislocate[d]” the couple’s “reproductive plans” for “biological parenthood.”⁴³ It also had profound effects on them.⁴⁴ The court noted the “anguish, stigma, disconcertment, and embarrassment” they were reminded of every time a friend or stranger asked about the “wife’s fidelity and the paternity of [their] child[.]”.⁴⁵ Wellbeing is what mattered more. But autonomy also helped to justify the need for redress. And its setback in such cases helps to round out a more complete account of the harm that reproductive negligence inflicts.

This loss of autonomy also explains my misgivings about Sanger’s proposal to recognize a separate tort for negligence in childbirth. She calls

35. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion) (O’Connor, Kennedy & Souter, JJ.).

36. See Fox, *Reproductive Negligence*, supra note 2, at 219–20.

37. See id. at 221–22. For discussion of why I would permit recovery for confounded heredity but not race, see *infra* notes 93–116 and accompanying text.

38. ACB v. Thomson Med. Pte Ltd. [2017] SGCA 20 (Sing.).

39. Id. at para. 128.

40. Id. at para. 210.

41. Id. at para. 128 (citing Fox, *Reproductive Negligence*, supra note 2, at 179).

42. Id. at para. 130 (citing Fox, *Reproductive Negligence*, supra note 2, at 174).

43. Id. at paras. 125–126.

44. Id. at para. 147 (noting the “unique” harms that “vary depending on the particular reasons fertility treatment was sought, the precise manner in which the negligence took place, and the personal circumstances of the plaintiff (such as the presence of other children or the familial and/or cultural histories particular to him or her)” (citing Fox, *Reproductive Negligence*, supra note 2, at 219–20)).

45. Id. at paras. 133, 150.

salutary attention to the gendered character of reproductive interests.⁴⁶ Besides the three interests that I had distinguished in pregnancy (gestating a fetus), parenthood (raising a child), and particulars (selecting offspring traits), Sanger identifies a separate interest specific to childbirth in matters of labor and delivery. These cases involve medical mistakes that lead a woman to get the epidural injection for pain relief that she had expressly declined, for instance, or to deliver via Cesarean section instead of the vaginal birth that she strongly preferred.⁴⁷

I would still exclude this interest from the new forms of protection that I proposed for the other three. These child-delivery errors have “been neglected in torts” for their own reasons,⁴⁸ separate from policy concerns about the sanctity of life or the unease our legal system harbors toward the value of intangible reproductive loss.⁴⁹ Faulty C-sections or epidurals implicate the physical harm or unconsented touching that qualify them for malpractice claims and pain-and-suffering damages.⁵⁰ These material setbacks are precisely what is missing when providers switch donors, drop embryos, or misdiagnose fetuses.⁵¹

Professor Rabin convinces me that the unitary action I proposed to remedy these injuries would be improved by dividing it into three.⁵² I had acknowledged the risk that reliance on any overarching right “could dissolve into disarray if its protections are too nebulous to implement” across interests in pregnancy, parenthood, and particulars that “resist consolidation into any one identical injury or claim.”⁵³ In the end, however, I was drawn to the flexibility of an overarching tort that could more smoothly adapt to inevitable changes in reproductive culture or

46. Sanger, *supra* note 1, at 39–42. Prenatal and postpartum experiences and expectations place singular demands on women’s bodies, time, identities, and resources, for example, in ways that encroach on their “health and sexual freedom, their ability to enter and end relationships, their education and job training, their ability to provide for their families, and their ability to negotiate work-family conflicts in institutions organized [along] traditional sex-role assumptions.” Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 Emory L.J. 815, 819 (2007).

47. See, e.g., *Pemberton v. Tallahassee Med. Ctr.*, 66 F. Supp. 2d 1247, 1250 (N.D. Fla. 1999); *Schreiber v. Physicians Ins. Co.*, 579 N.W.2d 730, 735–36 (Wis. Ct. App. 1998).

48. Sanger, *supra* note 1, at 44. Birthing mishaps have been overlooked, Sanger points out, because “historically, birthing women often expected to die during labor and rarely sued for physical harms that resulted from obstetric malpractice,” while “[m]ore recently, the fetus has become the primary patient in labor, similarly obscuring women’s harms and their convictions about claiming them.” *Id.* at 44–45 (citing Jamie R. Abrams, *Distorted and Diminished Tort Claims for Women*, 34 Cardozo L. Rev. 1955, 1978–79 (2013)).

49. See Fox, *Reproductive Negligence*, *supra* note 2, at 154, 159.

50. The incursion on bodily integrity also provides the legal hook to recover for associated emotional distress. See Abrams, *supra* note 48, at 1968.

51. See Fox, *Reproductive Negligence*, *supra* note 2, at 176–84.

52. See Rabin, *supra* note 1, at 233–35.

53. Fox, *Reproductive Negligence*, *supra* note 2, at 211.

technology.⁵⁴ Even in the months “since Fox’s essay was published,” Professor Sanger notes, “scientists for the first time successfully edited out a mutant gene from a human embryo.”⁵⁵ Meanwhile, “innovations in genetics and stem cell research [may soon] make embryo selection” for many more traits a common feature of reproductive life, thereby “expanding the possibilities for negligence.”⁵⁶

Despite the appeal of this single-tort approach, courthouse claims demand greater precision, Professor Rabin shows.⁵⁷ The wrongful disruption of plans to reproduce or not with particular traits in mind implicate discrete defenses and damages that judges and juries would risk running together under a monolithic right.⁵⁸ The fertility clinic that loses a cancer survivor’s sperm or contaminates a couple’s embryos leaves them with an empty cradle.⁵⁹ By contrast, the doctor who misprescribes birth control or overstates the risk of ending a pregnancy leaves women to carry or raise a child they were unable to.⁶⁰ And neither of these claims is quite like the swapping of reproductive donors or materials.⁶¹ Rabin would disentangle the torts into the three separate wrongs that I had identified as procreation deprived, imposed, and confounded. I embrace his amendment wholesale.

This important revision brings us back to the Singapore mix-up. Sanger does well to worry in cases like this whether “some parents might find themselves receiving less in compensation for” the “nonwhite child” they got in place of a lighter-skinned one.⁶² That the donor here was Indian—his complexion darker than the couple of German and Chinese descent—forced the court to consider “the complex role that physical resemblance, race, and cultural and ethnic identity have had and continue to have on our individual well-being.”⁶³ The wife’s affidavit singled out the baby’s “different skin tone” as the striking feature that “never fails to draw curious looks from the public” and “turn joyous family time into depressing moments.”⁶⁴ Being born conspicuously browner than her parents, the justices noted, would leave the child and

54. See *id.* at 151, 159, 241.

55. Sanger, *supra* note 1, at 31.

56. *Id.* (citing Greely, *supra* note 11, at 1–2).

