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## Redressing Future Intangible Losses

Dov Fox

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# REDRESSING FUTURE INTANGIBLE LOSSES

*Dov Fox\**

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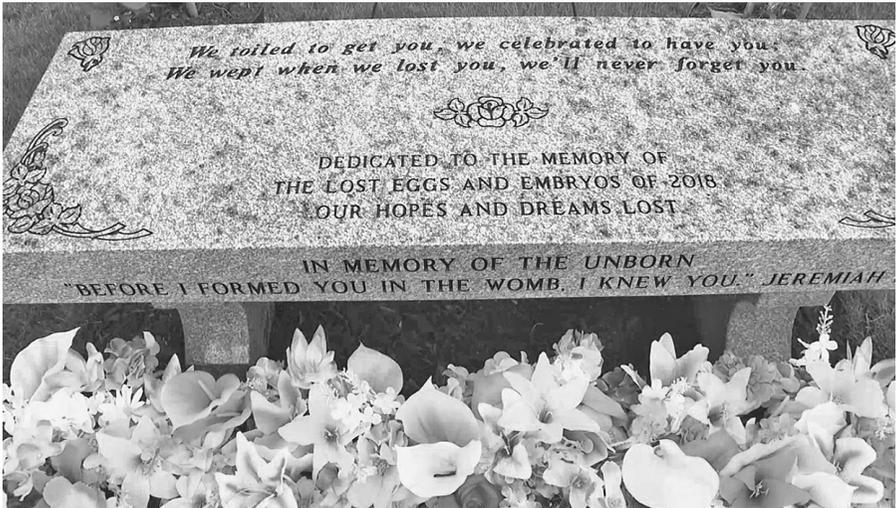
*Prominent scholars argue that torts is just for the loss of things you had before you were wrongfully injured. According to this view, tort law remedies the loss of a house you already live in, or health you already enjoy, or child you already have—but not the loss of a bigger house or better health or child you hope for, but do not have yet. John Gardner, Greg Keating, Arthur Ripstein, and Seana Shiffrin all subscribe to some version of this account. It reflects a familiar legal priority of existing losses over future ones, and relies on psychology principles of loss aversion and prospect theory to support the sense that it is worse to have something taken away from you when that thing—your house or health or child—was already yours, than it is to be deprived of that very same thing if you did not quite have it yet.*

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\* Professor of Law and Herzog Endowed Scholar, University of San Diego School of Law. The editors at *DePaul Law Review* provided stellar feedback on this contribution to the Clifford Symposium on Tort Law and Social Policy. Conversation with colleagues and friends improved these ideas immensely. I owe thanks to Glenn Cohen, Rebecca Eisenberg, Nora Engstrom, Michael Green, Dan Hemel, Stephan Landsman, Mark Lemley, Myrisha Lewis, Jonathan Masur, Lisa Ouellette, Stephanie Plamandon Bair, Robert Rabin, Richard Re, Lauren Scholz, Catherine Sharkey, Jacob Sherkow, Steve Smith, Christopher Yoo. For valuable engagement, I am grateful to faculty and student participants at the Health Law Workshop at Harvard Law School, the Clifford Symposium at DePaul College of Law, the PULSE Lecture Series at UCLA School of Law, and the Junior Faculty Forum for Law and STEM at Stanford Law School.

*This backward-looking vision of tort law makes too much of the asymmetry between “harms” and “benefits.” “Harms” worsen your position in the here and now, as compared with how things were going for you before you were wronged. “Benefits” instead look ahead to how your position would have improved had it not been for the wrong that was done to you. Tort liability should not be closed off to unrealized benefits if you had good reason to expect that those plans would have materialized otherwise. Future losses to your home or health—even intangible losses of reproductive health—should still be compensable. The hardest question is not about liability but remedies. This Article spells out practical ways for courts to redress these intangible future losses through principled measures of plaintiff well-being.*

“[T]o the memory of . . . our hopes and dream lost.”<sup>1</sup>



### A TALE OF TWO CITIES

Hundreds of would-be parents had their dreams of biological children crushed in 2018.<sup>2</sup> High-capacity freezers that were storing their embryos failed at two major medical facilities in Cleveland and San

1. Ariana Eunjung Cha, *These Would-be Parents' Embryos Were Lost. Now They're Grieving—And Suing*, WASH. POST (Aug. 24, 2018), [https://www.washingtonpost.com/national/health-science/these-would-be-parents-embryos-were-lost-now-theyre-grieving—and-suing/2018/08/24/57040ab0-733c-11e8-805c-4b67019fcfe4\\_story.html?noredirect=on&utm\\_term=.80e17d-f7e769](https://www.washingtonpost.com/national/health-science/these-would-be-parents-embryos-were-lost-now-theyre-grieving—and-suing/2018/08/24/57040ab0-733c-11e8-805c-4b67019fcfe4_story.html?noredirect=on&utm_term=.80e17d-f7e769).

2. See Natalie Lampert, *Their Embryos Were Destroyed: Now They Mourn the Children They'll Never Have*, THE GUARDIAN (May 13, 2018), <https://www.theguardian.com/lifeandstyle/2018/may/13/their-embryos-were-destroyed-now-they-mourn-the-children-theyll-never-have>.

Francisco.<sup>3</sup> These subzero containers are not regulated any better than kitchen appliances or farm tools. The bulk vats were developed in the 1960s to store livestock semen for breeding.<sup>4</sup> Now they are used by almost five hundred fertility clinics nationwide to cryopreserve people's eggs and embryos at a constant  $-196^{\circ}\text{C}$ .<sup>5</sup> Temperatures began rising on the same unstaffed weekend that March, with remote alarms inactive. By the time lab technicians returned on Monday morning, everything inside had been thawed beyond rescue or repair.<sup>6</sup>

Center operators pointed the finger at defective equipment, while manufacturers blamed laboratory staff for “forget[ting] to refill” the liquid nitrogen chambers in these “ever-dependable vessels.”<sup>7</sup> These were not the first fertility tank malfunctions. In October 2005, a mechanical crash at the University of Florida Health Center thawed the sperm that sixty men had cryopreserved before undergoing chemotherapy or deploying overseas.<sup>8</sup> An April 2012 malfunction likewise took the biological tissues of two hundred fifty patients and troops at Northwestern Memorial Hospital who had put their samples on ice.<sup>9</sup> And freezer breakdowns are hardly the only time that the very specialists entrusted to help people have biological children are the ones who render their sex cells unusable or reproductive capacities inoperative. The case law is rife with clinics that have lost, destroyed, and

3. See Danielle Zoellner, *Second Fertility Clinic in the Last Week Has a Freezer Failure*, DAILY MAIL (Mar. 11, 2018, 6:05 PM), <https://www.dailymail.co.uk/news/article-5488507/Eggs-embryos-possibly-damaged-California-clinic.html>.

4. See Kayla Webley Adler, *When Your Dreams of Motherhood Are Destroyed*, MARIE CLAIRE (Oct. 1, 2018), <https://www.marieclaire.com/health-fitness/a23327231/egg-freezing-embryos-lack-of-regulation/>.

5. See Amy Goldstein, *Fertility Clinic Informs Hundreds of Patients Their Eggs May Have Been Damaged*, WASH. POST (Mar. 11, 2018), [https://www.washingtonpost.com/national/health-science/fertility-clinic-informs-hundreds-of-patients-their-eggs-may-be-damaged/2018/03/11/b605ea82-2536-11e8-b79d-f3d931db7f68\\_story.html?utm\\_term=.1155a73dbbec](https://www.washingtonpost.com/national/health-science/fertility-clinic-informs-hundreds-of-patients-their-eggs-may-be-damaged/2018/03/11/b605ea82-2536-11e8-b79d-f3d931db7f68_story.html?utm_term=.1155a73dbbec).

6. See Rich Gardella & Erika Edwards, *Heartbreak, anxiety, lawsuits: The egg-freezing disaster a year later*, NBC NEWS (Mar. 4, 2019), <https://www.nbcnews.com/news/all/heartbreak-anxiety-lawsuits-egg-freezing-disaster-year-later-n978891>.

7. Mitchel C. Schiewe et al., *Comprehensive Assessment of Cryogenic Storage Risk and Quality Management Concerns: Best Practice Guidelines for ART Labs*, 36 J. ASSISTED REPROD. & GENETICS 5, 5 (2019); see also Zahava P. Michaelson et al., *Early Detection of Cryostorage Tank Failure Using a Weight-based Monitoring System*, 36 J. ASSISTED REPROD. & GENETICS 655 (2019).

8. See Nathan Crabbe, *Mechanical Glitch Ruins Sperm Stored at UF Center*, GAINESVILLE SUN (Sept. 3, 2006, 12:01 AM), <https://www.gainesville.com/news/20060903/mechanical-glitch-ruins-sperm-stored-at-uf-center>.

9. See *Doe v. Nw. Mem'l Hosp.*, No. 2014L000869, at 2 (Ill. Cir. Ct. Aug. 20, 2013); Michelle Manchir, *Lawsuit: Northwestern Memorial Damaged Sperm Samples*, CHI. TRIB. (Aug. 21, 2013), <http://www.chicagotribune.com/news/ct-xpm-2013-08-21-ct-met-40-northwestern-frozen-sperm-lawsuits-20130821-story.html>.

contaminated frozen sperm,<sup>10</sup> eggs,<sup>11</sup> and embryos.<sup>12</sup> Other facilities have switched donors or put one patient's samples into another.<sup>13</sup> Physicians have also botched procedures that leave people unable to conceive or gestate.<sup>14</sup> And misadvised women about baseless dangers that lead them to end the pregnancy they longed for.<sup>15</sup> Doctors have also misprescribed abortion pills to pregnant women who set out to have a baby.<sup>16</sup>

A couple examples give a sense of the stakes. Cindy Baker and her husband eagerly awaited the birth of their child. She was five months pregnant when an abnormal pap smear indicated perils of proceeding

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

11. See, e.g., Kate Briquet, *Aspiring Mom: Fertility Clinic Destroyed My Embryos and My Chance at Motherhood*, DAILY BEAST (Mar. 30, 2016), <http://www.thedailybeast.com/articles/2016/03/30/fertility-clinic-destroyed-her-embryos.html>; Jose Martinez, *Lesbian Pair Sues for 3M After Sperm Bank Loses Embryos*, N.Y. DAILY NEWS (Mar. 6, 2007), <http://www.nydailynews.com/news/lesbian-pair-sues-3m-sperm-bank-loses-embryos-article-1.214041>; SoCal Patch (Patch Staff), *Couple Accuses Pasadena Reproductive Center of Losing Embryos*, PASADENA PATCH (Aug. 11, 2016, 3:05 PM), <http://patch.com/california/pasadena-ca/couple-accuses-pasadena-reproductive-center-losing-embryos>.

12. See, e.g., *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1261–62 (Ariz. Ct. App. 2005); *Kazmeirczak v. Reprod. Genetic Inst., Inc.*, No. 10 C 05253, 2012 WL 4482753, at \*1 (N.D. Ill. Sept. 26, 2012); *Miller v. Am. Infertility Grp. of Ill.*, 897 N.E.2d 837, 839 (Ill. App. Ct. 2008); *Frisina v. Women & Infants Hosp. of R.I.*, Nos. CIV. A. 95-4037, CIV. A. 95-4469, CIV. A. 95-5827, 2002 WL 1288784, at \*1 (R.I. Super. Ct. May 30, 2002); *Inst. for Women's Health, P.L.L.C. v. Imad*, No. 04-05-00555-CV, 2006 WL 334013, at \*1 (Tex. Ct. App. Feb. 15, 2006).

13. See *Creed v. United Hosp.*, 600 N.Y.S.2d 151, 151–52 (App. Div. 1993); *Lubowitz v. Albert Einstein Med. Ctr.*, 623 A.2d 3, 4–5 (Pa. Super. Ct. 1993); Complaint at 4–5, *Walterspiel v. Jain*, No. BC467123 (Cal. Super. Ct. Aug. 17, 2011); Mike Celizic, *Genetic Parents of Embryo Felt "Powerless,"* TODAY (Sept. 23, 2009, 6:00 AM), <https://www.today.com/health/genetic-parents-embryo-felt-powerless-1C9404873>; Associated Press, *Woman Awarded \$1 Million in Embryo Mix-Up*, NBC NEWS: WOMEN'S HEALTH (Aug. 4, 2004, 3:08 PM), [http://www.nbcnews.com/id/5603277/ns/health-womens\\_health/t/woman-awarded-million-embryo-mix-up/#.V9sl2JM-rJE4](http://www.nbcnews.com/id/5603277/ns/health-womens_health/t/woman-awarded-million-embryo-mix-up/#.V9sl2JM-rJE4).

14. See, e.g., *Cohen v. Cabrini Med. Ctr.*, 730 N.E.2d 949, 950 (N.Y. 2000); *Albala v. City of New York*, 429 N.E.2d 786, 788–89 (N.Y. 1981); *Chen v. Genetics & IVF Inst., Inc.*, No. L-153343, 1996 WL 1065627, at \*1 (Va. Cir. Ct. Oct. 21, 1996); *Terrie Morgan-Besecker, Judge Refuses to Seal \$4.25 Million Settlement in Baby Death Case*, TIMES-TRIB. (Aug. 23, 2016), <http://thetimes-tribune.com/news/judge-refuses-to-seal-4-25-million-settlement-in-baby-death-case-1.2081805>.

15. See, e.g., *Elderkin v. Greater New Haven OB-GYN Grp., P.C.*, No. NNHCV156056190, LEXIS 1440, Conn., at \*1–4 (Conn. Super. Ct. 2018); *Johnson v. United States*, 735 F. Supp. 1, 2 (D.D.C. 1990); *Martinez v. Long Island Jewish Hillside Med. Ctr.*, 512 N.E.2d 538, 539 (N.Y. 1987); *Breyné v. Potter*, 574 S.E.2d 916, 919 (Ga. Ct. App. 2002); *Alger v. Univ. of Rochester Med. Ctr.*, 980 N.Y.S.2d 200, 200–01 (App. Div. 2014).

16. See Matt Fountain, *Atascadero Woman Says Doctor Mistakenly Gave Her an Abortion Pill—Ending Her Pregnancy*, SACRAMENTO BEE (Jan. 8, 2019, 4:01 PM), <https://www.sacbee.com/news/state/california/article224083755.html>.

into the last trimester. Her doctor ordered a biopsy to test for malignant cells in her cervix.<sup>17</sup> When the test came back from the lab, the doctor called Cindy to break the news: “Your pap smear came back Stage III. It’s on the verge of becoming invasive cancer.”<sup>18</sup> He told her that the only way to treat it was to terminate the pregnancy “as quick as possible.”<sup>19</sup> The doctor made the appointment for Cindy that week. Only after having the abortion did she learn that she was healthy. Her tests had never indicated a greater threat of cancer.<sup>20</sup> Cindy’s doctor simply misread the results. She could have kept her pregnancy and had the child she and her husband so desperately wanted without any special risk to her own life or the baby’s. She was haunted day and night with “panic attacks” and “feelings of suffocation” at the horror that she had “had an abortion for no reason at all.”<sup>21</sup>

Sarah Robertson married her high school sweetheart, Aaron. The couple decided they would start a family after completing their degrees and buying a house. They were well on their way when a stroke landed Aaron in a coma that took his life at twenty-nine. Before he died, Aaron had his sperm extracted to cryopreserve his reproductive material, while Sarah went back to school and saved up for the home.<sup>22</sup> She set her heart on carrying out the plan they had made together. But when she was ready to have their child, the clinic informed her that the vials were gone. They were her only chance to have a baby who would share her husband’s genetics. Sarah’s lawyer figured the facility never told her because it “believed she would never come back to use that sperm,” that she’d probably “find someone else in her life to move on . . . and start a family with[.]”<sup>23</sup> For Robertson’s part, “[i]t’s been heartbreaking . . . to lose your husband then have something like this happen. I still feel like I’m in a nightmare.”<sup>24</sup>

When professional transgressions keep people from being able to reproduce like they had sought or hoped to, these lost opportunities

17. *Baker v. Gordon*, 759 S.W.2d 87, 88 (Mo. Ct. App. 1988).

18. *Id.* at 89.

19. *Id.*

20. *Id.* at 90.

21. *Id.* at 89–90, 94. For discussion of similar cases, see Ronen Perry & Yehuda Adar, *Wrongful Abortion: A Wrong in Search of a Remedy*, 5 *YALE J. HEALTH POL’Y L. & ETHICS* 507, 512–14 (2005); Brandy Zadrozny, *Parents Sue Doctors over “Wrongful Abortion,”* *DAILY BEAST* (Jan. 29, 2015), <http://www.thedailybeast.com/articles/2015/01/29/parents-sue-over-wrongful-abortion.html>.

22. Complaint, *Robertson v. Saadat* (Cal. Super. Ct. May 26, 2016) (No. BC621038).

23. Cole Kazdin, *What Happened to Aaron Robertson’s Sperm?*, *MEL MAG.* (Dec. 12, 2016), <https://melmagazine.com/what-happened-to-aaron-robertsons-sperm-7473ec028c47>.

