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## The Lopsided Harms of Reproductive Negligence

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## THE LOPSIDED HARMS OF REPRODUCTIVE NEGLIGENCE

*Carol Sanger\**

## INTRODUCTION

The concept of reproductive negligence is probably not unfamiliar to men and women of child-bearing or child-begetting age. Many a restless hour has been spent worrying about the consequences of a skipped pill, an abandoned condom, or some other form of contraceptive carelessness. The general rule in such circumstances is that the injured party has no recourse in tort against a sexual partner whose negligence resulted, say, in a pregnancy. (Interestingly, liability *may* arise as the result of the negligent transmission of herpes.<sup>1</sup>) To be sure, not all reproductive misconduct is negligent; some is intentional, as when a sexual partner tampers with his partner's birth control or lies about the use of contraception. But here, too, no liability attaches for the harm of an unwanted pregnancy.<sup>2</sup> As the New York Court of Appeals reminded a male respondent seeking to avoid a child support order, “[T]he mother’s conduct [misrepresenting her use of birth control] in no way limited *his* right to use contraception.”<sup>3</sup> Assumptions about trust between intimates aside, it is every man and woman for themselves in the world of private procreation.

The focus of Professor Dov Fox’s recent essay, *Reproductive Negligence*, however, is not on conduct, intentional or otherwise, between intimates but on the negligent provision of reproductive services by medical professionals.<sup>4</sup> Surprisingly—we are after all talking about the

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1. See *Berner v. Caldwell*, 543 So. 2d 686, 689 (Ala. 1989) (recognizing a cause of action for tortious transmittal of herpes “in line with the public policy of this state, which seeks to protect its citizens from infection by communicable diseases”).

2. See, e.g., *L. Pamela P. v. Frank S.*, 449 N.E.2d 713, 715 (N.Y. 1983) (holding the conduct of the parents in causing a child’s conception to be irrelevant in determining child support obligations); A. Rachel Camp, *Coercing Pregnancy*, 21 *Wm. & Mary J. Women & L.* 275, 308 (2015) (noting the discrepancy between contraception, in which courts are reluctant to become involved, and other contexts in which unwanted things can happen and invite a legal claim for injury).

3. *L. Pamela P.*, 449 N.E.2d at 716 (emphasis added).

4. Dov Fox, *Reproductive Negligence*, 117 *Colum. L. Rev.* 149, 151–57 (2017). Like some private parties, professional infertility specialists have also intentionally interfered with a patient’s reproductive plans, as when doctors substitute their own sperm for that of anonymous donors, sometimes repeatedly, creating a phalanx of half-siblings. See

provision of medical care by doctors—we learn right off the bat that plaintiffs who suffer at the negligent hands of medical personnel from whom reproductive treatment has been purchased have no recourse in tort, except in the rarest of circumstances.

Fox presents a comprehensive, well-structured, and most timely case that plaintiffs should indeed be able to receive damages for the harms suffered as a result of reproductive negligence. He powerfully argues for recognition of a new cause of action that establishes particular categories of reproductive harm—those involving neither physical injury nor financial loss—as compensable torts. Such recognition would enable judges and advocates to abandon the doctrinal gymnastics now used to shoehorn such claims under one or another existing tort in order to remedy what no one denies is a wrong.<sup>5</sup> As Professor Karl Llewellyn said with regard to “shoehorning” by construction in contracts—to recognize, for example, unconscionable conduct—the difficulty with such techniques is that “since they do not face the issue, they fail to accumulate either experience or authority in the needed direction . . . . The net effect is unnecessary confusion and unpredictability . . . and evil persisting that calls for remedy.”<sup>6</sup>

The new tort is not only just in its recognition of reproductive negligence, but it is also increasingly necessary. As Fox explains, the harms of thwarted reproductive planning find no remedy in other traditional sources of legal accountability—contract, property, emotional distress, or regulatory schemes—yet people are increasingly using the new technologies to address reproductive difficulties or preferences.<sup>7</sup> The law