57. Rabin cogently analogizes my three reproductive-negligence torts to the four rights of privacy. See Rabin, *supra* note 1, at 233–35.

58. See *id.* at 233.

59. See *id.* at 234–35.

60. See *id.* at 234.

61. See *id.* at 235.

62. Sanger, *supra* note 1, at 35.

63. ACB v. Thomson Med. Pte Ltd. [2017] SGCA 20 (Sing.) at paras. 6, 8, 134.

64. *Id.* at para. 130.

her family susceptible to the “racist bullying” of “abusive and derogative comments and hurtful name calling.”⁶⁵

It was not lost on the court that American judges usually deny compensation in similar cases. Some want to avoid casting children as “emotional bastard[s]”⁶⁶ or inviting the “unseemly spectacle of parents disparaging the ‘value’ of their children or the degree of their affection for them in open court.”⁶⁷ Others “are unwilling to say that life, even life with severe [impairments], may ever amount to a legal injury.”⁶⁸ They think it unfair to force doctors to subsidize the “invaluable ‘benefits’ of parenthood.”⁶⁹ The Singapore Supreme Court asserted that recognizing the loss of genetic affinity neither devalues “the worth of [the] [b]aby”⁷⁰ nor “judicial[ly] sanction[s]” a preference for “single-race families.”⁷¹ With that, the court granted the couple a sizable award: 30% of childrearing expenses, which translates to roughly \$78,000 in U.S. dollars today.⁷²

II. REFINING THE REMEDY

But what, exactly, is that money *for*? I gave three reasons to remedy reproductive negligence: to compensate victims, deter professional misconduct, and affirm values. I laid emphasis on the first two.⁷³ Professors Sanger and Rabin persuade me that the third deserves more. If the main point was compensation, why limit damages to those like this couple injured by professional wrongdoing? I would not provide recovery, Sanger observes, to those who suffer the same disruption of genetic ties due to infertility, infidelity, or misrepresentation.⁷⁴ A companion’s deceit, however shameful, doesn’t breach formal duty of reproductive care between sexual partners who are generally presumed equally capable of affirming their own respective interests.⁷⁵ Nor can deterrence alone account for damages in this

65. Id. at paras. 132–133 (discussing *A & B v. A Health & Soc. Servs. Tr.* [2011] NICA 28 (N.Ir.)).

66. *Wilbur v. Kerr*, 628 S.W.2d 568, 570 (Ark. 1982).

67. *Moorman v. Walker*, 773 P.2d 887, 889 (Wash. Ct. App. 1989); see also *ACB, SGCA 20* (Sing.) at para. 99.

68. *Atl. Obstetrics & Gynecology Grp. v. Abelson*, 398 S.E.2d 557, 561 (Ga. 1990) (internal quotation marks omitted) (quoting *Azzolino v. Dingfelder*, 337 S.E.2d 528, 534 (N.C. 1985)).

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

70. *ACB, SGCA 20* (Sing.) at para. 210.

71. See *id.* at para. 134.

72. See *id.* at para. 150; see also Mahita Gajanan, *The Cost of Raising a Child Jumps to \$233,610*, *Time* (Jan. 9, 2017), <http://time.com/money/4629700/child-raising-cost-department-of-agriculture-report/> [<http://perma.cc/ML8Y-XTc3>].

73. See Fox, *Reproductive Negligence*, *supra* note 2, at 211–13.

74. See Sanger, *supra* note 1, at 29.

75. When a man resists paying child support for a child he unwittingly conceived, courts have accordingly chided him that his partner’s having lied about using birth control “in no way limited his [own] right to [have] use[d] contraception.” *L. Pamela P. v. Frank S.*, 449 N.E.2d 713, 716 (N.Y. 1983) (quoted in Sanger, *supra* note 1, at 29).

case. The Singapore Supreme Court gave no reason to think that the \$78,000 will generate incentives that are designed, as Rabin noted, “for service providers to exercise optimal care” by adopting precautions to prevent such mix-ups, for example, that will cost less than the corresponding injuries that those measures would have averted.⁷⁶

His chronicling of personality torts points us toward the third purpose about shared values.⁷⁷ Professor Rabin makes a strong case that reproductive injuries resemble the logic of customary pain-and-suffering damages:

The plaintiff's [enjoyment of] life has been diminished by [the] 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 . . . shares the same distinctive temporal dimension. The harm has a similar continuing character in its more modern guise, as loss of companionship[,] [whereby] . . . [a] breach has been introduced into an embraced pattern of personal relations.⁷⁸

His account of damages comes close to capturing the distinct and serious impact that reproductive injuries have on social, physical, and other aspects of wellbeing beyond mental tranquility. Courts tend to regard grief or sorrow as too easy to fake or hard to measure to justify compensation on their own.⁷⁹

This skepticism explains the limitations that courts have placed on recovery for emotional distress. Plaintiffs must show that their loss was accompanied by bodily injury, physical impact, or at least its risk from within the “zone of danger.”⁸⁰ Even jurisdictions most receptive to claims of mental harm set an exacting threshold to qualify for compensation.⁸¹ Take the bystander who witnessed a horrific accident in California, the first state to loosen the strictness on emotional distress.⁸² However grave or clearly manifested her panic or shock, she cannot recover unless she is “closely related” to the victim, “present at the scene of [her] injury,” and fully “aware” of its incidence in real-time.⁸³ These onerous constraints on

76. Rabin, *supra* note 1, at 230.

77. *Id.* at 233.

78. *Id.* at 236.

79. For criticism of the distinction that tort law draws between physical and mental forms of harm, see Dov Fox & Alex Stein, *Dualism and Doctrine*, 90 Ind. L.J. 975, 985–92 (2015).

80. See Rabin, *supra* note 1, at 231–32.

81. See, e.g., *Lawson v. Mgmt. Activities, Inc.*, 81 Cal. Rptr. 2d 745, 756 (Ct. App. 1999) (holding that airline operators have no duty “to avoid the emotional trauma inherent in any crash to otherwise unhurt bystanders”).

82. See generally *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (extending recovery to a mother who witnessed her four-year-old daughter killed by a negligent driver); see also *Sanger*, *supra* note 1, at 44 (discussing *Dillon*).