24. *Id.*

deserve a remedy. This Article critically appraises the distinctive challenges that future intangible losses like these present. And it seeks to work out a principled approach to damage awards that will not penalize specialists unfairly or restrict access to valuable reproductive services. The project begins by showing how existing regulations fail to vindicate procreation interests against negligent misconduct or uncompensated injury. Then it sets forth the limited reach of available suits ranging from contract enforcement, property protection, and wrongful death to medical malpractice, breach of informed consent, and negligent infliction of emotional distress. A specialist's thwarting of wanted pregnancy and parenthood falls through the cracks of existing regimes: None say that missed opportunities for biological children matter, not legally speaking. The Tennessee Supreme Court summed up this state of affairs in a 2015 case, explaining that the "law does not recognize disruption of family planning either as an independent cause of action or element of damages."<sup>25</sup> After mining the history of personality torts for common law analogs in products liability and privacy rights, I answer the central criticism that future intangible harms are too speculative and unworthy of remedy. I argue that deprived parenthood is real and serious enough a harm to warrant civil justice recourse. Finally, I apply the doctrines of loss-of-chance and harm-mitigation to account for complicating factors like preexisting infertility and the availability of adoption.

#### THE NOT-QUITE WILD WEST

No governmental agency or authority keeps close watch over assisted reproduction in the United States.<sup>26</sup> At the federal level, the only directive that comes close is the Fertility Clinic Success Rate and Certification Act of 1992.<sup>27</sup> But the fertility industry convinced Congress to add a carve-out forbidding the agency from "establish[ing] any standard, regulation, or requirement, which has the effect of exercising supervision or control over the practice of medicine in assisted reproductive technology programs."<sup>28</sup> So the Food and Drug Admin-

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

26. Ellie Kincaid, *A Booming Medical Industry in the US Is Almost Totally Unregulated*, BUS. INSIDER (July 7, 2015, 3:50 PM), <https://www.businessinsider.com/assisted-reproduction-ivf-industry-regulation-2015-6>.

27. Fertility Clinic Success Rate and Certification Act of 1992, H.R. 4773, 102nd Cong., 138 CONG. REC. 16685 (June 29, 1992) (enacted).

28. *Id.* at 16686. "In particular, I would like to single out the excellent work of the American Fertility Society, both in terms of their voluntary guidelines and the cooperation they have shown the majority and the minority of our committee in working on this legislation." *Id.* at

istration (FDA) has no say over which procreation procedures are used or how they are carried out.<sup>29</sup> At the state level, laws are mostly limited to embryonic stem cell research, insurance coverage for infertility treatment, and surrogacy rules that govern gestational agreements and carrier compensation.<sup>30</sup>

When it comes to reproductive negligence, there's no licensure requirement, no monitoring regime, no data registry for adverse events, no system of warnings, disclosures, or disclaimers, or any other measures to track assisted procreation facilities or to hold the specialists they employ accountable.<sup>31</sup> Professional barriers to entry make assisted reproduction less of a cowboy venture than a fragmented cartel of mostly mom-and-pop shops.<sup>32</sup> Private organizations like the Col-

16688. See also 138 CONG. REC. 8211 (Apr. 3, 1992) (statement of Hon. Ron Wyden) (“[S]everal members and staff from professional societies and consumer groups worked hard with me to perfect this legislation over the past several weeks, particularly Lynne Lawrence and Dr. Robert Visscher, M.D., of the American Fertility Society.”); *Fertility Clinic Services: Hearing on H.R. 3940 Before the Subcomm. on Health & the Env’t of the H. Comm. on Energy & Commerce*, 102nd Cong. 98–102 (1992) (statement of Robert D. Visscher, Executive Director, American Fertility Society) (“[T]he clinical practice of reproductive medicine . . . depends a lot on the individual characteristics of the patient you are treating. It also depends on the resources that are available, not the least of which are the financial resources that are available or the institutional resources that are available . . . we don’t feel that there could be regulation to the degree that there can be in the laboratory. The laboratory, you can set standards. But for the practice of medicine it’s a matter of doing it in a different way.”).

29. In 2018, the FDA rejected as beyond its scope a petition to make it harder for sperm donors to sire dozens of genetic siblings who don’t know they’re related. The agency has so far weighed in only to discourage research on next-generation advances like mitochondrial transfer, human cloning, and germline embryo editing. See Myrisha S. Lewis, *How Subterranean Regulation Hinders Innovation in Assisted Reproductive Technology*, 39 CARDOZO L. REV. 1239, 1269 (2018).

30. Just a handful of states wade any further into assisted reproduction. In 2018, Arizona passed a law that says, when estranged couples disagree about what do with the frozen embryos they created, the partner who wants to use them to reproduce wins out, even if they’d previously agreed to have them destroyed. See ARIZ. REV. STAT. § 25-318.03 (LexisNexis 2018). A 2015 Utah law gives donor-conceived children who are eighteen and older access to the medical histories of their biological parents—even if those donors had only agreed to provide reproductive material under conditions of anonymity. See UTAH CODE ANN. § 78B-15-708 (West 2015). In 2019, Indiana and Texas passed laws against a doctor’s failure to obtain his fertility patient’s consent before inseminating her using his own sperm. See S.B. 174, 121st Gen. Assemb., Reg. Sess. (Ind. 2019); Relating to the prosecution of the offense of sexual assault. S.B. 1259, 86th Gen. Assemb., Reg. Sess. (Tex. 2019). And Louisiana has since 1986 required fertility doctors to “possess specialized training and skill,” without elaboration on what kind of knowledge or advances that entails. LA. REV. STAT. ANN. § 9:128 (LexisNexis 2009).

31. See Michael Ollove, *Lightly Regulated In Vitro Fertilization Yields Thousands of Babies Annually*, WASH. POST (Apr. 13, 2015), [https://www.washingtonpost.com/national/health-science/lightly-regulated-in-vitro-fertilization-yields-thousands-of-babies-annually/2015/04/13/f1f3fa36-d8a2-11e4-8103-fa84725dbf9d\\_story.html?utm\\_term=.366a1ca3f9c5](https://www.washingtonpost.com/national/health-science/lightly-regulated-in-vitro-fertilization-yields-thousands-of-babies-annually/2015/04/13/f1f3fa36-d8a2-11e4-8103-fa84725dbf9d_story.html?utm_term=.366a1ca3f9c5).

32. For example, the reproductive endocrinologists who perform IVF have to complete a three-year specialized fellowship following a four-year OB/GYN residency and another four of medical school.

lege of American Pathologists and the American Society for Reproductive Medicine (ASRM) set forth industry standards and best practices for facilities that opt into their Laboratory Accreditation Program.<sup>33</sup> But these recommendations are completely voluntary and routinely ignored. ASRM lacks the authority to sanction members that violate its guidelines, or auditing power required to detect such violations.<sup>34</sup>

Four factors help to explain this virtual regulatory vacuum on the practice of reproductive medicine and technology. First, many people are wary of ceding any foothold of control to the state on matters of procreation. Today, any American who can afford *in vitro* fertilization (IVF), surrogacy, and sperm or egg donation is free to use it. Negligence protections could open the door to further restrictions on who gets to form families and how.<sup>35</sup> Second is the free-market origins of reproductive technology in the United States, where it developed as more of a commercial industry than medical field, subject to the usual government investment and surveillance.<sup>36</sup> A robust private sphere of for-profit clinics sustains lobbying forces that have successfully blocked efforts to rein in its operations.<sup>37</sup>

A third factor is the murky politics of regulating assisted reproduction. Conservative states of course legislate abortion and contracep-

33. Am. Soc’y for Reprod. Med. et al., *Revised Minimum Standards for Practices Offering Assisted Reproductive Technologies: A Committee Opinion*, 102 FERTILITY & STERILITY 682 (2014), [http://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/practice-guidelines/for-non-members/revised\\_minimum\\_standards\\_for\\_practices\\_offering\\_assisted\\_reproductive\\_technologies-noprint.pdf](http://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/practice-guidelines/for-non-members/revised_minimum_standards_for_practices_offering_assisted_reproductive_technologies-noprint.pdf).

34. See Ariana Eunjung Cha, *Embryo Storage Bill Seeks Oversight of Fertility Centers and Penalties for Those That Violate Safeguards*, WASH. POST (July 5, 2018), [https://www.washingtonpost.com/news/to-your-health/wp/2018/07/05/embryo-storage-bill-seeks-oversight-of-fertility-centers-and-penalties-for-those-that-violate-safeguards/?noredirect=ON&utm\\_term=.A-9ac72972990](https://www.washingtonpost.com/news/to-your-health/wp/2018/07/05/embryo-storage-bill-seeks-oversight-of-fertility-centers-and-penalties-for-those-that-violate-safeguards/?noredirect=ON&utm_term=.A-9ac72972990).

35. These limits on reproductive access are not relics of a bygone era or repressive third world. Some developed countries like France still forbid single people and same-sex couples from using any tools of assisted procreation, including IVF and sperm donation. See Angelique Chrisafis, *France debates law to let lesbians and single women have IVF: Politicians brace for protests over plan to end discrimination over fertility treatments*, THE GUARDIAN (Sept. 24, 2019), <https://www.theguardian.com/world/2019/sep/24/france-debates-law-lesbians-single-women-ivf>.

36. In the early 1990s, the fertility industry convinced Congress to add a carve-out forbidding the agency from “establish[ing] any standard, regulation, or requirement, which has the effect of exercising supervision or control over the practice of medicine in assisted reproductive technology programs.” Fertility Clinic Success Rate and Certification Act of 1992, H.R. 4773, 102nd Cong., 138 CONG. REC. 16685 (June 29, 1992); 138 CONG. REC. 8210–11 (Apr. 3, 1992) (statement of Hon. Ron Wyden); *Fertility Clinic Services: Hearing on H.R. 3940 Before the Subcomm. on Health & the Env’t of the H. Comm. on Energy & Commerce*, 102nd Cong. 98–102 (1992) (statement of Robert D. Visscher, Executive Director, American Fertility Society).

37. See RESOLVE: THE NATIONAL INFERTILITY ASSOCIATION, *Convio Case Study* (2009), <http://www.convio.com/files/RESOLVE.pdf>.

tion all the time in the name of family values and unborn life.<sup>38</sup> But the workings of IVF and sperm donation raise hard new questions whose answers can pose uncertain electoral stakes even in reliably red or blue districts, and drive a wedge between core voting blocks that usually see eye to eye.<sup>39</sup> Fourth is the limited public outcry against transgressions in this domain. The civil justice transformations of America's past have required a political climate ripe for reform.<sup>40</sup> But there is no groundswell of civic agitation to replace even medical malpractice with a no-fault system like the one New Zealand and the Nordic countries administer for personal injuries by doctors and hospitals, or drugs and devices.<sup>41</sup> High barriers to *ex ante* legislation leaves vic-

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38. Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: State Policy Trends at Midyear, 2017*, GUTTMACHER INST. (July 13, 2017), <https://www.guttmacher.org/article/2017/07/laws-affecting-reproductive-health-and-rights-state-policy-trends-midyear-2017>.

39. To overgeneralize: Christian coalitions often urge citizens to be fruitful and multiply—especially straight, married couples. But while Evangelicals may support negligence protections, many Catholics are disinclined to regulate the interference with “natural” reproduction in ways that implicitly sanction that practice they frown on. Prudent officials avoid wading into the politics of procreation gone awry for fear of fracturing their bases.

40. The paradigm is workers' compensation—an insurance program that enables people who get hurt on the job to recoup for medical expenses and lost wages without having to prove misconduct was to blame. Employee benefits that are now standard in every state did not even exist until the twentieth century. Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J. LAW & ECON. 305, 327 (1998). Before that, there was only accident litigation, whose steep cost and deep uncertainty left most injured workers unable to secure damage awards against dangerous factory conditions and rampant child labor. Worker's compensation came to replace these deficient protections only because labor groups and other Progressive Era crusaders across the country demanded safer and healthier workplaces. See JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 31–40 (2004). The next tort overhaul came in the late 1970s, when half of states enacted a no-fault system of recovery for harms arising from motor-vehicle accidents. See Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Legacy*, 53 WAKE FOREST L. REV. 293, 312–13 (2018). These auto reforms were again embedded within larger movements, this time for car safety spearheaded by Ralph Nader's muckraking bestseller, *Unsafe at Any Speed*. RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965).

41. See KEN OLIPHANT & RICHARD W. WRIGHT, *MEDICAL MALPRACTICE AND COMPENSATION IN GLOBAL PERSPECTIVE* 555–57 (2013); Robert L. Rabin, *The Politics of Tort Reform*, 26 VAL. U. L. REV. 709, 710–11 (1992). There is one exception. Two states have experimented with no-fault compensation for birthing-related harms since the late 1980s. Liability insurance premiums had skyrocketed for obstetrician-gynecologists after a wave of high-cost litigation involving newborn neurological injuries. Virginia and Florida transferred claims from civil courts to administrative schemes financed through assessments on mostly participating physicians and hospitals. These schemes replaced hard-to-prove negligence claims with guaranteed reimbursement for health care and lost earnings any time a child is born with serious spinal cord or brain injuries from being deprived of oxygen during labor or delivery. Insufficient funding and dwindling subsidies have jeopardized the Virginia and Florida regimes since their inception, however. The hundreds of millions of dollars they have paid out are meager relative to those available through conventional litigation. And injured parties have further destabilized these insurance alternatives by sidestepping them to pursue fault-based actions with the promise of larger awards. No

tims of IVF misconduct to pursue their own after-the-fact justice from the courts for wrongs done and harms incurred.

#### THE LIMITS OF PRIVATE LAW

You would think that judicial recourse would be easy to come by. Surely these errors breach contracts—at least implied ones—to keep people’s reproductive materials safe. But no—since before the first IVF lawsuit in 1995, clinics have routinely required patients to sign indemnification clauses that shield them from liability against loss for any reason, even negligence.<sup>42</sup> Aggregate settlements might work for mass losses of frozen specimens—except that courts have seen these harms as too various to certify as a class.<sup>43</sup> Since freezing their samples, some plaintiffs have grown too old to reproduce, while others have gotten divorced or adopted. These injuries are thought to lack the sufficient commonality required to certify a class.

There is also a deeper problem. Our legal system is reluctant to recognize reproductive harms from which a plaintiff’s body and bank account emerge unscathed. Victims of freezer failures do not incur any property damage, since eggs and embryos are generally not considered property.<sup>44</sup> Nor do these losses incur any physical intrusion, aside from whatever medical procedure the parties freely agreed to. Such harms find little solicitude under American law.

A couple identified as Jane and John Doe managed to create three embryos after several attempts at IVF.<sup>45</sup> To store the embryos, their clinic used a solution that had been infected with a “fatal neurological disorder” that was “the human equivalent of . . . ‘Mad Cow Disease.’”<sup>46</sup> The manufacturer had previously sent the clinic a “Product Withdrawal Notice” advising customers to “immediately discontinue its use.”<sup>47</sup> But the clinic used the solution anyway, exposing all of the reproductive materials it touched, including the Does’ embryos. Yet the couple’s claims were summarily dismissed: The loss of their em-

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other state has followed Virginia’s and Florida’s lead to resolve either birth-related claims or any other medical injuries in agency offices instead of trial courts. See VA. CODE ANN. § 38.2-5014 (2007); FLA. STAT. § 766.302 (2007). For discussion, see Gil Siegal et al., *Adjudicating Severe Birth Injury Claims in Florida and Virginia: The Experience of a Landmark Experiment in Personal Injury Compensation*, 34 AM. J.L. & MED. 493, 533 (2008); Nora Freeman Engstrom, *Exit, Adversarialism, and the Stubborn Persistence of Tort*, 6 J. TORT LAW 1, 35–36 (2015).

42. Editorial, *Fertility Clinic Is Sued over the Loss of Embryos*, N.Y. TIMES, Oct. 1, 1995, at A26.

43. *Hebert v. Ochsner Fertility Clinic*, 102 So. 3d 913, 921 (La. Ct. App. 2012).

44. See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

45. *Doe v. Irvine Sci. Sales Co.*, 7 F. Supp. 2d 737, 739 (E.D. Va. 1998).

46. *Id.*

47. *Id.*

bryos resulted in “neither personal nor property injuries” that would entitle them to relief.<sup>48</sup> The invasive IVF procedure was “an elective process” that the Does “chose to undergo” prior to the contamination.<sup>49</sup> The Does had no valid negligence action because they could “prove no actionable physical harm or property damage resulting from Defendants’ actions.”<sup>50</sup>

The non-recognition reproductive suffering stymies recovery for deprived procreation even in more egregious circumstances. Glenda Ann Robinson’s doctor tied her fallopian tubes without her knowledge while she was under anesthesia for a cesarean section.<sup>51</sup> A 2001 Maryland court would not entertain her claims for intentional battery or informed consent, and not just because there was a chance that the mistake could have been chalked up to a simple administrative mix-up. Even if negligence were to blame, the unwitting sterilization “was not harmful because it did not cause any additional physical pain, injury or illness other than that occasioned by the C-Section procedure” that she had already agreed to.<sup>52</sup> The court also suggested that Glenda, an African American mother of six, did not need any more kids.<sup>53</sup> The court dismissed that “she and her husband were planning on having a seventh child . . .” and emphasized that three children were “born out-of-wedlock . . . .”<sup>54</sup> The court concluded that denying Glenda the “ability to have a seventh child after previously giving birth to six children is hardly something which would offend a reasonable sense of personal dignity.”<sup>55</sup>

These courts miss the centrality of wanted procreation and the magnitude of its deprivation. It can be hard to define the sense of emptiness and alienation victims face. Professors Dan Solove and Danielle Citron capture something like this loss in a metaphor they use to de-

48. *Id.* at 743.