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Associated Press, *Retired Fertility Doctor Accused of Impregnating Several Patients Pleads Not Guilty to Obstruction*, L.A. Times (Sept. 12, 2016), <http://www.latimes.com/nation/nationnow/la-na-fertility-doctor-20160912-snap-story.html> (on file with the *Columbia Law Review*) (noting there were at least eight children that resulted from fifty inseminations in which a fertility doctor used his own sperm “instead of donated sperm his patients were expecting”); Christopher F. Schuetze, *Dutch Fertility Doctor Swapped Donors’ Sperm with His, Lawsuit Claims*, N.Y. Times (May 15, 2017), <http://www.nytimes.com/2017/05/15/world/europe/dutch-fertility-doctor-swapped-donors-sperm-with-his-lawsuit-claims.html> (on file with the *Columbia Law Review*) (noting it is suspected that twelve children “were conceived using the clinic director’s sperm”); Rebecca Smith, *British Man ‘Fathered 600 Children’ at Own Fertility Clinic*, Telegraph (Apr. 8, 2012), <http://www.telegraph.co.uk/news/9193014/British-man-fathered-600-children-at-own-fertility-clinic.html> (on file with the *Columbia Law Review*) (“A British man may have fathered 600 children by repeatedly using his own sperm in a fertility clinic he ran . . .”).

5. Fox, *supra* note 4, at 154–55 (“Judges unwilling to dismiss such claims altogether have little success trying to shoehorn them into theories that are alternatively cramped (e.g., lost property, product liability), jarring (e.g., wrongful life, wrongful death), or disingenuous (e.g., intentional infliction of distress for mere accidents, breach without any warranty).” (footnotes omitted)).

6. K.N. Llewellyn, *Book Review*, 52 Harv. L. Rev. 700, 703 (1939).

7. Fox, *supra* note 4, at 151, 162–76. Fox does not, however, give up on the possibilities of recovery for emotional distress. As Professors Martha Chamallas and Jennifer Wiggins propose, where reproductive harms are concerned, a higher duty of care should

need not lag so far behind the demands of technology: The tort of reproductive negligence would be “uniquely equipped to meet emerging challenges about genetic modification that loom on the horizon.”<sup>8</sup> Indeed, since Fox’s essay was published in January of 2017, the horizon has gotten seriously closer. In August 2017, scientists for the first time successfully edited out a mutant gene from a human embryo, producing a healthy embryo.<sup>9</sup> The unfolding of gene-editing as well as more mundane opportunities for procreative negligence—failing to properly clean a used pipette before using it for a subsequent insemination<sup>10</sup>—are on the legal system’s doorstep right now. Indeed, in *The End of Sex and the Future of Human Reproduction*, Professor Henry Greely announces his expectation that within the next twenty to forty years, the children of people “with good health insurance” will be conceived not in bedrooms, but in clinics, as innovations in genetics and stem cell research will make embryo selection and implantation a common and irresistible procedure for human conception.<sup>11</sup> This all sounds quite modern and new, expanding the possibilities for negligence in the realm of assisted conception. We should remember, however, that reproductive negligence has been recognized for decades with regard to the frustrated procreative plans of parents who acquired their children not through intercourse or technology but through adoption. In such cases, adoption agencies have been held liable for negligence, most often in failing to give parents accurate information about the health, ancestry, or physical condition of the adoptive child.<sup>12</sup> I put aside for now the question of whether

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be imposed on doctors to elevate the emotional injuries stemming from reproductive harms and the harm to infants to the same status as property or physical damage. Martha Chamallas & Jennifer B. Wriggins, *The Measure of Injury: Race, Gender, and Tort Law* 111 (2010).

8. Fox, *supra* note 4, at 241.

9. Pam Belluck, In Breakthrough, Scientists Edit a Dangerous Mutation from Genes in Human Embryos, *N.Y. Times* (Aug. 2, 2017), <http://www.nytimes.com/2017/08/02/science/gene-editing-human-embryos.html> (on file with the *Columbia Law Review*).