83. *Thing v. La Chusa*, 771 P.2d 814, 829–30 (Cal. 1989) (en banc).

claims to redress mental harm belittle the gravity of such injuries.⁸⁴ And reducing them to emotional distress fails, at any rate, to “speak to the enduringly disrupted life plans and transformed life experiences, especially when procreation is imposed or confounded.”⁸⁵

By contrast, a right to recover for reproductive negligence marks out that conduct as morally wrong.⁸⁶ The Singapore Supreme Court’s decision to hold the clinic liable rebutted any impression that its mix-up is an acceptable way of treating people who are trying to plan their family. The compensation was not for any out-of-pocket costs that the couple would incur in raising their baby.⁸⁷ The court explicitly rejected compensation to provide material support for one’s child.⁸⁸ It benchmarked the award in terms of childrearing expenses merely for want of a less arbitrary point of reference to “reflect[] sufficiently the seriousness of the . . . loss and [a] just, equitable, and proportionate [response under] the circumstances of the case”—one that falls “somewhere between these two extremes” of full “indemnity for the costs of raising [the] [b]aby” and a “nominal sum” that would “make a mockery of the value of the interest at stake.”⁸⁹

The precise total could not escape a measure of arbitrariness. But that award of “substantial damages” signaled that such mix-ups are not acceptable ways to treat patients who have counted on specialists to help them plan their family. By holding the clinic liable for breaching its duty to care for the couple’s reproductive interests, the court said that confounded procreation is serious enough to warrant public vindication. The clinic’s mistreatment of the couple would not thereby stand as a lasting marker that their “community did not care to do anything about.”⁹⁰ And the hefty quantity of that award designated their reproductive injury as one that matters.

This symbolic function cuts both ways, however. Rabin is sensitive to the risks lurking in “judicial receptivity to recognizing parental expectations

84. See Rabin, *supra* note 1, at 237 (arguing that “emotional distress claims [accordingly sound] a cautionary note”).

85. Fox, *Reproductive Negligence*, *supra* note 2, at 171.

86. See *id.* at 212.

87. See ACB v. Thomson Med. Pte Ltd. [2017] SGCA 20 (Sing.) at paras. 86–101.

88. Such compensation would “raise[] the spectre of a possible conflict of interest between the parents’ private interests in the litigation and their duties vis-à-vis their children,” the court concluded. *Id.* at para. 95. “[T]o establish a case for the recovery of” costs to house, clothe, feed, and care for their child, “parents would have to come to court to prove that their child[] represent[s] a net loss to them. The very nature of such an exercise,” by “encourag[ing] the exaggeration of any infirmities and the diminution of benefits as might exist in their children,” it explained, would “taint [the] essential character” of parenthood’s “legal, moral, and social obligations to care for, support, and nurture” one’s child. *Id.* at paras. 87, 95, 99.

89. See *id.* at para. 150.

90. Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. Tort L. (forthcoming 2018) (manuscript at 23) (on file with the *Columbia Law Review*).

regarding racial, ethnic, or gender selection and parental rights to opt for health-related, ability, or physical traits.⁹¹ Here are just three among the “ethically fraught” and “socially divisive” questions that cases like this raise:⁹² Does forcing the IVF clinic to pay the couple for dashed dreams of biological offspring devalue nontraditional families?⁹³ What does a court say when it awards considerable damages for the challenges of racial bias, isolation, and stratification that families of color struggle with every day?⁹⁴ Does compensating for thwarted attempts to choose a child’s race trade on divisive assumptions that families should be set apart along racial lines?⁹⁵

Abstract principles cannot answer questions so dependent on attention to cultural and historical context. This more tailored kind of interrogation, I argued, should “inform judicial determinations about the circumstances under which a remedy for reproductive negligence may be void for public policy.”⁹⁶ There are plausible reasons to value genetic or gestational ties, for example, without disfavoring adoptive, LGBT, or other families who flourish in the absence of biological kinship. Some prospective parents long to perceive a likeness in their baby’s appearance; they may even believe that such resemblance would help strengthen emotional bonds.⁹⁷ For others, being related to a child through DNA carries cultural or religious meaning that identifies the members of a family or connects them to a common past and future.⁹⁸ And certain people may value that connection in ways that others do not. Recovery need not express or reflect disrespect for individuals who defy traditional expectations about parenthood.

Race sorting in family formation also remains a source of evolving conflict more than moral clarity or social consensus.⁹⁹ The Supreme Court

91. Rabin, *supra* note 1, at 238.

92. *Id.*

93. See Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 Wis. L. Rev. 1065, 1085–86.

94. See R.A. Lenhardt, *The Color of Kinship*, 102 Iowa L. Rev. 2071, 2084–85 (2017).

95. See Fox, *Reproductive Negligence*, *supra* note 2, at 234.

96. *Id.* at 231.

97. This ideal of genetic kinship assumes pride of place in the history of United States adoption. That institution was designed to “unite children with parents who looked like them” to “obscure the fact that they had been born to others.” Ellen Herman, *Kinship by Design: A History of Adoption in the Modern United States* 123, 150 (2008). Adoption agencies and social workers sought above all to bring adoptive parents together with children who resembled them. “Enduring beliefs in the power of blood, and widespread doubts about whether families could thrive without it, fueled ardent efforts to subject adoption to” the social engineering of so-called “naturalization.” *Id.* at 7. This matching paradigm reflects the persistent assumption that resemblance between parents and children “expedited love,” while differences threatened a sense of shared identity, emotional bonding, and family belonging. *Id.* at 125.

98. See Fox, *Reproductive Negligence*, *supra* note 2, at 179–80.

99. See Dov Fox, *Race Sorting in Family Formation*, 49 Fam. L.Q. 55, 59 (2015).

has accordingly exempted child placement decisions from the usual constitutional bar on government decisions based on considerations involving race.¹⁰⁰ Minority parents may in certain cases want a child who shares a genetically-infused heritage or tribal identity. And the Singapore couple's interest in genetic affinity takes the edge off the divisive message their suit might otherwise send. But it is often white parents seeking white offspring, sometimes without biological ties, when those efforts go awry.¹⁰¹ Some seek to spare their child racial taunts, confused racial identity, or deficient access to racial culture. Others fear that racially phenotypic differences make their community or extended family less likely to accept them.