49. *Id.* at 741.

50. *Id.* at 739, 741, 743; Appellant’s Opening Brief at 4, *Doe v. Irvine Sci. Sales Co.*, 7 F. Supp. 2d 737 (E.D. Va. 1998). Another court gave Cora Creed and her husband the same reason for rejecting their complaint against the clinic that negligently transferred their embryos into somebody else. IVF had required hormone drugs—some ingested, others injected—as well as surgery. But that “intrusion into the plaintiff wife’s body to extract her ova was not a cause of the subsequent improper implanting” of their embryos “into the other woman.” The court stated that the error itself did not physically harm her. *Creed v. United Hosp.*, 600 N.Y.S.2d 151, 153 (App. Div. 1993).

51. *Robinson v. Cutchin*, 140 F. Supp. 2d 488, 490 (D. Md. 2001).

52. *Id.* at 493.

53. *Id.*

54. *Id.* at 491.

55. *Id.* at 493, 491 n.1.

scribe a distinct injury: personal data breach.<sup>56</sup> Having your sensitive or identifying information leaked and vulnerable to malicious use may not encroach on you in physical or economic ways. But it still intrudes on your life—like an unseen obstacle in the middle of a crowded room:

We may not be able to see an invisible object, but we see how everyone is bumping into it, how they are changing where they stand because of it, how they are walking different routes to avoid it, and so on. The object is invisible to the naked eye, but it is having a significant effect.<sup>57</sup>

Like the data breach victims who invest time and energy to protect against identity theft, patients deprived of procreation go to great lengths to try to have a child. They exhaust savings. They endure prying queries, onerous appointments, and risky medical procedures. They make professional and personal plans around the offspring they anticipate having—they pick names, prepare nurseries, and scout preschools. These efforts testify to the significance and sincerity of this reproductive interest—one that tort law should protect against its wrongful frustration.

Tort law might not ultimately be the most effective way to deter reproductive negligence or compensate its victims. Damage awards will likely be passed along to prospective patients in form of higher prices that reduce access to care if would-be procreators cannot afford it. But at least tort liability would spread these costs more widely rather than concentrating them all on victims alone. That is not to say that after-the-fact remedies are superior to regulatory oversight. Compared to courts, legislatures and agencies have greater democratic legitimacy to implement measures designed to keep misconduct from happening in the first place. These governing bodies are equipped to find facts about the relative merits of incremental precautions in the course of investigations, hearings, or public commentary that are not limited to any single case or to events that have already happened. But the peculiar divisiveness and political economy of reproductive politics in the United States gives regulation an outside chance.<sup>58</sup> Meanwhile, tort plaintiffs are fueled by the self-interest to get justice as quickly as possible, and verdicts can alert lawmakers to the need for change, while ad hoc juries are immune to lobbying or capture.

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56. See Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737 (2018).

57. *Id.* at 756.

58. See *supra* notes 26–44 and accompanying text.

## OF PERSONALITY TORTS AND BEYOND

For most of American history, courthouses were not the place to work out intangible harms to emotional tranquility or reputation. Before the twentieth century, judicial remedies were limited to physical injury or property damage. The only exceptions were torts for assault (threatened touching), offensive battery (like spitting), false imprisonment (restraint without consent or justification).<sup>59</sup> These were explicitly grounded in wrongful touching or detention, where bodily interferences were imminent or already manifested. All other losses were consigned to the rough and tumble of quotidian social affairs—people just took those less tangible harms on the chin, unless they responded through verbal retaliation or physical dueling.<sup>60</sup> Informal mechanisms might have worked in small towns, where people knew each other and shared core values—but not in the big cities where rural workers flocked *en masse* in search of commercial jobs. Urban dislocation between 1880 and 1910 obscured the forces responsible for wounding one’s sense of self or worth, making it difficult, if not impossible, to defend one’s honor “with the sword.”<sup>61</sup>

Courts held greater promise for resolving these disputes as they began grappling with the injuries born of modern work and social life. Technological advances from Edison’s light bulb to Ford’s assembly line produced flash burns and broken bones on a larger scale than ever before. The Supreme Court observed that “[t]he industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms,” while “[t]raffic of velocities, volumes and varieties unheard of” suddenly “subject[ed] the wayfarer to intolerable casualty risks.”<sup>62</sup> Consumer goods from soft drinks to power tools let dangerous defects loose on unsuspecting patrons. Meanwhile, new drugs and industrial chemicals contributed to gradual maladies with indeterminate consequences. Lawmakers could not be expected to foresee every harm these innovations might generate. And the slow churn of the legislative process took too long to erect effective guardrails before those injuries happened. But, after-

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59. See Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 363–67 (2006).

60. See William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 875–77 (1939).

61. E. L. Godkin, *The Rights of the Citizen: IV.—To His Own Reputation*, SCRIBNER’S MAGAZINE, July 1890, at 59. For discussion, see Samantha Barbas, *The Social Origins of Personality Torts*, 67 RUTGERS U. L. REV. 393, 400–02 (2015).

62. *Morissette v. United States*, 342 U.S. 246, 253–54 (1952).

the-fact victims could still find relief in court, even if the parties that injured them had not broken any promises.<sup>63</sup>

In 1910, Donald MacPherson landed in the hospital when the wood-spoked wheels fell off his Model 10 Runabout while he was driving it in upstate New York.<sup>64</sup> The hitch corkscrewed his car off the road, where it ricocheted off a telephone pole and tumbled end over end into a three-foot ditch. MacPherson sued the manufacturer for his broken wrist, cracked ribs, and battered face. Buick executives contended that the motor company had not made MacPherson any promises. He had not bought the automobile from them, after all, but from a go-between retailer that made no specific representations about the car's quality.<sup>65</sup> Judge Benjamin Cardozo rejected Buick's argument that liability claims could not extend past the sales vendor. He was adamant that the brave new world of remote transactions demanded more of the law than the cramped enforcement of face-to-face agreements. That merchants did not do business directly with consumers could not justify immunity from liability for whatever injuries their products unleashed. Basic principles of fair dealing and reasonable care required that courts let injured parties sue companies they never shook hands with. Judge Cardozo concluded:

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.<sup>66</sup>

“The law” in which Judge Cardozo placed this legal duty is tort law, which he celebrated for its doctrinal agility and moral imagination.<sup>67</sup> Negligence liability enables injured parties to obtain recourse from the faraway firms that create the products that harmed them. This tort doctrine is not limited to physical injuries like MacPherson's, which can be traced to faulty parts from distant factories. It also protects against the dignitary harms that mudslingers and peeping Toms inflict to self-image and reputation. This is where “personality torts” come in—libel, slander, defamation, and intentional infliction of emotional distress.<sup>68</sup>

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63. See William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099, 1100 (1960).

64. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 384–85 (1916).

65. *Id.* at 388.

66. *Id.* at 390.

67. See David G. Owen, *The Evolution of Products Liability Law*, 26 *REV. LITIG.* 955, 967–69 (2007); Robert L. Rabin, *Restating the Law: The Dilemmas of Products Liability*, 30 *U. MICH. J.L. REFORM* 197, 199–200 (1997).

68. See Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of “Just Compensation” Law*, 80 *HARV. L. REV.* 1165, 1192 (1967). Richard Abel observes that

The most famous such tort is the right to privacy. Former wrestler Hulk Hogan famously asserted this right in 2016 to win a \$140 million judgment that bankrupted Gawker after the media giant posted his sex tapes online.<sup>69</sup> As established as the privacy right is today, American law shut its eyes to such unconsented exposure of secrets until the late 1800s, when advances in picture-taking made natural bedfellows with professional muckraking. News outlets used to be an exclusive enterprise, with the handful of major papers focused on economics, politics, and art.<sup>70</sup> Photography at that time was an unwieldy and time-consuming undertaking in which willing participants had their portraits taken in a formal studio.<sup>71</sup> Cheaper and quicker printing techniques ushered in a competitive tabloid industry that used salacious reporting to sell papers.<sup>72</sup> Sensationalist journalism got a major boost from the invention of handheld cameras that let amateur shutterbugs pry into the personal spaces of other people and memorialize their guarded moments for the whole world to see.<sup>73</sup>

These privacy incursions found no redress in the law of contract, defamation, copyright, or otherwise. In 1888, Thomas Cooley, former Chief Justice of the Michigan Supreme Court, proposed that the legal system take action. The second edition of his famed treatise on torts sets forth a novel right “to be let alone.”<sup>74</sup> Two years later, law school classmates Samuel Warren and Louis Brandeis filled in the details of that right in the pathbreaking article they published in the *Harvard Law Review*.<sup>75</sup> Warren and Brandeis argued that individuals should be entitled to control the extent to which their depictions, “sentiments, and emotions shall be communicated to others.”<sup>76</sup> Fearing that “what

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“history shapes tort law” not only through the “effect of technology on the ability of inadvertent actions to inflict catastrophic harm, but also . . . the growing capacity of medicine to repair the harm (at ever increasing prices), and the corollary sense of entitlement to physical and mental well-being.” Richard Abel, *General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253, 255 (2006).

69. Sydney Ember, *In Bankruptcy, Gawker Offers Itself for Sale*, N.Y. TIMES, June 11, 2016, at A1.

70. See ROBERT WILLIAM JONES, JOURNALISM IN THE UNITED STATES 248 (1947).

71. See SARAH E. IGO, THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA 9–25 (2018).

72. See MICHAEL LYNCH, THE INTERNET OF US 89 (2016).

73. See JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 12–27 (2018).

74. THOMAS M. COOLEY, THE LAW OF TORTS 29 (2d ed. 1888). The expression previously appeared in the copyright case *Wheaton v. Peters*, 33 U.S. 591, 634 (1834) (“The defendant asks nothing—wants nothing, but to be let alone until it can be shown that he has violated the rights of another.”).

75. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Brandeis, like Cardozo, would ascend to a seat on the United States Supreme Court.

76. *Id.* at 198.

is whispered in the closet shall be proclaimed from the house-tops," they proposed a civil action to sue for the public disclosure of private facts.

The press is overstepping in every direction the obvious bounds of propriety and of decency . . . . To satisfy a prurient taste[,] the details of sexual relations are [ ] broadcast in . . . 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.<sup>77</sup>

Highbrow dailies piled on this indignation against voyeuristic snapshots in news and advertising. The *Los Angeles Times* decried the state of affairs in which ordinary individuals, who "in no way put themselves before the public," found themselves "dragged into notoriety by any adventurer who thinks he can fill his pockets by exploiting them." The *New York Times* took these mercenary "kodakers" to task for "outrages" that led even the most "thick-skinned" celebrities—hardly "shrinking violet[s]"—to "revolt from the continuous ordeal of the camera."<sup>78</sup>

Judges initially rejected appeals to Warren and Brandeis's privacy action for straying too far from existing precedents in the common law. The very "phrase 'right of privacy,'" they complained, originated with that "clever article in the *Harvard Law Review*."<sup>79</sup> In 1902, New York's high court protested that even the "[m]ention of such a right is not to be found in Blackstone, Kent or any other of the great commentators upon the law."<sup>80</sup> However, just three years later, Georgia became the first state to recognize the privacy right when its supreme court ordered an insurer to pay the man whose image the company had used in its advertisements without his consent.<sup>81</sup> "One who desires to live a life of partial seclusion," the court affirmed, "has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze."<sup>82</sup> By 1941, most states recognized the now-familiar tort of privacy.<sup>83</sup> Just as click-camera incursions placed privacy interests in sharp relief, botched IVF procedures and lost embryos bring to fuller expression the meaning and significance of interests related to having children.<sup>84</sup>

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77. *Id.* at 196–98.

78. *The Right of Privacy: Georgia's Highest Court Makes Ruling Adverse to that of Judge Parker*, L.A. TIMES, July 28, 1905, at 4; *The Right of Privacy*, N.Y. TIMES, Aug. 23, 1902, at 8.

79. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 444 (N.Y. 1902).

80. *Id.*

81. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905).

82. *Id.*

83. *See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS* 1050 (1st ed. 1941).

84. To be clear, my claim is not that tort law is the most effective or efficient way to deter these transgressions or compensate its victims. It probably is not. Exorbitant damages could

## HARMS AND (UNREALIZED) BENEFITS

The tort system is equipped to accommodate reproductive injuries that do not involve any unwanted touching, broken agreement, or damaged belongings—or so I suggested in a 2017 article in the *Columbia Law Review*.<sup>85</sup> Some scholars resisted the analogy to privacy’s origin story. The most formidable critique came from a distinguished torts theorist, Professor Gregory Keating. His commentary in *Columbia*’s online pages later that year began: “The invocation of this glorious past tugs at the heartstrings of any torts scholar. But it moves my mind less than my heart.”<sup>86</sup> Professor Keating argued that “the common law of torts is poorly positioned to respond to this particular kind of wrongful harm” because the ways in which “reproductive negligence interferes with its victims’ pursuit of their [life] projects differs from the interferences with which tort law is characteristically concerned.”<sup>87</sup> The tort system “protects people’s lives and possessions as they are,” he explains, rather than “as they might be.”<sup>88</sup> This domain of law presumes that existing value “makes a greater claim on us than value that has yet to be created.”<sup>89</sup>

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reduce access to reproductive care by driving up prices beyond what would-be parents can afford. These pass-through costs were the very reason that, in 1977, the California Supreme Court denied awarding nine children the \$100,000 that each requested for their mother’s lost “tutelage” and “affection” after she was seriously injured by a lighting fixture that fell on her from an airport ceiling. *Borer v. Am. Airlines, Inc.*, 563 P.2d 858, 861 (Cal. 1977). The nearly million-dollar payout would ostensibly rest with “the ‘negligent’ defendant or his insurer.” *Id.* at 862. But the court reasoned that it would ultimately “be borne by the public generally in increased insurance premiums or in the enhanced danger that accrues from the greater number of people who may choose to go without insurance.” *Id.* Access concerns would be lower in states like Massachusetts, which mandate insurance for certain techniques of assisted procreation. However, even there, aspiring parents want for coverage. But liability risks could chill the delivery of higher-risk procedures that are some patient’s only hope to treat their infertility. That would not be as big a problem if clinicians and facilities could pool their resources to protect against steep payouts. That is how it works in most fields of medicine, where hospitals and doctors carry deep coverage for adverse outcomes. But carriers are wary of liability exposure to the prohibitive costs and moral hazard that typify reproductive care. Insurers call it a “triple risk activity” because it can harm not just the patient, but her partner and offspring too; any of whom might be able to “pursu[e] a lawsuit against the physician, nurse, and/or hospital for bad outcomes.” See Serena Scurria et al., *Professional Liability Insurance in Obstetrics and Gynaecology*, BMC Res. Notes, June 17, 2011, at 1, 2. Tort liability would at least avoid concentrating their burden on the luckless plaintiffs who are deprived of their ability to procreate.

85. Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149 (2017).

86. Gregory C. Keating, *Response to Fox: Impaired Conditions, Frustrated Expectations, and the Law of Torts*, 117 COLUM. L. REV. ONLINE 212, 214 (2017), <http://columbialawreview.org/content/response-to-fox-impaired-conditions-frustrated-expectations-and-the-law-of-torts/>.

87. *Id.*

88. *Id.* at 224.

89. *Id.*

According to Professor Keating, torts remedy the wrongful deprivation of health, wealth, or other goods that plaintiffs have already come to enjoy—not the mere absence of goods they wish they had. Professor John Gardner makes a similar point in his 2018 book, *From Personal Life to Private Law*, when he writes that tort law redresses harms to “the life one already has before one, with its current trajectory.”<sup>90</sup> Gardner makes clear that torts are just for damage to “the house that the potential plaintiff already lives in,” or the “work she already does,” or the “peace and quiet she has already found.”<sup>91</sup> This body of law does not guard against injuries to the bigger house or better work or sounder peace that she dreams of.<sup>92</sup> Tort protections are limited to preserving what the plaintiff had at the time she got injured—torts do not protect anything else that she might have gotten after that point.

This priority of existing losses over potential ones reflects the widely held view that behavioral economists call the endowment effect.<sup>93</sup> This is the sense that it is worse to have something taken away that was already yours, than it is to be denied that very same thing that you do not yet have. Cognitive psychology principles like “loss aversion” and “prospect theory” try to explain why people care more about losing what is theirs at the moment, than they do missing out on equivalent gains just around the corner.<sup>94</sup> We usually think of harms and benefits in these temporal terms that measure a person’s present state of affairs against her past (harm) or future (benefit). Harms worsen a person’s position in the here and now, as compared with the position that she found herself in before that event or circumstance. Benefits, by contrast, upgrade her current position by looking ahead to how she can reasonably expect it to improve. It is like the difference between being infected with a disease and being denied the vaccine during an outbreak. The infection harms you presently, by impairing your existing medical condition relative to what it was previously. Not receiving a vaccine leaves you at risk of the illness moving forward. That loss does not cause you harm, in Keating’s terms—it withholds a benefit.<sup>95</sup> So too, he argues, when professionals upend plans for procreation mishaps.