10. For instances in which this occurred, see Ilan Lior, *Gay Israeli Couple Received Wrong Baby from Surrogate Mother in Nepal*, *Haaretz* (Jan. 8, 2016), <http://www.haaretz.com/israel-news/.premium-1.696174> (on file with the *Columbia Law Review*); Marlise Simons, *Uproar over Twins, and a Dutch Couple’s Anguish*, *N.Y. Times* (June 28, 1995), <http://www.nytimes.com/1995/06/28/world/uproar-over-twins-and-a-dutch-couple-s-anguish.html> (on file with the *Columbia Law Review*).

11. Henry T. Greely, *The End of Sex and the Future of Human Reproduction* 1–2 (2016).

12. See *Wolford v. Children’s Home Soc’y of W. Va.*, 17 F. Supp. 2d 577, 580 (S.D. W. Va. 1998) (“The wrong complained of in plaintiffs’ lawsuit lies not in the adoption itself, but in the alleged misconduct of the defendant . . . [which] plaintiffs claim infected the adoption process and caused compensable harm. . . . The plaintiffs’ claims are more properly characterized . . . as alleging a “wronged adoption.”); *Roe v. Catholic Charities of the Diocese Springfield*, 588 N.E.2d 354, 357 (Ill. App. Ct. 1992) (recognizing “a cause of action for fraud based upon an adoption agency’s intentional misrepresentation of a child’s health and psychological background”); *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1112–14 (Mass. 1995) (recognizing a cause of action for “wrongful adoption”); *M.H. v.*

adoption is a form of procreation or something else. Yet the template of these cases neatly maps onto Fox's tort of procreative negligence.

In engaging with Fox's essay, my plan is first to quickly set out his basic arguments, supplementing some of them with additional examples or tweaks along the way. Then, to satisfy my sense that more might be said or clarified, I shall take on three aspects of Fox's analysis that give me pause. The first concerns how Fox frames the question of what is at stake; the second addresses distinctions among plaintiffs with regard to their experience of harm; and the third addresses the political setting in which reproductive harms now arise. My comments and critiques are offered in the interest of making Fox's persuasive case even more so (though perhaps not less problematic).

### I. FOX'S BASICS

Under the new tort law, Fox organizes the procreative wrongs that stand to be righted into three categories: (1) the *imposition* of unwanted pregnancy or parenting through professional negligence (e.g., vitamins issued in place of birth control pills); (2) the *deprivation* of wanted pregnancy or parenting through professional negligence (e.g., fetal misdiagnosis leading to a pregnant woman's decision to abort a wanted pregnancy); and (3) negligent conduct that thwarts choices parents have made about the characteristics of the baby they want.<sup>13</sup> This third category Fox calls the *confounding of procreation*, and it includes mistakes in sperm-sorting, gene-editing, and pre-implant genetic diagnoses.<sup>14</sup> In sum, parents who respectively wanted no baby, a baby, and a special baby instead received a baby, no baby, and the wrong kind of baby. The proposed tort is capacious indeed, though each of these claims of harm presents distinctive challenges to the existing tort system. As Fox shows through the impressive compendium of case law he has assembled, recovery in tort is denied in each category.<sup>15</sup> This is not because there is a problem with causation, as there was in the diethylstilbestrol (DES) cases of the 1980s, in which plaintiffs struggling with infertility were unsure which pharmaceutical company had manufactured the exact brand of DES pill ingested by their pregnant mothers a generation earlier.<sup>16</sup> The problem Fox seeks to redress is rather that "our legal system does not

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Caritas Family Servs., 488 N.W.2d 282, 288 (Minn. 1992) (requiring adoption agencies "to use due care . . . when they undertake to disclose information about a child's genetic parents and medical history"); *Mallette v. Children's Friend & Serv.*, 661 A.2d 67 (R.I. 1995) (noting many states impose a duty of care on adoption agencies when providing parents with information).

13. Fox, *supra* note 4, at 153.

14. *Id.* at 200–01.

15. *Id.* at 153–54.