In a recent dispute, for example, an Ohio sperm bank swapped a white donor for a black one.¹⁰² The “obviously mixed race[] baby girl” marked her—and her white parents—as racially different in their 98%-white suburb.¹⁰³ It was not just that to get her hair cut properly, the couple had to travel to “a black neighborhood, far from where [they] live[], where she is obviously different in appearance, and not overtly welcome.”¹⁰⁴ Their daughter’s “irrepressibl[y]” African-American heritage unsettled their vision of the normalizing family life they had hoped for—“not only in her all-white community, but [also] in her all-white, and often unconsciously insensitive, family.”¹⁰⁵ The mix-up subjected them to

100. See Katie Eyer, Constitutional Colorblindness and the Family, 162 U. Pa. L. Rev. 537, 541–42 (2014); see also *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“[A] child living with a [parent] of a different race may be subject to a variety of pressures and stresses.”).

101. See, e.g., Michael Lasalandra, Woman, Ex and Hospital Settle over Sperm Mixup, *Bos. Herald*, Aug. 27, 1998, at 12; Mike Stobbe, Alleged Mix-up Leads to Lawsuit, *Fla. Times-Union* (Sept. 1, 1997), <http://jacksonville.com/tu-online/stories/090197/3a5LOOKB.html> [<http://perma.cc/MW66-5KT2>]; Marlise Simons, Uproar Over Twins, and a Dutch Couple’s Anguish, *N.Y. Times* (June 28, 1995), <http://www.nytimes.com/1995/06/28/world/uproar-over-twins-and-a-dutch-couple-s-anguish.html> (on file with the *Columbia Law Review*).

102. Complaint for Wrongful Birth and Breach of Warranty at 6–7, *Cramblett v. Midwest Sperm Bank, LLC*, No. 2014-L-010159 (Ill. Cir. Ct. Sept. 29, 2014), 2014 WL 4853400.

103. *Id.* at 6.

104. *Id.*

105. *Id.* As a lesbian growing up in a small conservative farm town, Jennifer Cramblett knew the sting of not fitting in. So when she and her long-term partner Amanda Zinkon decided to start a family, they looked for a donor who would at least resemble them. Her doctor recommended Midwest Sperm Bank, with its hundreds of potential donors and detailed profiles to pick from. They carefully selected donor No. 380, who was white like they are. Plus, he had blond hair and blue eyes like Zinkon. (They expected that Cramblett’s traits would already be reflected in the child, since she would be carrying their baby-to-be.) After Cramblett got pregnant, the couple called the sperm bank to order additional samples from the same donor, so that their little girl could have a biological sibling. The receptionist on the phone confirmed: “Okay, you want eight vials of sperm from Donor No. 330,” to which Cramblett replied, “No, I said . . . No. 380.” *Id.* at 4. The sperm bank, it turns out, handwrites its records by pen and paper. So whoever had set aside the sample for Cramblett must have mistaken an 8 for a 3. Realizing that the couple was apparently given the wrong sperm, the receptionist clarified whether she “had requested an African

the first-hand experience of their community's indifference to racial exclusion and the stinging insults of an uncle who "speaks openly and derisively about persons of color."¹⁰⁶ The couple fears that they are woefully ill-equipped with the "cultural competency"¹⁰⁷ required to navigate the "challenges [of] transracial parenting."¹⁰⁸

The case was partially dismissed as contrary to state policy against recognition of "wrongful birth."¹⁰⁹ I am inclined to agree with the court that the harms these parents suffered find uncomfortable recourse under the law. But my reasons are different. Framed as a response to enduring racial prejudice and disadvantage, recovery could dignify those "private biases" to which, the Supreme Court has held in the custody context, "the law cannot, directly or indirectly, give . . . effect."¹¹⁰ This is not, the Court clarified, to deny "the reality of private biases and the possible injury they might inflict" in matters of family life.¹¹¹ But the law may not codify or elevate their status. This procreation right overreaches when it breathes life into the idea that it is worse for parents to have a child with darker skin or mixed ancestry. Affording relief for the consequent adversities of navigating public life risks sustaining monoracial family whiteness as a socially advantaged norm.¹¹² The not-so-distant history of American eugenics informs the social meaning of confounded offspring race. Cities in Mississippi and North Carolina forcibly sterilized immigrants and poor women of color well into the 1970s, many of whom were undergoing appendectomies or child delivery at state hospitals.¹¹³ And as recently as 2010, California officials reportedly paid prison doctors to

American donor." "Why would I?" Cramblett answered. "My partner and I are Caucasian." *Id.* at 3–6.

106. *Id.* at 6.

107. *Id.*

108. Complaint at 5, Cramblett v. Midwest Sperm Bank, LLC, No. 1:16-cv-04553 (N.D. Ill. Apr. 22, 2016).

109. Order, Cramblett v. Midwest Sperm Bank, LLC, No. 2015-L-000282 (Ill. Cir. Ct. Sept. 3, 2015). The plaintiff mother declined to refile an amended action in state court in favor of a federal diversity suit under 28 U.S.C. § 1332, alleging seven claims against Midwest Sperm Bank, including negligence, consumer and common law fraud, and breach of contract and warranty. See Complaint, *supra* note 108, at 5–11.

110. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

111. *Id.*

112. See Angela Onwuachi-Willig, According to Our Hearts: *Rhinelander v. Rhinelander* and the Law of the Multiracial Family 17–19 (2013); Clare Huntington, Staging the Family, 88 N.Y.U. L. Rev. 589, 590–91 (2013).

113. See, e.g., Valerie Bauerlein, North Carolina to Compensate Sterilization Victims: State Sets \$10 Million Pool to Pay Subjects in Eugenics Program, *Wall St. J.* (July 26, 2013), <http://www.wsj.com/articles/SB10001424127887323971204578629943220881914> (on file with the *Columbia Law Review*).

perform tubal ligations on over 150 minority female inmates without their consent.¹¹⁴

The Ohio couple counts themselves among those for whom “state policies (e.g., sterilization) that differentiated between more- and less-desirable citizens for a good part of the past century evoke apology and horror today.”¹¹⁵ They do not mean to call hard-won gains for racial equality into any greater question than they do the love they have for their daughter. But reproductive efforts to “naturalize kinship” through racialized “blood and biology” cannot so readily shake off the country’s stubborn shadow.¹¹⁶ This past cannot help but color what it means for courts to award damages for thwarted efforts to have a white child. That does not mean that policy concerns rule out any remedy at all in cases like Cramblett’s. Courts could still authorize a cause of action that disapproves and disciplines any proven professional wrongdoing. Deterrent compensation could take statutory form in liquidated damages for negligently confounded procreation. This would be a modest, fixed amount for nothing more than the failure to provide competent services. That award would explicitly disclaim inquiry into the more particular nature of reproductive loss.