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90. JOHN GARDNER, *FROM PERSONAL LIFE TO PRIVATE LAW* 179 (2018).

91. *Id.*

92. *Id.* at 179–80.

93. *Id.*

94. See Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 195–97 (1991).

95. See Keating, *supra* note 86, at 213.

When professional misconduct takes away your chances of reproduction, what you miss out on is the future experience and genetic relationship that characteristically brings people great meaning or satisfaction. Yet that unrealized benefit is not as bad as a harm to the same good you would have enjoyed before, Keating says.<sup>96</sup> These transgressions do not inflict the more serious kind of setback that he refers to as harms—they simply deny benefits. It’s this fundamental asymmetry, he argues, that makes tort law “inhospitable to the recognition of [those] reproductive wrongs.”<sup>97</sup> Prenatal losses do not harm fertility patients, in the sense of worsening their post-negligence family life, as compared with what it was before. Dropped embryos and negligently caused miscarriages frustrate the parental future that plaintiffs hoped for, but not any present or past existence they had already laid claim to. And the tort system responds only to harms, on Keating’s account—it was never intended to remedy the unfulfilled benefits that people had just began to set their sights on. That is why he says tort law cannot vindicate reproductive interests in pursuing pregnancy and genetic parenthood. But even Keating himself acknowledges elsewhere that tort awards are not really designed to restore plaintiffs to a point in time before the injury took place.<sup>98</sup> Their goal is to restore the narrative arc of victim’s lives.

Professor Keating makes too much of this harm/benefit asymmetry and its ostensible connection to autonomy. Tort remedies should not be foreclosed to people whose reproductive losses have not yet materialized, at least not when they had sound reason to expect that they would reproduce and had planned their lives accordingly. Tort law is capacious enough to remedy unfulfilled benefits—indeed, sometimes it does. Courts allow medical malpractice grievances for future risk and disrupted expectations.<sup>99</sup> Damage awards are available for the lost chance to achieve some more favorable outcomes like the lost “opportunity to obtain a better degree of recovery.”<sup>100</sup> In one case, an obstetrician’s bungled surgery left a woman with fine health for now, but higher odds of bowel obstruction down the road.<sup>101</sup> The court ap-

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96. *Id.* at 214–15.

97. *Id.* at 215.

98. See Gregory C. Keating, *Comment on Avraham and Yuracko: Torts and the Paradox of Conservative Justice*, OHIO STATE L. J. ONLINE (2016).

99. *Lord v. Lovett*, 770 A.2d 1103, 1104–06 (N.H. 2001); *Petriello v. Kalman*, 576 A.2d 474, 476–77, 484 (Conn. 1990). 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, 181–83 (1992).

100. *Lovett*, 770 A.2d at 1105.

101. *Petriello*, 576 A.2d at 477.

proved compensation for that eight to sixteen percent chance of developing an ailment she did not yet face and might not in the future either.<sup>102</sup> It is not just doctors. Accountants have been held liable for bad investments that lose a client potential revenue. And drunk drivers are forced to pay for the income that a dead victim might have earned—even if the deceased is a minor who never had a job to give up in the first place.<sup>103</sup> Young children usually lack not only any income history, the First Court noted, but even any clearly defined skills, career goals, or other “characteristics from which [their] earnings [capacity] may be anticipated.”<sup>104</sup> So “absent some extraordinary demonstrations,” it concluded, “there is nothing individual to go on.”<sup>105</sup> Yet courts have not hesitated to approve awards based on the jury’s “common knowledge and sense of justice,” in the absence of particularized evidence to quantify that loss of future earnings.<sup>106</sup> So tort law already responds to more than just existing harms. It also redresses certain blocked benefits—employment earnings, investment returns, or chances for improved health—so long as the injured parties were reasonable to have expected those goods in the future, if they had not been mistreated.

Professor Keating’s argument has appeal if you feel the loss of what you had already more intensely than the loss of what you reasonably expect—your depleted nest egg, as opposed to the future savings. In other legal contexts, however, the Supreme Court has taken a dim view of the distinction between harms and benefits. For example, the Court rejected a harms/benefits-based dividing line for government takings when it distinguished compensable intrusions on private property from takings that the state does not have to pay property owners for.<sup>107</sup> Justice Antonin Scalia, writing for the majority in *Lucas v. South Carolina Coastal Council*, explained that “the distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder,” depending on nothing less subjective than “the observer’s evaluation of the relative importance” of the underlying

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102. *Lovett*, 770 A.2d at 1104–06.

103. *See Dickhoff v. Green*, 836 N.W.2d 321, 325–26 (Minn. 2013); *Cast Art Indus. v. KPMG*, 36 A.3d 1049, 1051–52 (N.J. 2012); *Greyhound Lines, Inc. v. Sutton*, 765 So. 2d 1269, 1276–77 (Miss. 2000).

104. *D’Ambra v. United States*, 481 F.2d 14, 18 (1st Cir. 1973).

105. *Id.*

106. *Pipgras v. Hart*, 832 S.W.2d 360, 366 (Tex. App. 1992); *see also Murray v. Sanford*, 487 S.E.2d 135, 136 (Ga. Ct. App. 1997); *Rubio v. Davis*, 500 S.E.2d 367, 371 (Ga. Ct. App. 1998); *C.T.W. v. B.C.G.*, 809 S.W.2d 788, 794 (Tex. App. 1991); *Tri-State Motor Transit Co. v. Nicar*, 765 S.W.2d 486, 493–94 (Tex. App. 1989).

107. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

ing activity.<sup>108</sup> Whether some regulation gets designated as a “harm” or “denied benefit” to the people it affects may, in other words, be a function of implicit judgments about the (in)significance or (un)worthiness of the activity it targets. These points are not lost on Professor Keating. He does not scoff at reproductive negligence. And he appreciates that harms and benefits are just pluses and minuses on either end of the same scale, one logically identical to the other, except that harms are bad and benefits good.

Professor Keating argues that tort law is right to draw a sharp line between these twin concepts because “[h]arms and benefits stand in very different relations to autonomy.”<sup>109</sup> Here, he echoes an idea that Professor Arthur Ripstein articulated in his 1999 book, *Equality, Responsibility, and the Law*—that “certain security interests are protected” because of “their importance to leading an autonomous life.”<sup>110</sup> These core interests are the ones Ripstein says we need to exercise our moral capacity for meaningful choice about the direction our lives take.<sup>111</sup> Professor Seana Shiffrin put the point more sharply in an article she published that same year in *Legal Theory*. What distinguishes harms like pain and property loss, she wrote, is that they “impose experiential conditions that are affirmatively contrary to one’s will” or “seriously interfere[ ] with the exercise of agency.”<sup>112</sup> Keating picks up where Ripstein and Shiffrin left off twenty years ago, singling out immediate intrusions on “our bodies and to our possessions” for how acutely they aggravate “the principal means at our disposal” for exerting our wills upon the world.<sup>113</sup> Keating says that the present impairment of these abilities and tools strikes a greater blow to autonomy than future setbacks that are also less concrete: Suppressing intangible aspirations does not likewise “rob us of our normal and foundational powers of agency.”<sup>114</sup>

But blocked benefits are not so different in this respect from harms to what an individual already has. Unrealized benefits can keep me from quarterbacking my life just like harms do. Say I have arranged my life around building a house, or getting a job, or having a child when a wrongful injury spoils everything just before the last coat of

108. *Id.* at 1024–26.

109. Keating, *supra* note 86, at 223.

110. ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 55 (1999).

111. *Id.*

112. Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *LEGAL THEORY* 117, 123–24 (1999).

113. Keating, *supra* note 86, at 223.

114. *Id.* at 216–17 (citing Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 *VA. L. REV.* 1147 (2006)).

paint, or round of interviews, or stage of pregnancy. That loss is not singularly less devastating just because I was not quite a homeowner, employee, or parent. My life can be upended even if I have not moved in, or gotten a paycheck, or held the baby in my arms.<sup>115</sup> Just replace an historical comparison between my present and past state of affairs, with a counterfactual one between my present and an alternate universe in which things went how they were supposed to. What matters is not so much harm versus unrealized benefit; that is, whether the loss is to what I already have as opposed to what I otherwise might have gotten. The important thing is how reasonable I was to have expected the good or life goal in the first place, and how not getting it foreseeably affects me.

The distinction between historical and counterfactual comparisons comes from philosopher Joel Feinberg. He recognized that something can still be bad for me even if I am no worse off than I was before. If a surgeon leaves a small blunt medical instrument in my body, I am actually better off than before the life-saving operation, albeit not nearly as healthy or happy as I would have been if she had removed the object.<sup>116</sup> Procreation deprived is similar: it leaves my life just as bereft of children as it was before, but my reproductive options are worse for me than if my infertility had been treated in a way that was not negligent. Besides, it is not all about autonomy—not by far. The value of infertility treatment has less to do with choices than consequences. More important than individual control over reproductive decisions is how those decisions help a person live well. Procreation matters most for its practical impact on health, education, employment, social standing, intimate relationships, and other critical features of well-being. That is why the U.S. Center for Disease Control and Prevention ranks “family planning” among the “ten great public health achievements” in the twentieth century.<sup>117</sup>

Professor Keating has a point when he talks down benefits on the ground that their putative good for me might not in fact be “congru-

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115. See Dov Fox, *Making Things Right When Reproductive Medicine Goes Wrong? Reply to Robert Rabin, Carol Sanger, and Gregory Keating*, 118 COLUM. L. REV. ONLINE 94 (2018), <https://columbialawreview.org/content/making-things-right-when-reproductive-medicine-goes-wrongreply-to-robert-rabin-carol-sanger-and-gregory-keating/>. This article builds upon that piece in a number of ways, for example, by spelling out *how* to measure and calculate reproductive harm.

116. Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, in FREEDOM AND FULFILLMENT 3, 7 (1992).

117. CDC, *Ten Great Public Health Achievements—United States, 1900-1999*, 48 MORBIDITY MORTALITY WKLY. REP. 241 (1999), <http://www.cdc.gov/mmwr/preview/mmwrhtml/000567-96.htm>.

ent with [my] will.”<sup>118</sup> He explains that 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.<sup>119</sup> Getting a house, or job, or child I did not consent to risks depriving me of the very autonomy that Keating says tort law is designed to preserve. But the benefits I hope to derive from IVF or sperm donation are not unsolicited. Patients seek out these services with the express purpose of having a child. When specialists frustrate that purpose, it foists a lifetime of childlessness on patients who made clear their preference to grow their family. These injuries disorder their lives no less than “broken bones, crippling pain, [or] significant disability.”<sup>120</sup> Wrongfully denying a person the chance to reproduce erodes his agency and self-determination too. But there are more practical reasons than individual autonomy that explain why tort law privileges existing harms over future benefits. The main one is that the loss of a benefit is harder to prove and calculate.

That benefits have not yet happened clouds what might have been realized and obscures the value of goods that never were. Suppose two reckless drivers each crash their car into another one around the corner from a hospital’s labor and delivery wing. One of those other vehicles was on its way home after childbirth, and one was on its way there to give birth. While the collision claims the life of the newborn leaving the hospital, it also causes the arriving would-be-mother to miscarry. Why should tort law distinguish so conspicuously between the two cases, allowing full recovery in the first and forbidding it altogether in the second? The clearest difference between the two cases has nothing to do with reproductive autonomy, but rather perceptual vividness. Even the most striking ultrasound images will not let you hold or hear a fetus. By contrast, it is hard not to be moved by the sound of your baby’s cry or how her hand feels wrapping around your finger.<sup>121</sup> The Supreme Court of California reflected on the opacity of prenatal loss in a 1977 wrongful death case involving negligent hospital midwives:

The parents of a stillborn fetus have never known more than a mysterious presence dimly sensed by random movements in the womb [whereas] the mother and father of a child born alive have seen, touched, and heard their baby, have witnessed his developing personality, and have started the lifelong process of communicating

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118. Keating, *supra* note 86, at 223.

119. *Id.*

120. *Id.* at 215 (citing Seana Shiffrin, *Harm and Its Moral Significance*, 18 *LEGAL THEORY* 357 (2012)).

121. Steven D. Smith, *Missing Persons*, 2 *NEV. L.J.* 590, 598, 602–03 (2002).

and interacting with him. These are the rich experiences upon which a meaningful parent-child relationship is built, and they do not begin until the moment of birth.<sup>122</sup>

And yet certain features of the long-awaited potential offspring are not all that hard for prospective parents to conjure up. The expected child occupies an overriding role in their life that no other person could. While the precise contours and consequences of a losing an expected child will be uncertain, this loss can still be projected clearly and confidently enough to sustain a remedy in tort. That is why most courts treat the two car accidents similarly. Courts compensate for a baby's wrongful death, whether before or after her first breath. The amount might vary, but if a court awards damages when a child "dies immediately after birth," it also does for "a stillborn child."<sup>123</sup> Professor Keating would approach these cases differently. Only after a wanted child arrives do parents enjoy goods associated with her tangible place in their life, such that her loss would substantially impair their ability to plan it. Before her birth, these parental goods are not yet theirs to lose. Acquiring those benefits might "enlarge the reach" of their will, he grants, but not getting them does not impair it.<sup>124</sup>

#### UNBORN PERSONHOOD OR PROPERTY

When frozen sperm, eggs, or embryos go missing or are damaged, plaintiffs have sued for "wrongful destruction" or "wrongful death," comparing reproductive materials to property or persons. Neither strategy has found much success in courts, but that has not stopped victims from asserting them. Wendy and Rick Penniman brought a "wrongful death" claim against the freezer-failure clinic in Cleveland, and asked the court to call their three IVF embryos "persons."<sup>125</sup> In a 1986 Supreme Court case, Justice Byron White rightly described an embryo (or fetus) as "an entity that bears in its cells all the genetic information that . . . distinguishes an individual member of this species from all others."<sup>126</sup> But the Court has long maintained that even a late-stage fetus lacks any constitutional rights of its own that could

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122. *Justus v. Atchison*, 565 P.2d 122, 133 (Cal. 1977) (en banc).

123. *Smith v. Mercy Hosp. & Med. Ctr.*, 560 N.E.2d 1164, 1171 (Ill. App. Ct. 1990). See also *Porter v. Lassiter*, 87 S.E.2d 100, 103 (Ga. Ct. App. 1955); *Danos v. St. Pierre*, 402 So. 2d 633, 638 (La. 1981); *Connor v. Monkem Co.*, 898 S.W.2d 89, 93 (Mo. 1995); *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787, 790-91 (S.D. 1996); *Farley v. Sartin*, 466 S.E.2d 522, 533 (W. Va. 1995).

124. Keating, *supra* note 86, at 217.

125. *Penniman v. Univ. Hosps. Health Sys., Inc.*, 130 N.E.3d 333, 338-39 (Ohio Ct. App. 2019).

126. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 792 (1986) (White, J., dissenting).

override a woman's decision to end her pregnancy.<sup>127</sup> Just because a gestating fetus does not count as a person for purposes of abortion rights and regulations, does not necessarily mean that a frozen embryo cannot be thought of as a person in the distinct context of negligence actions involving the unborn's destruction by others. Embryos need not be afforded any rights of their own to allow embryo-denied couples to sue for "wrongful death." But that does not make these lawsuits a good idea.

The peculiar history of the wrongful death tort explains how claims involving the unborn can hang together with constitutional rights to abortion. Legislatures enacted wrongful death statutes to fill an untenable gap in the early common law. Negligence liability for serious injuries attached only if a plaintiff survived—if he died, the defendant went scot-free.<sup>128</sup> Wrongful death suits were designed to deter misconduct and compensate the victim's survivors, however imperfectly. A coal miner's widow explained, "It's not about the money . . . I don't want this to happen to anyone else's husband. I want the company to make things safer. But the money is the only thing you are allowed to sue for."<sup>129</sup> Whatever solace or sense of vindication money might provide, neither existing life, nor a hoped-for one, is not a fungible or replaceable good like "a stock, car, home, or other such item bought and sold in some marketplace."<sup>130</sup> Originally, recovery was allowed only for economic losses like funeral expenses and a loved one's lost wages. Most jurisdictions now let wrongful-death plaintiffs recover for emotional distress and other nonpecuniary losses of companionship and peace of mind. This allowed parents to recover for the wrongful death of relatives and other dependents whose death did not set them back financially, including children whose injuries had been inflicted before they were born.<sup>131</sup> But this expansion to infant deaths resulting from harms incurred during pregnancy invited yet another dilemma. Wrongful death now afforded relief to new parents whose fetuses survived until birth, but not those whose fetuses were hurt so bad that they died before they were born. Remedies were slighter for a graver harm.