16. E.g., *Sindell v. Abbott Labs.*, 607 P.2d 924, 925 (Cal. 1980). Although the DES cases involved goods, liability puzzles are also likely to arise with regard to services in our ongoing "complex industrial society." *Id.* at 936.

recognize a conception of injury that accommodates the disruption of reproductive plans.”<sup>17</sup>

How can this be? We seem to be an enthusiastically pro-natalist country, or, in Professor Katherine Franke’s words, we are a country saturated in “repronormativity.”<sup>18</sup> The Supreme Court has made clear that states may try to persuade pregnant women to choose childbirth over abortion,<sup>19</sup> and a fair number of states have taken them up on the invitation.<sup>20</sup> Under the Trump Administration, the “culture of life” introduced into American politics by President Ronald Reagan is making an official comeback with its renewed commitment to abstinence over contraception education.<sup>21</sup> Our jurisprudence has long recognized the protection of procreative practices and abilities as fundamental to our core social values, notwithstanding the sterilizations of the institutionalized Carrie Buck in the 1920s<sup>22</sup> and of poor, black women into the 1970s without their consent.<sup>23</sup> Still, by the 1940s, the Court had begun to come around. Jack Skinner could not be castrated as punishment for stealing chickens; to do so would deprive him on equal protection grounds (embezzlers just did jail time) of “the right to have offspring,” which the Court announced as “one of the basic civil rights of man.”<sup>24</sup>

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17. Fox, *supra* note 4, at 153.

18. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *Colum. L. Rev.* 181, 183 (2001).

19. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (“Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.”).

20. See *What Anti-Choice Measures Are in Place in Your State?*, NARAL Pro-Choice Am., <http://www.prochoiceamerica.org/laws-policy/state-government/> [<http://perma.cc/4V9T-YZ2B>] (last visited Aug. 14, 2017) (highlighting, using an interactive map, each state’s relative position on reproductive rights).

21. See Ronald Reagan, *Abortion and the Conscience of the Nation* 15, 18 (1984) (arguing no legislative majority had voted for “abortion-on-demand” and that many Americans were saddened by the ruling in *Roe v. Wade*); Pam Belluck, *Programs that Fight Teenage Pregnancy Are at Risk of Being Cut*, *N.Y. Times* (Aug. 10, 2017), <http://www.nytimes.com/2017/08/10/health/teen-pregnancy-prevention-trump-budget-cuts.html> (on file with the *Columbia Law Review*) (discussing the Trump Administration’s plan to eliminate funding for certain pregnancy-prevention programs that could effectively “end the Obama-era effort to shift away from decades of reliance on abstinence-only programs”); see also Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 *Colum. L. Rev.* 753, 800–08 (2006) (discussing the “culture of life” and its origins).

22. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (“Three generations of imbeciles are enough.”).

23. Up until the 1970s, forced sterilizations were not deemed offensive to a reasonable person’s sense of dignity because they were performed on impoverished black women who already had children. Chamallas & Wriggins, *supra* note 7, at 105–06.

24. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536, 541 (1942). See generally Victoria F. Nourse, *In Reckless Hands: Skinner v. Oklahoma and the Near Triumph of American Eugenics* 59–60 (2008) (discussing various rationales behind the practice of sterilizing inmates).

Against this most-serious-sounding constitutional support, it would seem that the tort of reproductive negligence is but a servant of public values. It is right and logical to encourage and protect procreative endeavors by granting people a civil remedy when their reproductive plans go wrong at the negligent hands of a medical professional.

Fox's proposed tort has been carefully thought out. The section on damages, for example, is alert not only to hostility by judges, legislatures, and the public regarding runaway verdicts<sup>25</sup> but also to the integrity of tort law itself as it attempts to balance public interests against private harm. Damages awards are to "operate as a function of: (1) the severity of injury to interests in the legitimate expectation of exercising control of pregnancy, parenthood, or selection of offspring particulars; and (2) the probability that such injuries were caused by deficient care rather than other factors."<sup>26</sup> Here I want to provide two contextual points that push on Fox's commitment to the loss of control as key to the injury suffered. First, people have differing expectations about exercising control over reproduction. For example, infertility is not always regarded as "being robbed of the ability to determine the conditions under which to procreate."<sup>27</sup> I have in mind the role of religion, which we see at work historically and into the present. In the seventeenth and eighteenth centuries, women "would not have considered seeking medical attention for their inability to conceive; doing so may have been viewed as defying the Lord."<sup>28</sup> Even today, when medical intervention is possible, faith still influences decisions by some infertile women to engage with artificial reproductive technologies, and religion may also play a role when such technologies fail. For example, in her small but suggestive study of infertile religious women, sociologist Patricia Jennings uncovered the importance of religious doctrine to women considering the use of artificial reproductive technologies (ARTs), the use of a surrogate, and the possibility of adoption.<sup>29</sup> Some of these women accepted on faith that God may have had "something else in mind" for them.<sup>30</sup>

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25. See, e.g., *Hot Coffee* (HBO June 27, 2011) (detailing how the infamous legal battle over a cup of hot coffee from McDonald's led a push for tort reform).