III. RETHINKING THE THEORY

Professor Keating argues that my proposal to remedy reproductive negligence betrays the storied history of tort law and lays bare its conceptual limits. Tort law redresses only “harms” sustained to existing things of value that we already have, as future goods—what Keating calls “benefits”—are not ours yet.¹¹⁷ This “preoccupation” with harms over benefits reflects the widely held view that the loss of existing goods is more serious and worthier of relief.¹¹⁸ Yet it is unrealized benefits at stake when you get the baby you did not plan for, for example, or do not get the one you did. The tort system is accordingly “inhospitable to the recognition of the reproductive wrongs.”¹¹⁹ Professor Keating’s harm–benefit distinction is like the difference between being infected with a disease and being refused the vaccine to prevent it. Infection harms you by impairing a health you had been enjoying, whereas refusing the vaccine imperils only your future health. That loss does not do any *harm*, in Keating’s term; it denies

114. Corey G. Johnson, Female Inmates Sterilized in California Prisons Without Approval, NBC (July 8, 2013), <http://www.nbcbayarea.com/news/california/Female-Inmates-Sterilized-in-California-Prisons-Without-Approval-214634341.html> [http://perma.cc/6JHZ-22HS].

115. Herman, *supra* note 97, at 298.

116. Modern American “anxiety about adoptees’ racial status” reflects “the chastened post-Nazi era” program of eugenics, according to historian Ellen Herman, during which talk of “bad seeds” and racial “degeneration transmuted into more polite forms” of genetic counseling and selection. *Id.* at 131, 283.

117. See Keating, *supra* note 1, at 218.

118. See *id.* at 221.

119. *Id.* at 225.

a *benefit*. This threat to future rather than existing goods, however likely and grave, simply is not enough, he argues, to support a claim under existing tort law.¹²⁰

Yet some torts do confer what Keating calls “benefits.” They redress the lost chance of achieving a more favorable outcome or lost “opportunity to obtain a better degree of recovery.”¹²¹ So, for example, when an obstetrician’s botched surgery left a woman healthy for now, but at greater risk of bowel obstruction down the road, the court approved compensation for that 8–16% chance of future peril.¹²² It is not just doctors who must answer for mistakes that make patients more vulnerable to some physical ailment they do not yet have and might never develop.¹²³ Accountants can also be held liable under the tort of malpractice for bad investments that lose a client potential income.¹²⁴ And drunk drivers can be forced to pay for the lost income a victim might otherwise have earned, even when that victim is a child who never had a job in the first place.¹²⁵

I will explain shortly why I think that such examples of future-oriented tort awards cannot simply be explained away as proxies for the impairment of existing wealth, health, or companionship, especially as they apply to reproductive negligence.¹²⁶ But for now let us accept Keating’s contention that tort law responds only to harms, not lost benefits. He does recognize that harms and benefits are just “pluses and minuses” on either end of “the same scale.”¹²⁷ Yet tort distinguishes these concepts, in his view, because “[h]arms and benefits stand in very different relations to autonomy.”¹²⁸ Harms “to our bodies and to our possessions” in particular “impair[] the principal means at our disposal for . . . exert[ing] our wills upon the world,”¹²⁹ Keating argues, whereas the suppression of benefits rarely “rob[s] us of our normal and foundational powers of agency.”¹³⁰

This seems too quick. It limits my ability to chart my life course no less just because the identity or project that I throw myself into happens to be a future benefit. Keating has a point that benefits I have not undertaken

120. See *id.* at 219, 222.

121. *Lord v. Lovett*, 770 A.2d 1103, 1104–06 (N.H. 2001). For discussion, see Claire Finkelstein, *Is Risk a Harm?*, 151 U. Pa. L. Rev. 963, 985–86 (2003); Nancy Levit, *Ethereal Torts*, 61 Geo. Wash. L. Rev. 136, 154–58 (1992).

122. *Petriello v. Kalman*, 576 A.2d 474, 476–77, 484 (Conn. 1990).

123. See, e.g., *Dickhoff v. Green*, 836 N.W.2d 321, 325–26 (Minn. 2013).

124. See, e.g., *Cast Art Indus. v. KPMG*, 36 A.3d 1049, 1051–52 (N.J. 2012).

125. See, e.g., *Greyhound Lines, Inc. v. Sutton*, 765 So. 2d 1269, 1276–77 (Miss. 2000).

126. See *infra* notes 146–152 and accompanying text (discussing tort damages for loss of filial consortium).

127. Keating, *supra* note 1, at 222.

128. *Id.* at 223. Keating indeed argues that the whole point of our tort system is to promote the very autonomy that Sanger had advised my proposal eschew. See *supra* notes 23–26 and accompanying text.

129. Keating, *supra* note 1, at 217, 223.

130. *Id.* at 223.

or enjoyed may not be “congruent with [my] will[] . To thrust an unsought benefit upon [me] and demand compensation . . . for the value conferred” would conscript me in a project that I have not chosen.¹³¹ Benefits I did not seek out—the vaccine that I never consented to—may thereby deprive me of the very autonomy that Keating says tort law is designed to preserve.

The benefits that reproductive negligence frustrates are not, in the first place, unsolicited. It is prospective parents who those procreation rights would protect, after all, not the potential children who could not have asked for any of this. Would-be parents seek out fertility or infertility treatment with the explicit goal of remaining childfree or becoming a caretaker. When a doctor bungles a tubal ligation or drops a tray of embryos, that error foists parenthood or childlessness on people who had made crystal clear their strong preference to the contrary. Reproductive negligence disorders their lives in profound ways that they experience as at least as foreign as any “broken bones, crippling pain, [or] significant disability.”¹³²

This leads me to think that Professor Keating draws the harm–benefit asymmetry too sharply and makes too much of it. My quarrel is not just with his descriptive claim that tort law tends, as a general matter, to protect against the withdrawal of existing goods more than it does the withholding of future ones.¹³³ I am also wary of his normative claim about why tort law could not at any rate admit exceptions.¹³⁴ To the extent that tort law privileges harms over benefits, more practical reasons make better sense than autonomy of why. Future benefits are harder to prove and calculate. That they have not happened yet clouds the picture of what might have been, or obscures the value of goods that never were. The uncertainty of that loss does not, however, mean that it can never be projected clearly or confidently enough to sustain redress. Damages should simply be discounted by the chances that some other factor was to blame for having caused that loss, such that procreation would have been imposed, deprived, or confounded just the same even in the absence of wrongdoing.¹³⁵ This is just the probabilistic recovery afforded under the loss-of-chance doctrine.¹³⁶

Another uncertainty concerns whether a projected loss will befall the victims, either at all or as severely as anticipated. But again, tort law has sound ways to address that problem. Say it cannot be known whether a child will ultimately develop the genetic disease that a mix-up or misdiagnosis left

131. *Id.* at 223.