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127. *Roe v. Wade*, 410 U.S. 113, 161, 163 (1973).

128. See Wex S. Malone, *The Genesis of Wrongful Death*, 17 *STAN. L. REV.* 1043, 1062–66 (1965).

129. See Deborah R. Hensler, *Money Talks: Searching for Justice Through Compensation for Personal Injury and Death*, 53 *DEPAUL L. REV.* 417, 417 n.2 (2003) (quoting Lisa Belkin, *Just Money*, *N.Y. TIMES*, Dec. 8, 2002, § 6 (Magazine), at 92).

130. *Loth v. Truck-a-Way*, 60 Cal. App. 4th 757, 767 (1998).

131. William Prosser & W. Page Keeton, *THE LAW OF TORTS* § 127, at 945 (5th ed. 1984).

To address this paradox, the majority of states expanded the action once more—this time to cover fetuses capable of surviving on their own. Since wrongful death statutes applied only to the death of a “person,” this move required defining fetuses as persons—but just for the narrowly circumscribed purpose of allowing would-have-been parents to recover. Their claim for the wrongful death of a viable fetus speaks to the devastating loss that would-be-parents endure when negligence ends their wanted pregnancy. It does not entitle the fetus itself to make claims on others, including the woman.<sup>132</sup> Claims for wrongful prenatal death are allowed only for fetal deaths incurred during the final trimester—not any earlier in pregnancy. Every court that has considered the “wrongful death” of IVF embryos has rejected the claim on the ground that the term “person” or “human being” does not apply to frozen embryos under the meaning of this doctrine in that state.<sup>133</sup> But courts need not declare lost embryos “people” to recognize that plaintiffs like the Pennimans have suffered a profound loss, or that apologies and refunds alone are not enough to redress the negligent destruction of their reproductive cells.

The reason that states can ban abortion later in pregnancy is not that viable fetuses have rights of their own. In *Roe v. Wade*, the Court held that it is because the state has an “important and legitimate” interest in “potential life”; an interest whose strength grows as a fetus does and becomes compelling once it develops the capacity for “meaningful life outside the mother’s womb.”<sup>134</sup> The interest belongs to the state, not the fetus. So, thinking about the fetus as the kind of entity subject to “wrongful death” coheres with government interests in preserving fetal life. Courts have entitled not-yet-implanted embryos to far less deference, albeit more than mere property or bodily cells, on account of their “potential to become a person.”<sup>135</sup> This intermediate status—“greater than that accorded to human tissues” like blood or hair, but less than a person—is what the Tennessee Supreme Court assigned to embryos in a 1992 divorce action between Mary Sue and Junior Davis.<sup>136</sup> They agreed on all terms of the dissolution except what to do with the seven embryos that they had cryopreserved while

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132. See, e.g., *Carranza v. United States*, 267 P.3d 912, 916–17 (Utah 2011); *Summerfield v. Super. Ct.*, 698 P.2d 712, 715, 724 (Ariz. 1985).

133. See *McClain v. Univ. of Mich. Bd. of Regents*, 665 N.W.2d 484, 486 (Mich. Ct. App. 2003); *Miccolis v. Amica Mut. Ins. Co.*, 587 A.2d 67, 71 (R.I. 1991); *Gentry v. Gilmore*, 613 So.2d 1241, 1244 (Ala. 1993); *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1261–62 (Ariz. Ct. App. 2005); *Miller v. Am. Infertility Grp. of Ill.*, 897 N.E.2d 837, 839–40 (Ill. App. Ct. 2008).

134. *Roe v. Wade*, 410 U.S. 113, 151, 163 (1973).

135. *Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992).

136. *Id.* at 596.

they were married. She wanted to use them to get pregnant; he wanted them donated to a childless couple.<sup>137</sup> Tennessee’s designation of “special respect” has been widely adopted to resolve embryo disposition disputes in other states.<sup>138</sup>

Say courts declare that embryos deserve this special respect when it comes to “custody” battles or tort remedies. That legal conclusion would not require affording embryos that higher status in disputes arising in other contexts like stem cell research or abortion. The law can compartmentalize concepts and definitions into (and out of) particular domains. But political line-drawing and spillover is a different matter. Treating embryos as persons under any discrete part of the law plausibly risks the politically charged implication of embryonic personhood everywhere. Calling embryos “persons”—even for the sole purpose of wrongful-death recovery—could bolster the cause of those who would restrict practices like IVF and stem cell research that involve foreseeable damage to embryos.<sup>139</sup> Today, IVF patients in every state except Louisiana can do what they want with any embryos they created and do not ultimately use.<sup>140</sup> Recognition of wrongful death for lost embryos could provide support for legislative proposals to limit embryo creation, mandate “adoption” of unused IVF embryos, and force female patients who do not get pregnant after the first cycle to undergo additional rounds of painful egg retrieval.<sup>141</sup> At any rate, no American court has ever defined lost embryos as “persons” under the meaning of statutes authorizing plaintiffs to sue for wrongful death.<sup>142</sup>

Judges have been more open to think of reproductive materials as something closer to property. This willingness has been halfhearted, however, and mostly limited to disputes over what to do with frozen sperm, eggs, and embryos that are not lost at all, but caught in a tug of war.<sup>143</sup> One California case involved a posthumous battle over frozen

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137. *Id.* at 589.

138. See, e.g., *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1270–71 (Ariz. Ct. App. 2005); *McQueen v. Gadberry*, 507 S.W.3d 127, 148–49 (Mo. Ct. App. 2016).

139. See *Doe v. Obama*, 631 F.3d 157, 160 (4th Cir. 2011); Sarah Zhang, *Can Lost Embryos Give Rise to a Wrongful-Death Suit?*, THE ATLANTIC (Apr. 5, 2018), <https://www.theatlantic.com/health/archive/2018/04/fertility-clinic-embryos/557258/>.

140. LA. STAT. ANN. § 9:128 (2009).

141. See I. Glenn Cohen, Dov Fox & Eli Adashi, *Losing Embryos, Finding Justice: Life, Liberty, and the Pursuit of Personhood*, 169 ANN. INT. MED. 800, 801 (2018).

142. See *supra* notes 133–39 and accompanying text.

143. See I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1139–41 (2008).

sperm.<sup>144</sup> Before Bill Kane committed suicide, he willed twelve vials of frozen sperm to his girlfriend, Deborah Hecht, so that she could have his child after he died. His grown children wanted the sperm removed from his estate and destroyed. A state appellate court ruled that the decision was up to Hecht.<sup>145</sup> The court called the sperm a “unique form of ‘property.’”<sup>146</sup> The California Supreme Court denied review, letting the appellate decision stand to resolve Hecht’s quarrel with Kane’s children. But it also decertified the judgment as precedent that would have any legal authority in future cases.<sup>147</sup> A Virginia decision accorded similar property interests to the progenitors of frozen embryos.<sup>148</sup> That case pitted fertility patients Steven York and Risa Adler-York against the Jones Institute for Reproductive Medicine, which refused to transfer the couple’s embryos to another clinic after multiple efforts at the Jones Institute had failed. The court held that the embryos had to be returned in the same way a valet service or parking garage has to give back people’s cars.<sup>149</sup> But that was only because the Institute had “consistently refer[red] to” the embryos “as the ‘property’ of the Yorks in the Cryopreservation Agreement” between them.<sup>150</sup>

Courts resist the implications of propertizing embryos in another kind of dispute—between former spouses over what to do with the frozen embryos they had created together at a happier time in their relationship. “Equating [embryos] with washing machines and jewelry borders on the absurd,” courts insist.<sup>151</sup> They have reluctantly classified embryos as “marital property,” in the limited sense of nonperson entities acquired during the marriage. But that does not mean that embryos can be sold on the open market. Judges use “property” here as a legal term of art that designates control over how something can be used. Any “interest in the nature of ownership” over frozen embryos is limited to “decision-making authority concerning the[ir] disposition.” Courts explain that recognizing these narrow property interests in embryos is consistent with affording them the “special respect” they deserve by virtue of “their potential for human life” and

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144. See *Hecht v. Super. Ct.*, 59 Cal. Rptr. 2d 222 (Cal. Ct. App. 1996), *depublished by Hecht v. Super. Ct.*, 1997 Cal. LEXIS 131 (Cal. 1997).

145. *Id.* at 227–28.

146. *Id.* at 226.

147. *Id.*

148. See *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).

149. *Id.* at 425 (court analyzes the bailor-bailee relationship between the parties).

150. *Id.*

151. *Kass v. Kass*, 1995 WL 110368, \*2 (N.Y. Sup. Ct. 1995), *rev'd on other grounds*, 235 A.D.2d 150 (App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

“symbolic meaning for many people.”<sup>152</sup> There is nonetheless an undeniable “awkwardness” to treating embryos as “personal property.”<sup>153</sup>

This body of law faces other problems in trying to resolve negligently mishandled embryos. One is that property disputes involve contested ownership claims. This might work for reproductive disputes between (ex-) husband and wife, clinic and patients, or the decedent’s girlfriend and his children—with each party vying for control over existing entities whose whereabouts are known. But for professional negligence, when frozen tissues decompose or go unaccounted for, no competing party claims them as her own. Lost sex cells are just that—lost. Rules for misappropriated property could still be adapted to missing or destroyed eggs or embryos, but remedies are constrained. It is not just that compensation levels would be too low. The vocabulary of property law cannot articulate the meaning of these losses or compute a suitable remedy for their defeat.<sup>154</sup>

The task of determining damages came to the forefront in the first-ever IVF lawsuit in the United States, in which three couples sued for the loss of their total of nine embryos. The state court in *Frisina v. Women and Infants Hospital of Rhode Island* allowed the families to recover for the missing embryos “based on the loss of irreplaceable property.”<sup>155</sup> The court had a hard time pinpointing the basis for awards. There’s no market for frozen embryos, so they lack commercial value—but so do lots of other unique forms of personal property like family heirlooms or custom-made suits.<sup>156</sup> “Replacement cost” is one option, but age, health, or other factors may make it too late for progenitors to replace lost reproductive materials. What about the price of creating them? That would be small change for sperm, a few thousand dollars for eggs, a couple more for procedures to create embryos and store them, plus time and resources expended. This is the kind of tallying that courts have applied to assess damages for the wrongful destruction of research materials.<sup>157</sup>

But embryo loss has far greater significance and meaning for people who had sought to reproduce rather than experiment with them. Courts, like the one in *Frisina*, struggle mightily to translate defeated

152. *Id.*

153. *In re Marriage of Dahl*, 194 P.3d 834, 838–39 (Or. Ct. App. 2008).

154. See Judith D. Fischer, *Misappropriation of Human Eggs and Embryos and the Tort of Conversion: A Relational View*, 32 *LOY. L.A. L. REV.* 381, 419 (1999).

155. *Frisina v. Women & Infants Hosp. of R.I.*, No. CIV. A. 95-4037, 2002 WL 1288784, at \*9, \*10 (R.I. Super. Ct. May 30, 2002).

156. See *Sell v. Ward*, 81 Ill. App. 675, 678 (1898).

157. See *United States v. Arora*, 860 F. Supp. 1091, 1100 (D. Md. 1994).

life plans under the auspices of property law. The closest analogy that the court could find was a basement flooding that caused the “discomfort” and “annoyance” of being denied the use of one’s home.<sup>158</sup> Being robbed of one’s prospects for procreation is a weightier kind of injury, one whose repercussions reach further than inconveniences or sentimentalities. Casting that loss as tantamount to the nuisance of damaged property distorts and devalues the kinds of harm that reproductive negligence characteristically inflicts. Property law misses the real losses sustained and corresponding damages owed. Courts resist treating frozen gametes or embryos as the kinds of entities that people can own or put a price tag on. And they get stuck trying to appraise thwarted family plans in terms of damaged possessions. Neither the cost of procedures to extract eggs nor the symbolic value of embryos created can capture their worth.

#### INFLICTION OF EMOTIONAL DISTRESS

The personality torts were radical because civil recovery for wrongful injury usually requires harm to the victim’s person or possessions. Even today, the Supreme Court maintains that emotional harm alone does not qualify for compensation under circumstances in which modest bodily injuries would.<sup>159</sup> The modern precedent comes from 1997.<sup>160</sup> A train track pipefitter named Michael Buckley was among the “snowmen of Grand Central,” so called because the end of each workday saw them covered with white insulation dust.<sup>161</sup> It was asbestos. Buckley’s employer, Metro-North Railroad, conceded that it was wrong to have used the known carcinogen. Wracked by anxiety that his prolonged exposure to the known carcinogen would inflict a slow and painful death, Buckley sued the company for negligent infliction of emotional distress. Medical checkups did not turn up any signs that he had asbestos-related diseases. Then again, it can take years before a person who has inhaled the toxic fibers develops mesothelioma, asbestosis, or lung cancer. And many never do. Symptoms of these often-fatal diseases do not manifest until down the road.<sup>162</sup> The Court would not let Buckley recover for his present fear because that mental angst could not be readily discerned. The majority worried that claims of emotional harm alone are too easy to fake and too hard to dis-

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158. *Frisina*, 2002 WL 1288784, at \*9 (citing *Hawkins v. Scituate Oil*, 723 A.2d 771 (R.I. 1999)).

159. *See Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 439 (1997).

160. *See generally id.*

161. *Id.* at 446.

162. *Id.* at 446, 427.

prove. Plaintiffs or their attorneys could cook up any heartache and lay it on thick through poignant accounts that defendants would be hard-pressed to dispute. To “distinguish between reliable and serious claims” of emotional anguish from “unreliable and relatively trivial” ones, the Court refused to remedy Buckley’s injury without proof that he had also suffered physical or economic harm.<sup>163</sup>

Lower courts pile on concerns that run deeper than problems with evidence and risk of fraud. They add that “mental distress of a trivial and transient nature is part and parcel of everyday life.”<sup>164</sup> The ubiquity of fleeting anxieties leaves judges wary of catering to oversensitive victims or “curry[ing] to neurotic patterns in the population.”<sup>165</sup> These considerations help to explain the barriers that American tort law puts up in the way of recovery for freestanding emotional harm.<sup>166</sup> Plaintiffs have variously been required to show that intangible loss was connected to: first, bodily injury; then, physical impact; and, finally, probable, imminent corporeal consequences, or “zone of danger”—as in the near-miss case of a nose-diving plane whose passengers do not crash.<sup>167</sup> Professor Robert Rabin notes that “the zone-of-danger limitation, as a practical matter, has a built-in threshold that further constrains the floodgates concern: most near-miss claims would be regarded as *de minimis* by a trier of fact and hence are very unlikely to be brought.”<sup>168</sup> Where courts entertain claims for emotional distress, they set the bar high, demanding proof of grave and lasting damage. A bystander who witnesses a horrific accident cannot recover, however grave his panic or manifest his shock, unless he is “closely related” to the victim, “present at the scene of the [physical] injury,” and “aware” of it in real time.<sup>169</sup> Courts reject claims for missing embryos, switched donors, and failed birth control on the ground that victims do not experience “present and demonstrable physical injury”<sup>170</sup> and did not witness “the occurrence which caused” their emotional distress.<sup>171</sup> Nor do any resulting children, back when

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163. *Id.* at 444, 433 (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994)); see also *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 157–58 (2003). For discussion, see Dov Fox & Alex Stein, *Dualism and Doctrine*, 90 *IND. L.J.* 975, 985–86 (2015).

164. *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970).

165. *Id.*

166. See Nancy Levit, *Ethereal Torts*, 61 *GEO. WASH. L. REV.* 136, 144–45 (1992).

167. See *Quill v. Trans World Airlines, Inc.*, 361 N.W.2d 438 (Minn. Ct. App. 1985).

168. See Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 *WAKE FOREST L. REV.* 1197, 1199 n.11 (2009).

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

170. *Garrison v. Med. Ctr. of Del.*, 581 A.2d 288, 293 (Del. 1989).

171. *Arche v. United States*, 798 P.2d 477, 482 (Kan. 1990).

embryos or sex cells, count as the kind of “victims” to which their future parents might claim relation or proximity at the scene.<sup>172</sup>

Recovery for intentional infliction of emotional distress requires that the defendant’s misconduct be “outrageous.”<sup>173</sup> Deliberate reproductive malfeasance is not just the stuff of dystopian dramas (*Handmaid’s Tale*), quirky comedies (*Almost Famous*), and *Law & Order* episodes.<sup>174</sup> DNA kits like 23andMe and Ancestry.com have exposed four doctors who inseminated patients decades ago using their own sperm.<sup>175</sup> Clinics in New York and Texas stole eggs and embryos from their patients.<sup>176</sup> And in the mid-1990s, a Pulitzer-winning investigation by the Orange County Register exposed a web of cover-ups, employee intimidation, and hush money payments at UC Irvine’s Center for Reproductive Health.<sup>177</sup> Fertility specialist Ricardo Asch and his medical partners took eggs from patients without their consent, mixed and matched them with sperm from others, and implanted the resulting embryos into different people.<sup>178</sup> Especially for intentional wrongs like these, but also for reproductive negligence, concerns about opening the floodgates to disingenuous claims do not justify restricting remedies for emotional distress. Would-be cheats face too many hoops to jump through—they would have to stage costly or invasive procedures and produce contemporaneous evidence reliable enough to substantiate their asserted reproductive plans. To weed out smoke and

172. *Id.*; *Garrison*, 581 A.2d at 293.