26. Fox, *supra* note 4, at 212.

27. *Id.* at 155. The vocabulary leads to another wrinkle: Some infertile women view their infertility as "robbing their own mothers of the chance to bond with them through a shared experience of pregnancy and childbirth." Patricia K. Jennings, "God Had Something Else in Mind": Family, Religion and Infertility, 39 *J. Contemp. Ethnography* 215, 223 (2010). The intergenerational connection raises a question of what we might think of as "procreative bystander liability," which here would seem to be a stretch.

28. Sarah Rodriguez, Placing the History of Oncofertility, *in* *Oncofertility: Ethical, Legal, Social, and Medical Perspectives* 103, 105 (Teresa K. Woodruff et al. eds., 2010). See generally Margaret Marsh & Wanda Ronner, *The Empty Cradle: Infertility in America from Colonial Times to the Present* (1996) (exploring the medical and cultural notions, including religious beliefs, and misconceptions surrounding infertility).

29. Jennings, *supra* note 26, at 215.

30. *Id.* at 232.

Second, in calculating damages for a pregnancy that didn't happen due to negligence, is the loss for the pregnancy itself or for the eventual child? The question provokes interrogation over how much a woman takes satisfaction or pleasure in gestation itself. And if compensation is about the loss of the child, a different problem arises. As Professors Martha Chamallas and Jennifer Wriggins have pointed out, race- and gender-based actuarial charts "are of particular importance in cases involving severe injuries to persons who have not yet established an individual track record of employment and earnings, notably children."<sup>31</sup> The implications of this for persons using ARTs may be less than in other types of catastrophes, when the risk of loss may be spread more evenly across demographic categories. Nonetheless, because pregnancy loss is such a deeply personal and penetrating loss, reproductive negligence cases reveal an equality of suffering among parents that actuarial tables necessarily abandon, as some parents might find themselves receiving less in compensation for a girl or nonwhite child than for a white boy.<sup>32</sup>

Before moving ahead, there is a small point I was initially reluctant to make, but I come in friendship. Professor Fox's essay makes an important, much needed contribution to the scholarly fields of reproduction and tort law. It is new in the comprehensiveness of its reach and in its conceptual framing (some of which I will quarrel with later). Yet I think it unnecessary for so fine a scholar as Fox to claim that he is the first to think this all up, when in the very same sentence he acknowledges "two prescient law students" and a recent grad writing ten years ago had done something similar.<sup>33</sup> I mention this because it seems few scholarly papers these days, especially by junior scholars, fail to announce themselves as the first to have thought the subject up. This is a plea, I think, to hiring committees and to the law reviews not to require or expect such declarations when evaluating a candidate or accepting a piece. This takes nothing away from the originality of the author's own contribution but simply acknowledges that most of us are indebted to others, who may have individually or collectively provided the insightful sentence or example that led to our particular spark.

## II. THREE CONCERNS

I want now to draw attention to three aspects of Fox's analysis that have given me pause. I write not from the perspective of a torts specialist but as someone who spends time in the weeds of reproduction from a sociolegal point of view. Both reproduction and torts are touchy matters.

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31. Chamallas & Wriggins, *supra* note 7, at 159.

32. Cf. Kim Soffen, *In One Corner of the Law, Minorities and Women Are Often Valued Less*, Wash. Post: Wonkblog (Oct. 25, 2006) <http://www.washingtonpost.com/graphics/business/wonk/settlements/> [<http://perma.cc/N2MN-DD3U>] (discussing how juries may award less compensatory damages for victims that are minority or female).