132. *Id.* at 215. Keating relies in relevant part here on points developed in Seana Valentine Shiffrin, Harm and Its Moral Significance, 18 Legal Theory 357 (2012).

133. See *supra* notes 128–130 and accompanying text.

134. See Keating, *supra* note 1, at 214–15.

135. See Fox, *Reproductive Negligence*, *supra* note 2, at 189–91, 197–200, 206–09.

136. See *id.* at 226–28.

him susceptible to. Courts could fashion protective remedies like a judicially supervised guardianship or reversionary trust that disburses funds only as the repercussions of that mix-up or misdiagnosis are felt.¹³⁷ Anything that is left over if and when those consequences dissipate would be returned to the defendant.¹³⁸ Availability of such remedies leave little basis for tort law to deny recovery for the loss of a reasonably expected child-to-be when it readily compensates for the loss of an existing child, even moments after birth.¹³⁹ Of course, the newborn has already arrived to us in the here and now, while the yet-to-be born fetus or embryo may never have. But this uncertainty need not affect liability. Instead, courts should, at the damages stage, reduce awards based on the odds that “a couple’s age and other circumstances would have given them” to achieve “pregnancy and live birth” had misconduct not reduced those chances they had.¹⁴⁰

It is “easier to visualize what was at stake,” Professor Steven Smith argues, when the sound of a baby’s gentle cry or touch of her hand wrapping around one’s finger “are actual memories and not just conceptual possibilities.”¹⁴¹ Whereas the newborn assumes an unmistakable place in her parents’ world, it may “require an act of imagination to appreciate the value that could have been realized with a potential person who never actually came into living, breathing existence.”¹⁴² What parenthood will involve or mean is hazier when “there is no actual child . . . for the couple’s reflections to distill around.”¹⁴³ But when their expectation was well founded, the loss of that relationship-to-be is still real and serious.¹⁴⁴ Refusal to recognize that harm underestimates tort’s conceptual agility.

Courts already measure damages for lost consortium and enjoyment of life as a function of losses that have not yet come to pass.¹⁴⁵ Professor JoEllen Lind observes that these awards thereby “exhibit the forward-

137. See id. at 208–09.

138. See, e.g., Robak v. United States, 503 F. Supp. 982, 983 (N.D. Ill. 1980), aff’d in part, rev’d in part, 658 F.2d 471 (7th Cir. 1981); Garrison v. Med. Ctr. of Del. Inc., 581 A.2d 288, 292 (Del. 1989); Kush v. Lloyd, 616 So. 2d 415, 422–24 (Fla. 1992); Arche v. U.S. Dep’t of the Army, 798 P.2d 477, 486–87 (Kan. 1990).

139. Cf. Michael B. Kelly, The Rightful Position in “Wrongful Life” Actions, 42 Hastings L.J. 505, 558 (1991) (arguing that wrongful-birth torts protect expectation interests by focusing recovery on “the difference between the cost of raising a healthy child, which the parents expected and were willing to pay, and the cost of raising an impaired child, which the parents did not expect”).

140. Fox, Reproductive Negligence, supra note 2, at 199.

141. Steven D. Smith, Missing Persons, 2 Nev. L.J. 590, 603 (2002).

142. Id. at 597–98.

143. Id. at 602.

144. See Jill Wieber Lens, Recognizing Invisible Death 9–10 (2018) (unpublished manuscript) (on file with the *Columbia Law Review*) (noting that understandings of and reactions to stillbirth have evolved over time).

145. JoEllen Lind, Valuing Relationships: The Role of Damages for Loss of Society, 35 N.M. L. Rev. 301, 303 & n.14 (2005).

looking, expectation attributes of contract law.”¹⁴⁶ Lost wages look to future losses too. Consortium damages, for their part, “focus on the missed opportunity” of human interaction that “would have flourished over time” had misconduct not impaired that relationship.¹⁴⁷ This future-oriented feature of consortium damages makes sense of why some courts do not condition their award on a potential child’s having been born. When a reckless driver took the life of a pregnant woman, the Iowa Supreme Court allowed her husband to recover consortium damages for the seven-and-a-half-month-old fetus as well.¹⁴⁸ That “loss certainly does not vanish because the deprivation occurred prior to birth,” the court held.¹⁴⁹ “To the deprived parent the loss is real either way.”¹⁵⁰ The unborn need not be treated as persons with legal interests of their own for prospective parents to have “developed a relationship with them,” as one Arizona court made clear in awarding consortium damages in a medical malpractice suit for loss of stillborn twins.¹⁵¹ It was enough that it was reasonable for the parents to have “developed love for them and expectations for their future.”¹⁵²

It strains the imagination to conjure the defeated benefits when imposed or confounded procreation leaves a person with the baby she did not have before and specifically sought to avoid. One need only think of the lost sleep, freedom, or time for other existing kids or projects outside the family that are central to her life enjoyment. Professor Keating argues that these future goods were mere benefits because she did not have them already, so they cannot be treated as autonomously hers. Acquiring the benefits may have “enlarge[d] the reach” of her will, but losing them does not impair it.¹⁵³ This strikes me as a distinction without a difference. Why should it matter that she did not have those things so long as she had good reason to expect them and plan her life accordingly? Keating’s answer sounds less in the legal outcome than its mechanics. He would not deny compensation for reproductive negligence. He would just look elsewhere for authority. Tort law is *protective*, he might say, not *productive* like contract is. But when misconduct imposes, deprives, or confounds procreation, it does not really protect against the kind of bad outcomes that make people worse off; it just fails to produce good ones that would have improved their lot.

Tort is limited to “interactions in which one of the parties detrimentally changes the position of the other,” is how Professor Ronen Perry puts it; contract applies when “one of the parties promised something to the other

146. *Id.* at 305.

147. *Id.* at 302, 305.

148. *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 831, 834 (Iowa 1983).

149. *Id.* at 833.