173. See *Lawson v. Mgmt. Activities, Inc.*, 81 Cal. Rptr. 2d 745, 747 (Cal. Ct. App. 1999); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 (AM. LAW INST. 2012).

174. See *The Handmaid’s Tale: Nolite Te Bastardes Carborundorum* (Hulu television broadcast, May 3, 2017); *Sisters: Episode 1.1* (Fox television broadcast, 2019); *Law & Order: Special Victims Unit: Inconceivable* (NBC television broadcast, Jan. 22, 2008).

175. See *Rowlette v. Mortimer*, 352 F. Supp. 3d 1012, 1018 (D. Idaho 2018); Ken Kusmer, *Donald Cline, Indianapolis Fertility Doctor, Used Own Sperm to Impregnate Women: Affidavit*, WASH. TIMES (Sept. 12, 2016), <http://www.washingtontimes.com/news/2016/sep/12/donald-cline-indianapolis-fertility-doctor-used-ow/>; *Lawsuit Claims Former Fertility Doctor Used His Own Sperm*, BBC NEWS: U.S. & CAN. (Nov. 3, 2016), <http://www.bbc.com/news/world-us-canada-37842458> [<https://perma.cc/MCK5-7TN5>]; Matthew Piper, *Report: Utah Kidnapper Is Woman’s Father Due to Semen Switch*, SALT LAKE TRIB. (Jan. 10, 2014, 10:18 AM), <http://archive.sltrib.com/story.php?ref=/sltrib/news/57372964-78/lippert-says-family-daughter.html.csp>; *Conviction Upheld in Fertility Case*, N.Y. TIMES, Sept. 8, 1993, at B11.

176. See *Saleh v. Hollinger*, 335 S.W.3d 368, 371 (Tex. App. 2011); *Del Zio v. Presbyterian Hosp.*, No. 74 Civ. 3588 (CES), 1978 U.S. Dist. LEXIS 14450, at \*3–4 (S.D.N.Y. Nov. 9, 1978).

177. See MARY DODGE & GILBERT GEIS, *STEALING DREAMS: A FERTILITY CLINIC SCANDAL* 190 (2003).

178. The scandal made international news and triggered state senate hearings. The school shelled out over \$24 million to settle complaints by more than 137 families. See *Prato-Morrison v. Doe*, 126 Cal. Rptr. 2d 509, 511 (Cal. Ct. App. 2002); MARY DODGE & GILBERT GEIS, *STEALING DREAMS: A FERTILITY CLINIC SCANDAL* 190 (2003); Kimi Yoshino, *UCI Settles Dozens of Fertility Suits*, L.A. TIMES (Sept. 11, 2009), <http://articles.latimes.com/2009/sep/11/local/me-uci-fertility11>.

mirrors, courts need only ask for hard-to-fake medical records, corroborating witnesses, and long-term preparations. Even if the absence of physical harm did invite “greater opportunity for fraud,” the California Supreme Court has explained, that threat would “not warrant courts of law in closing the door to all cases of that class.”<sup>179</sup>

Yet tort law is reluctant to compensate freestanding emotional distress. Outside of the reproductive context, courts have made three main exceptions. First are cases in which doctors or other medical specialists misdiagnose a potentially fatal disease, like telling a patient he has cancer or AIDS when he does not.<sup>180</sup> In the second class of complaints, military or law enforcement professionals inform family members that their loved ones died when they have not.<sup>181</sup> The last exception is the most common today. It involves the mishandling of corpses, such as cremating a body intended for burial. When plaintiffs win in negligent-infliction cases like these, courts rely on the collective judgment of juries to come up with damages for standalone emotional harm: Awards of between \$200,000 and \$450,000 for the wrongful loss or destruction of a relative’s corpse have recently been approved.<sup>182</sup> Judges have singled out three features of these dead-body cases that justify special recovery.<sup>183</sup> First is that the social practice at stake is deeply valued across our moral culture—honoring loved ones by disposing of their remains in accordance with religious rituals, family traditions, or parting wishes.<sup>184</sup> Second is the considerable degree of faith that vulnerable victims, such as grief-stricken mourners, place in the hands of professionals, like undertakers, morticians, coroners, embalmers, and funeral directors.<sup>185</sup> Third is the lack of alternate measures to deter misconduct. The departed themselves cannot bring a claim if their survivors are not allowed to.<sup>186</sup>

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179. *Dillon v. Legg*, 441 P.2d 912, 918 (Cal. 1968) (citing *Emery v. Emery*, 45 Cal.2d 421, 431 (1955)).

180. *See, e.g., Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789 (D.C. 2011) (en banc); *Chizmar v. Mackie*, 896 P.2d 196, 203–05 (Alaska 1995).

181. *See, e.g., W. Union v. Smith*, 227 S.W. 1111, 1112 (Tex. Civ. App. 1921); *Young v. W. Union Tel. Co.*, 11 S.E. 1044, 1045 (N.C. 1890).

182. *See Smith v. Telophase Nat. Cremation Soc., Inc.*, 471 So. 2d 163 (Fla. Dist. Ct. App. 1985); *Akins Funeral Home, Inc. v. Miller*, 878 So. 2d 267 (Ala. 2003); *Guth v. Freeland*, 28 P.3d 982, 990 (Haw. 2001).

183. *See Christensen v. Superior Court*, 820 P.2d 181, 190, 196–97 (Cal. 1991); *Quesada v. Oak Hill Improvement Co.*, 261 Cal.App.3d 596, 610 (1989); *Draper Mortuary v. Superior Court*, 185 Cal. Rptr. 396, 398 (Cal. Ct. App. 1982).

184. *See St. Louis Southwestern Ry. Co. v. White*, 91 S.W.2d 277, 278 (Ark. 1936).

185. *See Guth*, 28 P.3d at 989.

186. *See Gregory C. Keating, Is Negligent Infliction of Emotional Distress a Freestanding Tort?*, 44 WAKE FOREST L. REV. 1131, 1165–66, 1173–74 (2009).

Reproductive losses register close parallels along all three dimensions. First, efforts to have or avoid children occupy a central place in people's lives. Bringing a new member into one's family can be as emotionally charged and fraught as losing an old one. In 2008, a Connecticut court expressly analogized the "dignity interest" in "preserving the potential for human reproduction" to giving the deceased a "comfortable and dignified resting place."<sup>187</sup> Second, family members rely on specialists fully in matters of procreation, as in matters of death. A 2018 federal court in Idaho explained that the "position of trust" assumed by reproductive health care professionals gives them special "access to, and power over, areas of life that are unusually intimate and sacred."<sup>188</sup> Finally, no better-suited plaintiff emerges to help discipline the mishandling of human materials at the beginning of life, like at its end. Potential children have no more standing to sue than the deceased. Yet courts rarely carve out similar emotional-distress exceptions when professional misconduct deprives people of wanted procreation.

Just three courts—among scores—have awarded any limited recovery for the negligent infliction of emotional distress.<sup>189</sup> These three courts are extreme outliers, and two of them leaned hard on exceptional circumstances of religion and race to justify exempting plaintiffs deprived of procreation from the usual physical injury requirement.<sup>190</sup> Carmen Martinez was a devout Catholic who regarded abortion as a sin "except under exceptional circumstances."<sup>191</sup> She and her husband Arthur eagerly awaited the arrival of their fifth child. But her doctor recommended abortion. He informed her that a medication she had been taking when the couple conceived critically risked that their "baby would be born with the congenital birth defect of microcephaly (small brain) or anencephaly (no brain)."<sup>192</sup> When Martinez balked at the prospect of terminating her pregnancy, her doctor pressed:

I don't think you realize how serious this is . . . the baby would need machines to do what the brain couldn't do, would probably need machines to breathe, that it would have to be fed intravenously, that this baby was never going to leave the hospital, that the baby would be another Karen Quinlan.<sup>193</sup>

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187. *Witt v. Yale-New Haven Hosp.*, 977 A.2d 779, 791 (Conn. Super. Ct. 2008).

188. *Rowlette v. Mortimer*, 352 F. Supp. 3d 1012, 1017–18 (D. Idaho 2018).

189. *See, e.g.*, cases cited *supra* notes 9–24.

190. *See Martinez v. Long Island Jewish Hillside Med. Ctr.*, 512 N.E.2d 538 (N.Y. 1987); *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

191. *Martinez*, 512 N.E.2d at 538.

192. *Id.*

193. Brief of Plaintiff-Appellants at 54, *Martinez v. Long Island Jewish Hillside Med. Ctr.*, 512 N.E.2d 538 (N.Y. 1987).

Quinlan was the woman at the center of the landmark right-to-die case decided a few years prior—irreversible brain damage had left her in a persistent vegetative state.<sup>194</sup> Martinez decided to abort. Two days later, the doctor learned that he had gravely overstated the risk of fetal abnormality.<sup>195</sup> It turned out there was no reason to think that her baby would not have been perfectly healthy. A fetal autopsy confirmed it. Martinez was in a complete state of shock for over a year after “being misinformed that her fetus was hopelessly malformed and that an abortion [had not been] necessary.”<sup>196</sup> According to court documents, she couldn’t function well at all and didn’t want to go anywhere or enjoy doing anything anymore.<sup>197</sup> The feeling that Martinez had killed her own baby racked her with guilt and “permanently altered her life.”<sup>198</sup> The court held the doctor liable, but only for “the psychological injury directly caused by her agreeing to an act which, as the jury found, was contrary to her firmly held beliefs” and “deep-seated convictions” about abortion.<sup>199</sup>

Another case involved two infertile couples, the Rogers and the Fasanos, who were receiving treatment at the same clinic.<sup>200</sup> They would occasionally bump into each another there. The husbands, Robert Rogers and Richard Fasano, would exchange small talk while their wives, Deborah Rogers and Donna Fasano, were being treated for ovarian stimulation and egg retrieval. The women were scheduled for implantation on the same morning, but only Mrs. Fasano got pregnant. She ended up giving birth to two baby boys. One looked like the Fasanos, who are white; the other like the Rogers, who are black. The Rogers were awarded custody of their biological child and sued the doctor. He had implanted one of their embryos in Mrs. Fasano, and

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194. *Quinlan*, 355 A.2d at 647.

195. *Martinez v. Long Island Jewish Hillside Med. Ctr.*, 504 N.Y.S.2d 693, 694 (1986) (Gibbon, J., dissenting), *rev'd*, 512 N.E.2d 538 (1987).

196. *Id.*

197. Brief of Plaintiff-Appellants, *supra* note 193, at 2–4.

198. *Id.* at 2.

199. *Martinez*, 512 N.E.2d at 538–39. The original jury verdict awarded Carmen Martinez \$125,000 and Arthur Martinez \$25,000. In 1986, New York’s Second Department Appellate Division reversed this judgment based on holding that “[n]o cause of action exists to recover solely upon a claim of emotional injuries suffered by a mother as the result of physical harm done to her child in utero.” *Martinez*, 504 N.Y.S.2d at 693. In 1987, the Court of Appeals reversed the Second Department’s opinion and remanded the case back to the Second Division Appellate Department for further proceedings, holding: “Under these unusual circumstances, where there is a breach of a duty owed by defendant to plaintiff, the breach of that duty resulting directly in emotional harm is actionable.” *Martinez*, 512 N.E.2d at 539. Upon remittitur, the Second Department Appellate Division found that the plaintiffs had successfully proved their cause of action; however, they found the jury award excessive and declined to reinstate it.

200. *See Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (App. Div. 2000).

another of theirs in some other patient the clinic could not identify.<sup>201</sup> The court awarded the Rogers damages for the “emotional harm caused by their having been deprived of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their child,” and for the fear “that the child that they wanted so desperately . . . might be born to someone else and that they might never know his or her fate.”<sup>202</sup> But the court narrowly restricted compensation to those claims that could be substantiated by medical receipts and affidavits about the economic measure of psychological treatment that they could demonstrate the mix-up took on them.<sup>203</sup>

The final example involves Carolyn Witt and her husband Thomas. They were planning to have a family together when she was diagnosed with breast cancer.<sup>204</sup> Lifesaving radiation therapy would leave her infertile, so she had a doctor at Yale New Haven Hospital remove the ovarian tissue she would need to have children and keep it safe until the couple was ready. But when that time came, they learned that the hospital had “unilaterally discarded it without consulting or even notifying the Witts.”<sup>205</sup> The mistake “foreclose[d] the potential for the plaintiffs to ever conceive a child together.”<sup>206</sup> Even though that loss incurred no bodily injury, the court found the hospital liable for having “creat[ed] an unreasonable risk of causing emotional distress.”<sup>207</sup> Even still, no damages were ultimately awarded.<sup>208</sup> And these are outliers *in favor of* allowing recovery when reproduction is deprived. Most suits of this kind are dismissed outright.

Signs of change can be gleaned in the most recent edition of the American Restatement of Torts, a widely cited legal treatise that summarizes general principles of tort law.<sup>209</sup> The 2012 Restatement would forgo the physical manifestation requirement for negligently inflicted injuries sustained in the course of activities “fraught with the risk of

201. See *id.* at 21–22, 29–30, 28–29; Jim Yardley, *After Embryo Mix-Up, Couple Say They Will Give Up a Baby*, N.Y. TIMES (Mar. 30, 1999), <http://www.nytimes.com/1999/03/30/nyregion/after-embryo-mix-up-couple-say-they-will-give-up-a-baby.html>; Jim Yardley, *Sharing Baby Proves Rough on 2 Mothers*, N.Y. TIMES (June 30, 1999), <http://www.nytimes.com/1999/06/30/nyregion/about-new-york-sharing-baby-proves-rough-on-2-mothers.html?ref=topics>.

202. *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d 28, 29 (App. Div. 2001).

203. See *id.* at 29–30.

204. See *Witt v. Yale-New Haven Hosp.*, 977 A.2d 779 (Conn. Super. Ct. 2008).

205. *Id.* at 795.

206. *Id.* at 788.

207. *Id.*

208. The court let the case move forward on counts of negligent infliction of emotional distress to both Carolyn and her husband (as well as intentional infliction to Carolyn). The action was withdrawn before ever going to trial.

209. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM (AM. LAW INST. 2012).

emotional harm.”<sup>210</sup> The Restatement did not specify relevant factors—a professional relationship or contractual obligation, for example—that might qualify for exemption from the general bar on recovery for mental distress that is not physically apparent. It left judges to identify contexts in which plaintiffs must show “credible evidence” of “serious” harms that they were not idiosyncratic or unreasonable to experience.<sup>211</sup> And courts have so far applied this relaxed standard sparingly,<sup>212</sup> limiting recovery for purely emotional distress to legal malpractice in child custody or criminal defense cases that lead clients to lose visitation rights or be wrongfully incarcerated.<sup>213</sup>

Allowing people to recover for the emotional harm of losing out on the chance to reproduce would be a start. Anxiety, disappointment, and sorrow are certainly part of any such loss. And declining to remedy that wrongful denial does not simply punt these determinations to a lower court or another day. It takes clear sides on the authenticity and magnitude of these losses: Refusing to redress them denies, at least implicitly, that the law considers those injuries real or serious enough to matter. But these losses cannot plausibly be described harmless errors. We are not talking about mis-prescribed abortion pills that result in a healthy pregnancy anyway, or dropped embryos that still leave enough left over to have children. These are longed-for dreams of pregnancy and genetic parenthood that misconduct shatters, for now or forever.

#### MEASURING REPRODUCTIVE INJURIES

Some will decry recovery for reproductive losses as too arbitrary and prone to abuse. They will say that there is no sound way to translate such unfamiliar and imprecise harms into hard-and-fast dollar amounts; no objective test to appraise the severity of injuries that depend so heavily on subjective testimony; no clear mechanism to channel legislative or judicial deliberations about corresponding damage awards; or, no market value available to set principled limits within some ceiling or floor.<sup>214</sup> But just because reproductive injuries can be nebulous does not mean they are not “concrete,” at least not in the

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210. *Id.* § 47 & cmt. B.

211. *Id.*

212. See *Bylsma v. Burger King Corp.*, 293 P.3d 1168, 1171, 1172 (Wash. 2013) (Johnson, J., dissenting).

213. See *Vincent v. DeVries*, 72 A.3d 886, 890–97 (Vt. 2013); *Miranda v. Said*, 836 N.W.2d 8, 27–28 (Iowa 2013).

214. See, e.g., Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 779 (1985); Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 224–25 (1953).