33. Fox, *supra* note 4, at 156.



Trying to remedy wrongs (infertility, for example) that some would regard as God's will in a legal field that others think shouldn't exist (New Zealand abandoned personal injury torts in 1974<sup>34</sup>) or that others think should be stringently regulated by statehouses (enactment of damage caps across the United States<sup>35</sup>) isn't going to be easy.

So to my concerns. The first is Fox's framing of what is at stake for plaintiffs with regard to the bundle of reproductive wrongs he has identified. The second concerns the differences between men and women with regard to the procreative harm suffered. My third concern is that, as Fox acknowledges, it is easy to come up with constitutional phrases recognizing the importance of procreation to individuals and thus the doctrinal expansion of causes of actions protecting those interests. Yet the story is not only constitutional or doctrinal but deeply political as well. In the bitter wars concerning abortion, any issue that touches upon reproduction is fraught with political consequence. As we shall see, there are connections among my three concerns: framing, gender, and politics. These connections are sometimes pursued quietly; increasingly, they are pursued boldly and explicitly.

#### A. *Framing*

At the center of any tort is the necessary element of harm. Yet Fox's framing of what the harm has been does not ring entirely true to me. My problem is with Fox's determination that in each of the three areas he treats—imposing procreation, denying it, or confounding particular desires regarding the child's make-up—the nature of the harm that results from the negligence is the disruption to an individual's procreative plans. I want to suggest it is not the loss of control over planning but rather the loss of what the plan meant to produce.

Fox formulates the nature of the harm as “the disruption of family planning,”<sup>36</sup> frustrating “the control individuals have over their reproductive lives,”<sup>37</sup> and the loss of “people's legitimate expectations to exercise a reasonable measure of control over decisions about having children.”<sup>38</sup> Damages are intended to compensate those who have been robbed “of their legitimate expectations of control over whether, when, and how to undertake the life roles of pregnancy and parenthood.”<sup>39</sup> While each of the three specific procreative frustrations—imposing,

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34. Geoffrey Palmer, *New Zealand's Accident Compensation Scheme: Twenty Years On*, 44 U. Toronto L. J. 223, 223 (1994).

35. See Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. Rev. 391, 396–415 (2005); see also Ctr. for Justice & Democracy, *Caps on Compensatory Damages: A State Law Summary 2* (2017) (on file with the *Columbia Law Review*).

36. Fox, *supra* note 4, at 172.

37. *Id.* at 159.

38. *Id.* at 210–11.

39. *Id.* at 167.

denying, or confounding reproductive plans—has distinctive particulars in terms of exactly what isn’t achieved, the “whether, when, and how” makes clear that the essence of the harm—the failure of control over the outcome of reasonable procreative expectations—applies to all three procreative frustrations. Thus the focus is on the loss of procreative control rather than the loss of the hoped-for outcome. That at least is Fox’s contention. I am not entirely clear, however, why “control over” is the key. I see that it offers a unifying interest among the three wrongs at issue, since the outcome approach is so different in each. Control homogenizes procreative desires by roping them together with regard to the overarching motivation, and it satisfies Fox’s desire to find a *right* at the core of the tort.

Fox says that “[l]egal protection of these legitimate expectations of competent care in matters of procreation marks the next frontier of reproductive freedom.”<sup>40</sup> But expectations are always difficult to recover when medical services are at stake.<sup>41</sup> And I am not sure that control does us much better. Is this simply a way to avoid the malpractice requirement of physical injury? Is it an attempt to make the basis of liability more concrete, more objective? Or is it an attempt to connect the proposal for this new tort to the idea of autonomy, in the sense of vindicating a person’s self-authorship of his or her life?<sup>42</sup> Since this idea is already vindicated in the abortion jurisprudence,<sup>43</sup> perhaps Fox thinks it might be made the key in this area too. Might another approach, perhaps running in parallel, be to focus on the unique emotional harms of disappointed expectations with regard to offspring? Or, in the wrong-embryo-implanted cases, to focus on pregnancy itself as injury, as Professor Khiara Bridges has observed legislatures have done in the context of rape.<sup>44</sup>

What concerns me is that these formulations focus not on the disappointing outcome or on disappointment about the outcome but on the loss of control over the disappointing outcome. In this way, they place control, or choice, at center-stage. Early in his essay, Fox rightly celebrates the fact that evolving reproductive technologies have “transfer[red] the reins of control over procreation from chance to choice.”<sup>45</sup> This is unquestionably a good thing in terms of individual autonomy. But as pro-choice supporters have learned too well, we are not a country so fond of choice when it comes to all aspects of reproduction, or of rewarding the loss of control over disrupted plans when the plan

40. *Id.* at 161.