150. *Id.*

151. *Burnham v. Miller*, 972 P.2d 645, 647 (Ariz. Ct. App. 1998).

152. *Id.*

153. Keating, *supra* note 1, at 217.

and in so doing created an expectation that did not formerly exist.”¹⁵⁴ Keating echoes the sentiment that Perry expressed in a different context: “[S]ince the Gordian knot of tort law cannot be untied, it must be cut altogether. We must replace the traditional tort framework, which gives rise to an insoluble problem, with a more promising contractual framework.”¹⁵⁵ Keating argues that contract better addresses the thwarted exercise of one person’s will together with another’s for their mutual “creation and protection of legitimate expectations of future benefit.”¹⁵⁶ Sanger, too, had noted the allure of contract law in describing the angst that “disappointed plaintiffs” sustain when “they [don’t] get what they bargained and paid for—competent medical treatment—toward a reproductive goal.”¹⁵⁷

Indeed, U.S. courts have increasingly adopted a freedom-of-contract framework, for example, to adjudicate reproductive disputes between surrogates and the intended parents.¹⁵⁸ Contract enforcement is limited even in this context, however. A salient example comes from agreed-to terms about whether to selectively reduce a multiple-order pregnancy or terminate a single fetus diagnosed with an anomaly.¹⁵⁹ And besides, social and economic forces, I had noted, relieve most family-planning specialists of the usual market pressures to assure the results of their care.¹⁶⁰ So as a practical matter, there is rarely any “bargained and paid for” agreement to enforce against mishandled reproductive outcomes.¹⁶¹ Most family-planning specialists even insist that patients sign clauses that shield reproductive specialists from liability for even implied breach.¹⁶²

More fundamentally, however, contract misses tort law’s emphasis on the distinctively abiding forms of obligation that family planners are

154. Ronen Perry, It’s a Wonderful Life, 93 Cornell L. Rev. 329, 383 (2008).

155. Id. at 398 (discussing wrongful-life suits).

156. Keating, *supra* note 1, at 218.

157. Sanger, *supra* note 1, at 38.

158. Deborah S. Mazer, Born Breach: The Challenge of Remedies in Surrogacy Contracts, 28 Yale J.L. & Feminism 211, 218–19 (2017).

159. See, e.g., Dov Fox, Surrogacy Contracts, Abortion Conditions, and Parenting Licenses, Bill of Health (June 7, 2016), <http://blogs.harvard.edu/billofhealth/2016/06/07/surrogacy-contracts-abortion-conditions-and-parenting-licenses-in-the-curious-case-of-cook-v-harding/> [<http://perma.cc/79VW-CX9M>].

160. See Fox, Reproductive Negligence, *supra* note 2, at 172–74.

161. See *id.* at 173.

162. A typical indemnification-and-liquidated-damages clause comes from the standard contract used by the country’s leading sperm bank. California Cryobank requires anyone who wants to use one of its donors to start a family to sign this: “Client agrees to indemnify, defend and hold harmless Cryobank . . . against any claims, losses, damages, liabilities, demands, offsets, causes of action and expenses” resulting from “any possible loss, degradation, spoilage, contamination or the like of any portion or all of the semen for any reason, including but without limitation, as a result of Cryobank’s negligence.” Cal. Cryobank, Donor Semen Services Agreement 3–4, http://cryobank.com/uploadedFiles/Cryobankcom/_forms/pdf/documents/PurchaseStorageAgreement.pdf [<http://perma.cc/J6JG-84TH>]. Nor does Cryobank make any guarantees about the quality or viability of specimens.

owed by specialists ranging from obstetricians, pharmacists, and embryologists to fertility clinics, sperm banks, and surrogacy agencies. Each assumes practice-specific responsibilities that they cannot waive to the individuals they take on as patients or clients.¹⁶³ This commitment to their interests in pregnancy, parenthood, or particulars does more than either fill in contractual gaps in the name of justice or modify agreements for good faith or fair dealing.¹⁶⁴ Nondisclaimable duties of professional care are tort law's chief attraction in a context like reproductive medicine, in which people entrust professionals to carry out a cherished social practice with far-reaching life consequences.¹⁶⁵

Perhaps this explains why Professor Keating ultimately gestures toward a compound approach to reproductive negligence that would be part tort, part contract:

What we need is a hybrid legal regime that borrows from both tort and contract law. An adequate regime would take from tort law the principle that duties of care are binding and inalienable. It would take from contract law both a concern with fashioning the terms on which the assistance of others may be enlisted and a regime of remedies designed to address cases in which malfeasance results in the failure to realize a legitimate expectation of benefit.¹⁶⁶

I have no principled objection to grafting tort's duty of reproductive care onto contract law's enforcement of cooperative efforts between patients and providers. There is indeed precedent for this chimeric sort of action in the liability doctrine that governs product-borne injuries to persons or property.

Products liability started out in contract law.¹⁶⁷ Consumer transactions were governed exclusively by assurances made in the course of commercial marketing that the vended goods, for example, exhibited quality sufficient to make them fit for sale.¹⁶⁸ The twentieth century marked a transformation in products liability, however, toward tort actions like negligent misrepresentation and strict liability for design defects.¹⁶⁹ Exemplifying this turn is the celebrated 1916 case about the driver who was injured when the wooden

163. Fox, *Reproductive Negligence*, *supra* note 2, at 215–16.

164. See Perry, *supra* note 154, at 382.

165. See Fox, *Reproductive Negligence*, *supra* note 2, at 170.

166. Keating, *supra* note 1, at 227.

167. See David G. Owen, *The Evolution of Products Liability Law*, 26 *Rev. Litig.* 955, 967–69 (2007).

168. See Robert L. Rabin, *Restating the Law: The Dilemmas of Products Liability*, 30 *U. Mich. J.L. Reform* 197, 199–200 (1997).

169. Products liability was pushed beyond a negligence standard to strict liability by Justice Roger Traynor, first in concurrence, *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring), and later for a unanimous California Supreme Court, *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963).

wheel on his Buick collapsed.¹⁷⁰ The New York Court of Appeals held the manufacturer liable even though it had sold the automobile to the dealer without promising that it would work.¹⁷¹ The absence of contract elements was no barrier to recovery. Judge Benjamin Cardozo explained:

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.¹⁷²

“The law” where he placed this duty is tort, justly celebrated for its moral imagination.¹⁷³ Tort is uniquely equipped to accommodate new forms of wrongfully inflicted harm that merit protection in the absence of explicit or implicit warranty. This common law was capacious enough to protect against injuries that could be traced to defective car parts on distant assembly lines. So too should it guard against forced pregnancy or robbed parenthood at the hands of family planning specialists.