“usual meaning” the Supreme Court has ascribed to that term—namely, “‘real, and not ‘abstract.’”<sup>215</sup> Not getting the baby you wanted, or getting one you did not, is a harm in fact, not just in theory. “Although tangible injuries are perhaps easier to recognize . . . intangible injuries can nevertheless be concrete.”<sup>216</sup> This is why, as far back as 1931, the Court let a paper company recover for intangible injuries arising from a competitor’s antitrust violation.<sup>217</sup> Its decision in *Story Parchment Co. v. Paterson Parchment Paper Co.* authorized damage awards as “a matter of just and reasonable inference,” even though no harm “could be measured and expressed in figures not based on speculation and conjecture.”<sup>218</sup>

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.<sup>219</sup>

The Court also affirmed the principle that “the risk of the uncertainty [in measuring damages] should be thrown upon the wrongdoer instead of upon the injured party.”<sup>220</sup> A Michigan court sharpened this point in a wrongful death case thirty years later: “[I]t is not the privilege of him whose wrongful act caused the loss to hide behind the uncertainties inherent in the very situation his wrong has created.”<sup>221</sup>

Indeterminacy and incommensurability complicate remedies for reproductive harms, but not uniquely or prohibitively so. Hard as it is to value the loss of pregnancy and parenthood, it is not so much easier to come up with suitable dollar awards for claims of nuisance, trespass, or slander—let alone torts like wrongful death, wrongful conviction, and wrongful imprisonment. Yet courts do it all the time. That injuries to life, liberty, and dignity cannot be quantified with anything like precision does not justify refusing compensation outright. The same goes for the humiliation of privacy intrusion, betrayal of fiduciary breach, or even “wrongful living” when medical providers resuscitate some-

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215. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 472 (1971)).

216. *Id.* at 1548–49. This was a case about standing to sue in federal court under Article III of the U.S. Constitution, as opposed to the substance of tort claims under state law. The requirements for standing doctrine and substantive claims differ, but courts tend to think about the concept of harm similarly in both.

217. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

218. *Id.* at 563.

219. *Id.*

220. *Id.* at 561, 565. For discussion in the context of wrongful life claims, see *Berman v. Allan*, 404 A.2d 8, 14 (N.J. 1979).

221. *Wycko v. Gnodtke*, 105 N.W.2d 118, 123 (Mich. 1960).

one whose healthcare directives clearly said not to.<sup>222</sup> Courts should not throw up their hands just because these losses require care to enumerate or appraise. So too with the thwarting of reproductive interests.<sup>223</sup> The principal harm is not the lost choice or capacity to conceive and gestate.<sup>224</sup> It is the ways in which plaintiffs are affected by being denied the associated experiences and identities. These are subjective injuries to individual well-being.

Damages should depend on how much plaintiffs actually suffer. The impact will usually go beyond the “shock of discovering” that parenthood will take a radically different shape,<sup>225</sup> or even the “psychological trauma” of being deprived the child a couple “wanted so desperately.”<sup>226</sup> There are also the frayed marriages, disordered identities, and enduring senses of loneliness or isolation that these mishaps can leave in their wake.<sup>227</sup> Americans rate their inability to conceive or carry a wanted child as about as devastating as divorce or diagnosis with a terminal illness.<sup>228</sup>

In life and in law, people need not beget nor bear a child in order to be the child’s parents—adults with primary responsibility for sustaining and promoting his or her welfare and development. What makes a parent, in the complete and meaningful sense of that role, is this kind of functional and enduring caretaking, full stop. People who adopt a child are no less that child’s parents just because they lack shared DNA and fetal bonding. But the flourishing of adoptive families and availability of adoption, at least for some, does not negate the wrongful denial of a sought-after biological affinity that many Americans experience as a loss.<sup>229</sup> For those who believe that “DNA binds a

222. See *Campbell v. Delbridge*, 670 N.W.2d 108, 113 (Iowa 2003); *Callison v. Hillcrest Healthcare Sys.*, No. CJ-2010-3197, 2011 WL 7990001 (Okla. Dist. Ct. Tulsa Cnty. Apr. 14, 2011).

223. See *infra* notes 116–117 and accompanying text.

224. The capability approach, developed by Amartya Sen and Martha Nussbaum, places emphasis on people’s substantive freedom to choose from among sets of valued conditions and activities. For discussion, see Dov Fox, *Luck, Genes, and Equality*, 35 J.L. MED. & ETHICS 712, 719–21 (2007).

225. *Shelton v. St. Anthony’s Med. Ctr.*, 781 S.W.2d 48, 50 (Mo. 1989).

226. *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d 28, 29–30 (App. Div. 2001).

227. See, e.g., *Canesi v. Wilson*, 730 A.2d 805, 815 (N.J. 1999); *Cauman v. George Wash. Univ.*, 630 A.2d 1104, 1109 (D.C. 1993); *Becker v. Schwartz*, 386 N.E.2d 807, 814 (N.Y. 1978).

228. See Alice D. Domar et al., *The Psychological Impact of Infertility: A Comparison with Patients with Other Medical Conditions*, 14 J. PSYCHOSOMATIC OBSTET. & GYNECOL. 45, 49 tbl. 1 (1993).

229. A comprehensive study of American attitudes about adoption revealed that a thin majority believe “adoptive parents received the same amount of satisfaction from raising an adoptive child as from raising a biological child.” INTRODUCTION TO FAMILIES BY LAW: AN ADOPTION READER 1, 3 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004). Many perceive adoption as “not quite as good as having one’s own” children. See Allen P. Fisher, *Still “Not Quite as Good as Having Your Own”?* *Toward A Sociology of Adoption*, 29 ANN. REV. SOCIOL. 336, 361

person's past and future into a single family narrative," becoming a step- or adoptive parent cannot satisfy a felt lineage, rooted in flesh and blood, that "reinforce[s] continuity" with one's forebear and "act[s] as a repository of memory for an individual's past, which may have been otherwise forgotten."<sup>230</sup> A 2018 *New York Times* article profiled childless Americans who cannot "shake the feeling of being last one to turn the lights out."<sup>231</sup>

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(2003). In a 2005 survey, a majority of Americans said they took genetics and gestation to "legitimize the child as part of the family" and "construct the child's identity within" it. Gay Becker et al., *Resemblance Talk: A Challenge for Parents Whose Children Were Conceived with Donor Gametes in the U.S.*, 61 SOC. SCI. & MED. 1300, 1301 (2005). Some even think that adoptive parents "lack the presumed naturalness that characterizes the love felt by a 'real' parent for a child." Leslie A. Baxter et al., *Narrating Adoption: Resisting Adoption as "Second Best,"* 14 J. FAM. COMM. 253, 255 (2014). Others seek to strengthen the "real" or "natural" connection that they themselves would feel (or think others perceive) to a future child. Saskia Hendriks et al., *The Importance of Genetic Parenthood for Infertile Men and Women*, 32 HUM. REPROD. 2076, 2087 (2017).

Evidence of a preference for assisted reproduction over adoption comes from research by Professors Glenn Cohen and Daniel Chen. Cohen and Chen looked at before-and-after rates of adoption in states that mandated insurance coverage for fertility treatment. See I. Glenn Cohen & Daniel Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485 (2010). If adoption was seen as an equally attractive way to form a family, we would probably expect to see a trade-off with increased use of IVF as it became less expensive while adoption costs remained the same. The subsidies did attract more IVF in those jurisdictions, but no fewer adoptions. The researchers draw the implication that adoption never competed against IVF in the first place. They concluded that "[m]ore empirical work is needed to answer the question" of why those who wanted to be parents, but could not afford IVF before it was insured, did not consider adoption an adequate substitute. *Id.* at 550–54, 575.

230. KAJA FINKLER, EXPERIENCING THE NEW GENETICS: FAMILY AND KINSHIP ON THE MEDICAL FRONTIER 10 (2000). So it is not just the satisfaction some get from making out the similarities they perceive in a child's appearance or temperament. See Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347, 366–67 (2008) (citing David M. Schneider, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* (2d ed. 1980)). Or that being pregnant facilitates an intimate "bond" between woman and fetus that makes procreation "a distinct experience from adoption." *Reber v. Reiss*, 42 A.3d 1131, 1138 (Pa. Super. Ct. 2012). Instead, social norms and expectations surrounding parent-child heredity is usually what matters more to most people. See June Carbone, *Negating the Genetic Tie: Does the Law Encourage Unnecessary Risks?*, 79 UMKC L. REV. 333, 333–34 (2010).

231. Anna Goldfarb, *How to Leave a Legacy When You Don't Have Children*, N.Y. TIMES (July 17, 2018), <https://www.nytimes.com/2018/07/17/well/how-to-leave-a-legacy-when-you-dont-have-children.html>; see also *In re Baby M*, 537 A.2d 1227, 1235 (N.J. 1988) (describing the drive to procreate that consumed the father in the first American surrogacy dispute, the last Holocaust survivor in his family); Michelle Harrison, *Social Construction of Mary Beth Whitehead*, 1 GENDER & SOC'Y 300, 302 (1987) (explaining that "maintaining the genetic family line" would enable that man, William Stern, "to ward off existential loneliness"). Infertility stigma may also help to explain part of the preference for assisted reproduction over adoption. Guido Pennings, *The Right to Choose Your Donor: A Step Towards Commercialization or a Step Towards Empowering the Patient?*, 15 HUM. REPROD. 508, 508–09 (2000). People who pursue IVF or look-a-like donor services may seek to improve the chances that their family will be able to pass "the child as-if-begotten, the parent[s] as-if-genealogical." JUDITH S. MODELL, KINSHIP WITH STRANGERS: ADOPTION AND INTERPRETATIONS OF KINSHIP IN AMERICAN CULTURE 2 (1994). They may "not

To assess that loss, courts can and should consider more than what plaintiffs themselves say about how it has affected them. Life satisfaction surveys are among the aggregative empirical tools that can provide a subjective sense of how people tend to be impacted by similar life events and circumstances.<sup>232</sup> Another example is the experience sampling technique that uses mobile devices to survey people's real-time reactions to specific experiences throughout the day.<sup>233</sup> The self-reporting that such methods depend on is not perfectly reliable. But subjective well-being data can still correlate robustly with an array of demographic facts and experiential circumstances. Professors John Bronsteen, Christopher Buccafusco, and Jonathan Masur explain:

Using multivariate regression analyses that control for different circumstances, researchers are able to estimate the strength of the correlations between SWB and factors such as income, divorce, unemployment, disability, and the death of family members . . . . [L]ongitudinal data about changes in SWB over time . . . is especially valuable in assessing the causal effects of life events (such as marriage, disability, or unemployment) on [subjective well-being], because the same individual can be surveyed both before and after

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want the world—or the child—to know they used a sperm bank to conceive.” *Id.* For discussion, see Fox, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1862 n.87 (2009). Same-sex couples are not actually so different in this respect. It is true that gays and lesbians do not face the same expectations to reproduce or pressures to conceal fertility challenges. Ninety percent of heterosexual men and women report “a strong desire for biological children,” which compares with forty percent of lesbians and thirty-four percent of gay men. Same-sex couples are also nearly three times as likely to raise an adopted or foster child. Rachel H. Farr & Charlotte J. Patterson, *Lesbian and Gay Adoptive Parents and Their Children*, in LGBT-PARENT FAMILIES: INNOVATIONS IN RESEARCH AND IMPLICATIONS FOR PRACTICE 39, 45 (Abbie E. Goldberg & Katherine R. Allen eds., 2013). But same-sex couples still prefer to share DNA with their children to the extent possible, opting for surrogacy or donor insemination by wide margins over adoption. GARY J. GATES, DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY 1 (2015). To one lesbian couple, the choice was clear: “[W]e could have at least one of us in our children,” or neither. See KARIN LESNIK-OBERSTEIN, ON HAVING AN OWN CHILD: REPRODUCTIVE TECHNOLOGIES AND THE CULTURAL CONSTRUCTION OF CHILDHOOD xii (2008); Dana Berkowitz, *Gay Men and Surrogacy*, in LGBT-PARENT FAMILIES: INNOVATIONS IN RESEARCH AND IMPLICATIONS FOR PRACTICE 71, 76 (Abbie E. Goldberg & Katherine R. Allen eds., 2013). Many same-sex couples also choose a donor or surrogate who looks like the nongenetic parent, in hopes of enriching parent-child bonds or departing less from traditional norms of family formation. The presence and appearance of genetic affinity appeals to many same-sex couples too. See LAURA MAMO, QUEERING REPRODUCTION 191–92 (2007); DEAN A. MURPHY, GAY MEN PURSUING PARENTHOOD THROUGH SURROGACY 152–53 (2015).

232. See ED DIENER, RICHARD LUCAS, ULRICH SCHIMMACK & JOHN HELLIWELL, WELL-BEING FOR PUBLIC POLICY 191 (2009); William Pavot & Ed Diener, *Review of the Satisfaction with Life Scale*, 5 PSYCHOL. ASSESSMENT 164, 164 (1993).

233. See Alan B. Krueger, Daniel Kahneman, David Schkade, Norbert Schwarz & Arthur A. Stone, *National Time Accounting: The Currency of Life, in Measuring the Subjective Well-Being of Nations: National Accounts of Time Use and Well-Being*, NAT'L BUREAU ECON. RES. 9, 30 (Alan B. Krueger ed., Univ. Chicago Press 2009), <https://www.nber.org/chapters/c5053.pdf>.

the event. This eliminates the need for between-subjects comparisons . . . . More importantly, they rely on global judgments about how people's lives are going, rather than on those individuals' moment-by-moment hedonic experiences [that] are often poorly remembered . . . because of a person's momentary mood or the order in which questions are posed, among other errors.<sup>234</sup>

This non-individualized measure of characteristic damages will of course overcompensate some people and undercompensate others. But that would also be true for objective accounts of harm that measured reproductive losses in terms of deprived capacities to procreate, for example, as compared with lost capacities to walk or talk or see.<sup>235</sup> One advantage the characteristic-harm approach has over an individualized one is that it does not risk giving complainants perverse incentives *not* to adapt or feel better as a way to drive up their awards.<sup>236</sup> To be sure, appeal to life satisfaction surveys will not magically point to some correct level of compensation for lost chances to reproduce. But they can reliably approximate losses better than most alternatives.

#### RANKED HARMS, LOST CHANCES

Attention to facts and context can also help to distinguish greater reproductive harms from lesser ones. Consider an embryo switch that prevents plaintiffs from being pregnant as they wanted, but nonetheless enables them to be parents. That is not as bad as an otherwise similar error that also denies them parenthood. Shannon and Paul Morell's twin daughters were two and a half years old when the couple decided they wanted to give them a little brother or sister. After using IVF to conceive their twins, the couple had six embryos left in storage. But when they returned to the fertility clinic in hopes of having another child, the embryos were nowhere to be found. "I real-

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234. John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis v. Cost-Benefit Analysis*, 62 DUKE L.J. 1603, 1621–22 (2013) (citing series empirical studies that provide data on the hedonic consequences of various life events, and demonstrate ways to monetize them); see also David E. DePianto, *Tort Damages and the (Misunderstood) Money-Happiness Connection*, 44 ARIZ. ST. L. J. 1385 (2012); Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745 (2007); Christopher Essert, *Tort Law and Happiness*, 36 QUEENS L.J. 1 (2010); Cass R. Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157 (2008); Rick Swedloff & Peter H. Huang, *Tort Damages and the New Science of Happiness*, 85 IND. L.J. 553 (2010); Peter A. Ubel & George Loewenstein, *Pain and Suffering Awards: They Shouldn't Be (Just) About Pain and Suffering*, 37 J. LEGAL STUD. S195 (2008); Sean H. Williams, *Self-Altering Injury: The Hidden Harms of Hedonic Adaptation*, 96 CORNELL L. REV. 535 (2011).

235. See AMARTYA K. SEN, *INEQUALITY REEXAMINED* 39–41 (1992).

236. This point comes from Jonathan Masur.

ized I was powerless,” Shannon said.<sup>237</sup> The clinic had transferred them into another patient, Carolyn Savage. Carolyn and her husband Sean were devout Catholics who had been trying to have a baby themselves. They decided not to abort or sue for custody after Mrs. Savage gave birth to the boy they called “Little Man.” The Savages ultimately turned the baby over to the Moreells. Shannon was overjoyed to have her genetic child to raise. But still she noted: “All the emotions a woman has during pregnancy to bond with her child I haven’t had. I never felt the baby kick—none of that.”<sup>238</sup> Meanwhile, Carolyn’s act of kindness left her with post-traumatic stress disorder. “That absent child is always with you, a loss you feel some days as yearning and other days in a gasp of pain.”<sup>239</sup>

Here is another example: Permanent deprivations will tend to cause more acute harms than temporary reproductive setbacks. Psychology studies on the impact of infertility suggest that the inability to have a first child tends to cause greater heartache than missing out on an additional one.<sup>240</sup> It is not so different when professional negligence is to blame. In another context—disputes between former spouses about whether to use their frozen embryos—courts have already gauged the relative strength of reproductive interests based on whether the parties already have offspring or might yet be able to. In a 2012 Pennsylvania case, the ex-wife sought access to implant their cryopreserved embryos over the man’s objection.<sup>241</sup> The couple had not reached any prior agreement about what should happen to the embryos in the event of divorce. The court balanced their reproductive interests, concluding that hers—in favor of procreation—were more compelling under the circumstances. The woman’s age (forty-four), health (cancer survivor), and marital status (single) meant that the embryos were “likely her only chance at genetic parenthood and her most reasonable chance for parenthood at all,” given that adoption agencies prefer married couples.<sup>242</sup>

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237. PAUL MORELL & SHANNON MORELL, *MISCONCEPTION: ONE COUPLE’S JOURNEY FROM EMBRYO MIX-UP TO MIRACLE BABY* 65 (2010).