41. *Id.* at 126.

42. See Joseph Raz, *The Morality of Freedom* 204 (1986) (“An autonomous person is part author of his own life. His life is, in part, of his own making.”).

43. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860–61 (1992) (discussing how women’s autonomy to make reproductive decision underpins *Roe v. Wade*).

44. Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 *Stan. L. Rev.* 457, 457–58 (2013).

45. Fox, *supra* note 4, at 160.

was to terminate a pregnancy if pertinent facts had been accurately known. Control over reproductive plans is couched in the same rhetorical disadvantage that marks the very concept of reproductive choice and the attributed connotations of consumerism and self-satisfaction. Would there be a tort for a woman who, because of her doctor's negligence, delivers a healthy baby through a caesarian section rather than by her preferred method of a vaginal birth? There is no question that many women favor the latter form of birth as being more natural and participatory, and that they suffer psychologically when they are not able to proceed in that way.<sup>46</sup> Interestingly, in the attempt to reform Obamacare during the spring of 2017, the argument was raised that the stigma attached to C-sections is increased by designating them as "pre-existing conditions" and so outside the scope of insurance.<sup>47</sup>

Moreover, aside from the political challenge of identifying control, I am suspicious of the claim that control is really at the heart of the matter. I think disappointed plaintiffs as a factual matter are distressed that they didn't get what they bargained and paid for—competent medical treatment—toward a reproductive goal. To veer back toward contracts, they wanted their expectations to be met with regard to the quality of medical care.

Focusing on control over plans seems an unsympathetic strategy, in part because I am not sure it gets at what I can only call the spectral tangibleness regarding what is lost. Of course, disrupted planning has its own intrinsic problems: It is too close to abortion rhetoric. But the problem is deeper. Planning procreation has never been a surefire enterprise. People try, they wait, they consider adoption, they try some more. The focus on planning may reflect a generational difference. Today women under thirty-five are told to see a doctor if one year of unprotected intercourse has not resulted in a pregnancy.<sup>48</sup> The Centers for Disease Control recommends women over thirty-five see a doctor after six months of unsuccessful intercourse.<sup>49</sup> In the past, the period before

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46. Marci Lobela & Robyn Stein DeLucab, *Psychosocial Sequelae of Cesarean Delivery: Review and Analysis of Their Causes and Implications*, 64 *Soc. Sci. & Med.* 2272, 2274 (2007) (reporting that women who give birth via caesarian sections were more likely "to experience a loss of self-esteem and loss of body image than those delivering vaginally" and to describe their birth experience as terrible or traumatic); Alison Bowen, *C-section Scars Can Be Psychological Too: 'What Did I Do Wrong?'*, *Chi. Trib.* (May 18, 2017), <http://www.chicagotribune.com/lifestyles/sc-psychological-effects-c-section-family-0606-20170518-story.html> [<http://perma.cc/SHQ8-8EMA>].

47. Annamarya Scaccia, *Making C-Sections a Pre-Existing Condition Only Further Stigmatizes Them*, *Romper* (May 4, 2017), <http://www.romper.com/p/making-c-sections-a-pre-existing-condition-only-further-stigmatizes-them-55717> [<http://perma.cc/T6T7-RNLC>].

48. *Infertility FAQs*, *Ctrs. for Disease Control & Prevention*, <http://www.cdc.gov/reproductivehealth/infertility/index.htm> [<http://perma.cc/6XJK-RVAU>] (last visited Sept. 13, 2017).