To remedy reproductive negligence, tort law need not resign itself to freewheeling policy or sacrifice its conceptual integrity on the altar of justice. Keating divides the work of tort and contract in terms of whether an injured party suffered the loss of an existing or future good, a harm or a benefit. I would draw the doctrinal boundaries differently. Tort law is for those injuries that society has determined it will not stand for, whether or not a more vulnerable party secured assurances against their infliction. Contract is for other injuries, those that we have not declared intolerable, but that parties have made agreements about on their own. By demoting contract law to this private-ordering role, I do not mean to suggest that it should be “reabsorbed into the mainstream of ‘tort.’”¹⁷⁴ My point is only that tort can do without help from contract law in holding professionals to account for wrongfully imposing, depriving, or confounding procreation. And given the practical limits that beset contract enforcement, like the political challenges that stand in the way of public regulation, the clarion call of tort awards may for now be the best that we can do.

CONCLUSION

“Planning procreation,” Professor Sanger reminds us, “has never been a surefire enterprise.”¹⁷⁵ But neither is riding a car or preparing a meal

170. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

171. See *id.* at 1052–54.

172. *Id.* at 1053.

173. See, e.g., Oliver Wendell Holmes, Jr., *The Common Law* 37–38 (1881).

174. Grant Gilmore, *The Death of Contract* 95 (1974).

175. Sanger, *supra* note 1, at 38. Sanger speculates that “[t]he focus on planning may reflect a generational difference. . . . [I]n the past there were fewer treatments for infertility and so the medical profession had little to offer,” while today “more women are likely to have entered the zone of concern because they are actively seeking pregnancy later in their life

or all kinds of risky activities that our legal system has nothing to say about when food contamination or car accidents happen. And our laws still respond to those harms when a responsible party—such as a meat producer or drunk driver—is to blame for having caused them. Sanger is right that “loss of control” can sometimes shade into “acceptance” of the reproductive fate that negligence victims are dealt.¹⁷⁶ Not always, or even often perhaps; but maybe, and certainly sometimes. She points to the striking portrait that emerges from author Andrew Solomon’s *Far from the Tree*. His book tells the story of 300 families who “learn to tolerate, accept and finally celebrate children who are not what they originally had in mind.”¹⁷⁷ Solomon bears witness to how these parents of children—with deafness or dwarfism, Down syndrome or schizophrenia, prodigious talents or transgender identity—find themselves “falling in love with someone they didn’t yet know enough to want.”¹⁷⁸

The tenacity of parental love does not, however, diminish the legitimate interest in choosing offspring particulars, or the real losses to life plans or identities when that interest is wrongfully frustrated. Solomon also captures the episodic despair, isolation, and indignation of even the most resilient parents. And our law does not ordinarily condition legal relief for unjustly inflicted adversities on whether victims are able to abide or come to terms with them. Nor does it immunize wrongdoers from liability just because plaintiffs tough it out or find consolation in how things ended up. It makes no difference for remediation purposes that most “parents with moderate coping skills” do not “suffer lasting grief or family dysfunction,” for example, when flawed prenatal tests lead them to “have a child with a disabling condition.”¹⁷⁹ It is enough to support a claim against the specialist at fault that the parents had “wish[ed] to forgo the emotional, physical, and financial pressures of hospital visits, medical expenses, and special education that caring for a child with special needs can entail.”¹⁸⁰

That parents will value the relationship with a child whose features reproductive negligence rendered unanticipated or unfamiliar does not make that error harmless or that harm noncompensable. A longstanding tort doctrine was designed to remedy just this sort of injury by mitigating damages “[w]here the defendant’s [harmfully] tortious conduct” has at the same time “conferred upon the plaintiff a special benefit.”¹⁸¹ This

span.” Id. at 38–39. She “wonder[s] as well if there is a millennial—or more likely a Gen X—expectation of control over other things as well, connected in part to a faith in technology and invention.” Id. at 39.

176. Id.

177. Andrew Solomon, *Far from the Tree: Parents, Children, and the Search for Identity* 5 (2012).

178. Id. at 47.

179. Fox, *Reproductive Negligence*, supra note 2, at 235.

180. Id.

181. Restatement of Torts § 920 (1939).

benefit-offset rule eschews all-or-nothing awards in favor of one that balances the harms that misconduct caused against any countervailing benefits that it brought along with it as well.¹⁸² Courts have criticized this approach for “comparing apples and oranges, that is, involving highly speculative and unquantifiable damages in contrast to intangible benefits.”¹⁸³ They have a point. There is no precise way to work out and tally up harms and benefits in having the kind of child that you actually did instead of some counterfactual one you did not. The undeniable complexity of trying to tease apart or add up what parents experience as good or bad does not, however, warrant refusing compensation or deterrence outright.¹⁸⁴ Better to identify these tradeoffs with care than “to permit the law to be blinded to the realities of the plaintiff’s concrete situation for the sake of indefinite abstractions.”¹⁸⁵

Fertility treatment is not just some consumer indulgence. The choices we make about family formation dramatically shape our lives and the meaning they have for us. Misrepresented donors, misimplanted embryos, and misdiagnosed fetuses may be first-world problems; but they are not frivolous nor trivial harms. And they cannot be chalked up to occasional and honest mistakes like the inevitable slip of the hand or reasonable lapse in judgment. Their causes more often lie instead in the unsanitized laboratories, uncalibrated equipment, and unreliable quality controls that a regulatory vacuum makes predictable. These are clear breaches of the professional duty of care that sperm banks, IVF clinics, and OB/GYN doctors owe to those whose reproductive interests they agree to serve. They are wrongs in need of rights.

182. See *Jones v. Malinowski*, 473 A.2d 429, 436–37 (Md. 1984) (holding that the “jury must assess the[] benefits” of a slipshod sterilization “in light of the circumstances of the particular case . . . taking into account . . . family size and income, age of the parents and other relevant factors” to determine whether the negligently wrought reproductive outcome nevertheless benefits the parents).

183. *Smith v. Gore*, 728 S.W.2d 738, 743 (Tenn. 1987).

184. Fox, *Reproductive Negligence*, *supra* note 2, at 218–19 (observing that courts approximate damages for woolly losses to life, liberty, and dignity in matters of fiduciary breach, privacy intrusion, and lack of informed consent).

185. *Smith*, 728 S.W.2d at 744.