238. Mike Celizic, *Genetic Parents of Embryo Felt “Powerless,”* TODAY (Sept. 23, 2009, 6:00 AM), <https://www.today.com/health/genetic-parents-embryo-felt-powerless-1C9404873>.

239. CAROLYN SAVAGE & SEAN SAVAGE, *INCONCEIVABLE: A MEDICAL MISTAKE, THE BABY WE COULDN’T KEEP, AND OUR CHOICE TO DELIVER THE ULTIMATE GIFT 1* (2011); *Woman in Embryo Mix-up Gives Birth to Boy*, CNN (Sept. 26, 2009, 1:24 AM), <http://www.cnn.com/2009/HEALTH/09/25/wrong.embryo.birth/>.

240. See Arthur L. Greil et al., *Variation in Distress Among Women with Infertility Evidence from a Population-Based Sample*, 26 HUMAN REPROD. 2101, 2112 (2011).

241. See *Reber v. Reiss*, 42 A.3d 1131 (Pa. 2012).

242. *Id.* at 1138–40.

In a similar case out of Connecticut from 2017, the one-time husband and wife again had not entered into any contract over how to dispose of the IVF embryo they had created.<sup>243</sup> This time, the woman who wanted the embryos destroyed while the man wanted them implanted in a surrogate.<sup>244</sup> The court awarded the woman control over the embryos in deference to the “life-long emotional and psychological repercussions” of having genetic parenthood foisted upon her.<sup>245</sup> The court reasoned that the man’s existing biological children and potential to reproduce made his interest in the embryos weaker by comparison.<sup>246</sup> He “is already a father and is able to become a father to additional children, whether through natural procreation or further in vitro fertilization.”<sup>247</sup> Losing out on an additional child plausibly harms victims less than denials of the opportunity to be a parent in the first place, or at all.

This is not to say that being deprived of procreation can still devastate people who have children already, or might still in the future. Hewing compensation levels too closely to family size undervalues the significance of parenthood for any child beyond the first. And it risks sanctioning injuries that disproportionately affect African Americans and Hispanics, who are twice as likely as Caucasians or Asians to have four-plus children.<sup>248</sup> Courts also err when they deny damage awards for a negligently caused miscarriage, just because the couple conceived again, or are young and healthy enough that they still could.<sup>249</sup> A Louisiana judge explained that later-born offspring cannot “take the place” of the stillborn child or diminish the enormity of that loss.<sup>250</sup>

Besides the severity of any particular instance of deprived procreation, there is also the extent to which professional misconduct is to blame for having caused that reproductive loss. For most fertility patients, procreation is far from a sure thing. Disease, accidents, cancer treatment, prenatal history, and passing years leave one in eight American couples today unable to conceive or gestate without the

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243. See *Bilbao v. Goodwin*, 2017 WL 5642280 (Conn. Super. Ct. 2017).

244. *Id.*

245. *J.B. v. M.B.*, 783 A.2d 707, 717 (N.J. 2001).

246. *Bilbao*, 2017 WL 5642280, at \*4.

247. *J.B.*, 783 A.2d at 717.

248. See FAMILY SIZE, BY RACE AND ETHNICITY, PEW RES. CTR. (May 7, 2015), [http://www.pewsocialtrends.org/2015/05/07/childlessness-falls-family-size-grows-among-highly-educated-women/st\\_2015-05-07\\_childlessness-12/](http://www.pewsocialtrends.org/2015/05/07/childlessness-falls-family-size-grows-among-highly-educated-women/st_2015-05-07_childlessness-12/).

249. See *Carey v. Lovett*, 622 A.2d 1279, 1290 (N.J. 1993); *Kammer v. Hurley*, 765 So. 2d 975, 978 (Fla. Dist. Ct. App. 2000).

250. *McCann v. ABC Ins. Co.*, 640 So.2d 865, 875 (La. Ct. App. 1994).

help of reproductive technology.<sup>251</sup> Those who struggle with fertility have modest opportunities to get pregnant and carry a child to term even in the absence of professional misconduct. So the severity of harm that is attributable to negligence in these cases will depend in part on the plaintiff's pre-injury opportunities of gestation or live birth, in the event that their treatment had gone just right.<sup>252</sup>

Reproductive prospects vary from couple to couple and person to person. Age and sex are the most salient factors. Male and female fertility diminish at different rates. Women's biological clocks tick faster. Their fixed number of eggs grow more fragile over time, increasing the risk of miscarriages or genetic anomalies for women who hold off on procreation until they are older, whether to focus on career, find a partner, or any other number of reasons.<sup>253</sup> In 2016, the Centers for Disease Control and Prevention reported that, for the first time, American women ages thirty to thirty-four gave birth at higher rates than women in their late twenties.<sup>254</sup> The take-home-baby rate for female fertility patients under thirty-three hovers around thirty to forty percent.<sup>255</sup> At thirty-five or so, many "women confront a 'fertility cliff,' when the chances of becoming pregnant decline sharply as the[ir] eggs decrease in number and quality."<sup>256</sup> The average forty-year-old woman has a five percent chance of getting pregnant. By forty-five, her chances drop to one in one hundred.<sup>257</sup> A lost embryo or pregnancy might be that woman's last chance to conceive. Men typically have more time.

Male fertility does not decline as dramatically with age. Men replenish sperm throughout their lives, enabling biological offspring until later. Billy Joel, George Lucas, Steve Martin, and Robert De Niro all

251. See CDC, 2012 ASSISTED REPRODUCTIVE TECHNOLOGY: FERTILITY CLINIC SUCCESS RATES REPORT 23 (2014), <http://www.cdc.gov/art/pdf/2012-report/art-2012-fertility-clinic-report.pdf>.

252. See William J. Stewart & Randi Lynn Scheinblum, *Deprivation of Parenthood—A New Tort?*, 6 WEST. ST. U. L. REV. 229, 244–45 (1979).

253. See Heather Murphy, *Held in Reserve: Too Few Mr. Rights Lead More Women to Freeze Their Eggs*, N.Y. TIMES, July 9, 2018, at D2.

254. See CDC, *Natality Dashboard, Age Specific Birth Rates*, <https://www.cdc.gov/nchs/products/vsrr/natality-dashboard.htm#> (last updated Jan. 30, 2018).

255. See Siladitya Bhattacharya et al., *Factors Associated with Failed Treatment: An Analysis of 121,744 Women Embarking on Their First IVF Cycles*, 8 PLOS ONE 1, 12 (2013), <http://journals.plos.org/plosone/article/asset?id=10.1371/journal.pone.0082249.PDF>.

256. Ariana Eunjung Cha, *She Championed the Idea That Freezing Your Eggs Would Free Your Career. But Things Didn't Quite Work Out*, WASH. POST (Jan. 27, 2018, 5:35 PM), [https://www.washingtonpost.com/classic-apps/brigitte-adams-became-the-poster-child-for-freezing-your-eggs-but-things-didnt-quite-work-out-how-she-imagined/2018/01/27/ff55857a-e667-11e7-833f-155031558ff4\\_story.html?utm\\_term=.473549865feb](https://www.washingtonpost.com/classic-apps/brigitte-adams-became-the-poster-child-for-freezing-your-eggs-but-things-didnt-quite-work-out-how-she-imagined/2018/01/27/ff55857a-e667-11e7-833f-155031558ff4_story.html?utm_term=.473549865feb).

257. See *id.*

had kids in their sixties. But that larger window will not make much difference to straight couples committed to conceiving with half of the genetic material from each partner, or else not at all. But a man's longer time horizon might temper the loss of deprived procreation for different-sex couples who are open to using donor eggs. Contrast the destruction of a cancer patient's only pre-chemo sperm—after which no biological child will be possible—with the loss of embryos that can still be replaced, or the unsuccessful surrogate pregnancy that can be tried again with another gestational carrier.<sup>258</sup>

But for many victims of procreation deprived, taking a baby home was not a safe bet. It might be for some couples in the late stages of a healthy pregnancy. But in the first three months of pregnancy, one in four women miscarry.<sup>259</sup> Here is how one federal judge, writing in concurrence, spelled out a few of the factors that might help a trial court “to determine the extent of damages” that should awarded to parents “for the wrongful death of a stillborn” child:

1. the stage of pregnancy at which the stillbirth occurs; 2. the medical history of the mother with respect to previous childbirths; 3. the number of children the couple presently has; 4. whether the mother used artificial means to induce pregnancy, i.e., fertility drugs; 5. the probability of pregnancy going to full term; 6. any prior history of miscarriage; 7. prenatal care of the stillborn child; 8. parental preparation for the forthcoming child, i.e., house additions, baby crib and any other indicia of the degree of expectation exuded by the parents.<sup>260</sup>

The chances of live birth are lower still if an embryo had yet to be implanted, as in the fertility clinic freezer failures. Because most cases of frozen embryo loss involve people who were already struggling with infertility, their chances of reproducing were iffy even before negligence rendered their materials unusable.

Badly behaving specialists should not be liable for the infertility that patients already suffered from, or other reproductive complications they would have anyway, no matter what quality medical care they received. Probabilistic recovery offers a principled way to compute damages for the wrongful destruction of gametes or embryos under these circumstances.<sup>261</sup> Suppose a couple's age and health gave them a thirty percent chance of live birth if the clinic had not dropped

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258. See Dara Purvis, *Expectant Fathers, Abortion, and Embryos*, 43 J.L. MED. & ETHICS 330, 337–38 (2015).

259. See Roy G. Farquharson, Eric Jauniaux & Niek Exalto, *Updated and Revised Nomenclature for Description of Early Pregnancy Events*, 20 HUM. REPROD. 3008, 3008 (2005).

260. *Danos v. St. Pierre*, 383 So. 2d 1019, 1030–31 & n.15 (La. App. 1980), *aff'd*, 402 So. 2d 633 (La. App. 1981).

261. See *supra* notes 98–102 and accompanying text.

the tray containing their embryos; the error reduced that probability to three percent. Courts should start by coming up with some dollar figure that roughly captures the denial of all-but-guaranteed procreation. To calculate awards for the actual (lower) odds of pregnancy and parenthood they had before the embryo loss, reduce that initial figure by the thirty percent chance that competent care would have given them to reproduce with their frozen embryos intact. Finally, take ninety percent of that discounted amount. This is because the negligence still left them one-tenth of that chance they would have had either to conceive on their own or possibly to create another embryo with which to initiate a successful pregnancy. Say a jury valued the assurance of parenthood at \$100,000. Thirty percent of that absolute loss would be \$30,000, and nine-tenths of that amounts to a final remedy of \$27,000. That award would just be for the reproductive injury of procreation deprived. It would not replace but add to whatever separate compensation may be due for out-of-pocket costs related to the failed procedure, the price of replacing it, or any associated medical or work expenses.

Plaintiffs in a case like this would need to show that the lost chance was not insignificant—that competent treatment would have given them a reasonable chance to reproduce. For some people—women over forty-four, or men of any age who have no working sperm count—their potential for biological children was already so low that even the most egregious mistake would not make procreation much less likely than it was before.<sup>262</sup> In the case of cancer survivor Carolyn Witt discussed earlier,<sup>263</sup> the court noted that she and her husband would “not be entitled to recover” if her lost ovarian tissue had given them “no chance of success” anyway, at least assuming this should have been “known and understood by the plaintiffs.”<sup>264</sup> This is the conclusion that a Louisiana court reached in a 2011 case of shoddy obstetric treatment. Zsa Zsa Dunjee was a thirty-six-year-old diabetic woman with fibroid problems. Board-certified experts agreed that her doctor “deviated below the standard of care” by failing to postpone her fertility treatment until her diabetes was under control and her fallopian tubes were no longer infected.<sup>265</sup> But the court found “no record facts to support the conjecture that . . . Ms. Dunjee would have

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262. See Ian Sample, *Chances of IVF Success “Futile” for Women over 44, Says Study*, GUARDIAN (June 16, 2015, 7:46 PM), <http://www.theguardian.com/society/2015/jun/17/women-ivf-birth-donor-eggs>.

263. See *supra* notes 204–208 and accompanying text.

264. Witt v. Yale-New Haven Hosp., 977 A.2d 779, 787–88 (Conn. Super. Ct. 2008).

265. *In re Dunjee*, 57 So. 3d 541, 544 (La. Ct. App. 2011).

been able to conceive” in her health at that age, even if her doctor had not forged ahead and provided otherwise high-quality care.<sup>266</sup> Since Dunjee “had no real chance of becoming pregnant” anyway, the court did not hold the negligent doctor liable for that negligible and “speculative loss.”<sup>267</sup> That is not to say that her doctor should not have lowered Dunjee’s expectations by advising her that procreation was next to impossible.

Fertility clinics have long fed unrealistic patient expectations about reproductive outcomes. The former director of a leading clinic recently divulged that many IVF programs “massag[e] the data” to feign “extraordinarily high rates of pregnancy even in women over 40.”<sup>268</sup> Public outrage over inflated fertility clinic success rates brought federal and state regulation in the early 1990s. But it was not enforced. And by 1996, an American Medical Association report found that “deceptive advertising and insufficient informed consent” were rampant in assisted reproduction.<sup>269</sup> The report said that misrepresenting the likelihood of success violates moral obligations of informed consent—before proceeding with any procedure, a doctor must obtain the patient’s go-ahead after disclosing the relevant side effects and alternatives.<sup>270</sup> False promises of IVF success often omit pertinent facts about proposed care. But it is hard for patients to prove they would have refused treatment if they had been made aware of those facts.<sup>271</sup> And reproductive specialists are given a pass on informed consent by offering patients a cursory overview of forms to read rather than anything like a meaningful exchange.<sup>272</sup>

Some fertility patients get creative in their quest for legal relief after being misled. After seven failed IVF cycles, Jayne Karlin of New York sued her clinic under the state’s laws against deceptive business practices and false advertising for misrepresenting success rates and health risks. She won, but only after an investigative report by the TV program *20/20* exposed the wildly exaggerated claims splashed across the

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266. *Id.* at 552.

267. *Id.* at 551–52.

268. Jane E. Brody, *I.V.F.’s Misleading Promise to Those over 40*, N.Y. TIMES (Oct. 17, 2016), <http://www.nytimes.com/2016/10/18/well/the-misleading-promise-of-ivf-for-women-over-40.html>.

269. AM. MED. ASS’N COUNCIL ON ETHICAL & JUDICIAL AFFAIRS & COUNCIL ON SCI. AFFAIRS, ISSUES OF ETHICAL CONDUCT IN ASSISTED REPRODUCTIVE TECHNOLOGY 2 (1996). For discussion, see Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 299–313 (1997).

270. *Salgo v. Leland Stanford Jr. Univ. Bd. of Trs.*, 317 P.2d 170, 181 (Cal. Ct. App. 1957).

271. *Id.*

272. Jody Lyneé Madeira et al., *Inform and Consent: More Than Just “Sign Here,”* 108 FERTILITY & STERILITY 40, 41 (2007).

clinic's promotional materials, broadcast advertisements, and seminar talks.<sup>273</sup> Any deterrence under consumer protection claims is trifling, given the difficulty of showing that misrepresentation caused larger harms. The regulatory penalty is usually a small fine,<sup>274</sup> while claims for breach of informed consent require proof of bodily injury from hidden side effects or foregone alternatives.<sup>275</sup> That is why courts reject such suits where the harm from "undisclosed risks" relates "to the condition of pregnancy itself," as opposed to "the patient's physical integrity."<sup>276</sup>

### CONCLUSION

Freezer failures and other high-tech injuries raise hard questions about whether and how courts should treat the wrongful deprivation of valued goods that people did not have quite yet. Courts deny recourse when misconduct shatters people's dreams of having biological children. Victims often cannot point to any physical or financial injury; they were not parents already; and getting offspring was never assured. Our legal system seems resigned that these tragedies are just part of modern life, beyond the power of law to do anything about. But those reproductive harms are neither trivial nor unduly speculative. Today's plaintiffs missed the heyday of private law expansion. It has been more than century since courts last flexed their common-law muscles to establish new torts like slander, privacy, and defamation. But the scale and frequency of embryo mix-ups and fertility failures make recovering that muscle memory inescapable. The time has come to remedy future intangible losses for genetic affinity and the chance to reproduce.

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273. See *Karlin v. IVF America Inc.*, 712 N.E.2d 662, 664–65, 666–67 (N.Y. 1999).

274. See, e.g., Wheeler-Lea Act, ch. 49, § 5, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. § 45(a)(1) (2006)).

275. See Caroline Forell & Anna Sortun, *The Tort of Betrayal of Trust*, 42 U. MICH. J.L. REFORM 557, 570 (2009).

276. *Karlsons v. Guerinot*, 394 N.Y.S.2d 933, 939 (App. Div. 1977). For discussion, see Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justifiable Causation*, 1988 U. ILL. L. REV. 607, 656–57 (1988); Marjorie M. Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 233–36 (1985).