49. *Id.*

suggesting someone was infertile was longer.<sup>50</sup> Perhaps this is because in the past there were fewer treatments for infertility and so the medical profession had little to offer. It is also the case that the age of women when they have their first child has risen,<sup>51</sup> so that more women are likely to have entered the zone of concern because they are actively seeking pregnancy later in their life span. I wonder as well if there is a millennial—or more likely a Gen X—expectation of control over other things as well, connected in part to a faith in technology and invention. I put these questions to Professor Fox, in order to understand why disrupted plans, in contrast to procreation denied, is at the heart of the tort.

There is one other factual aspect regarding loss of control I want to mention. This is that sometimes loss of control becomes acceptance. I do not mean acceptance because there is no remedy and there is nothing left to do. I mean acceptance because, focusing on procreation confounded for a moment, parenting is a strange business. In *Far from the Tree*, Andrew Solomon studies 300 families whose children fell “far from the tree” in terms of characteristics, abilities, looks, behavior, and yet who accepted them.<sup>52</sup> This is not to say that if the distance between parent and child was the result of negligence, the parent might not have sued for the costs of raising the child. And certainly not all parents are resilient enough to manage a child that was beyond their expectations or their own abilities. But Solomon summarizes his case thus: “[A]cceptance reaches its apogee when parents conclude that while they supposed that they were pinioned by a great and catastrophic loss of hope, they were in fact falling in love with someone they didn’t yet know enough to want.”<sup>53</sup> To some, this may sound either too sugary or too noble. But after reading Solomon’s account of parents whose children had autism or Down’s Syndrome, were criminals, dwarfs, prodigies, or gay, it didn’t seem noble. Nor did it seem to have anything to do with law.

#### B. *Gendered Harms*

As part of his framing, Professor Fox talks about his reproductively wronged plaintiffs as persons and people, rather than as men and

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50. Melanie H. Jacobson et al., “Research on Infertility: Definition Makes a Difference” Revisited 3–4 (June 14, 2017) (unpublished manuscript) (on file with the *Columbia Law Review*) (noting the American Society for Reproductive Medicine revised the definition of infertility in 2013, and that an earlier 1989 study by the authors used a two-year range for defining infertility).

51. Nora Caplan-Bricker, For the First Time Ever, Thirty-Something Women Are Having More Babies than Their Twenty-Something Counterparts, *Slate* (May 17, 2017), [http://www.slate.com/blogs/xx\\_factor/2017/05/17/cdc\\_data\\_says\\_women\\_in\\_their\\_thirties\\_are\\_having\\_more\\_babies\\_than\\_women.html](http://www.slate.com/blogs/xx_factor/2017/05/17/cdc_data_says_women_in_their_thirties_are_having_more_babies_than_women.html) [<http://perma.cc/BNE6-MKGW>].

52. Andrew Solomon, *Far from the Tree: Parents, Children and the Search for Identity* 40–42 (2014).

53. *Id.* at 47.

women. I can see reasons for doing this. The gender neutral phrase “nonpregnant persons” as used in *Geduldig v. Aiello*<sup>54</sup> to explain why unfavorable treatment on account of pregnancy was not sex discrimination was once a matter of general mirth among feminist scholars. At present, the phrase is now understood to recognize the procreative capacities of transmen, and so it accurately reflects an aspect of modern reproductive realities. The language of gender neutrality also encompasses what is sometimes called “structural infertility,” a term used to describe the inability of same-sex couples to have biological children together.<sup>55</sup> The fact remains, however, that many men and women experience procreation disruptions differently, as Fox briefly acknowledges: “The exercise of control over decisions about whether or not to carry a child matters a great deal to women, and to a lesser extent to their partners.”<sup>56</sup> But the issue is too crucial to the nature of the harm at issue to leave the matter quite so undeveloped. Some sense of the differences needs to be taken into account directly and more vigorously into account in a discussion like this.

The point is not that men suffer no disappointment at losing control over reproductive plans, to use Fox’s formulation about what is at stake. But we know that in each of the three circumstances that comprise reproductive negligence, the measure of disappointment is not gender neutral. For example, with regard to fertility, women “experience greater amounts of infertility-related stress” and are “more likely than men to report depression and anxiety symptoms, take a more active role in medical treatment, and respond more poorly following treatment failure.”<sup>57</sup>

Perhaps these distinctions mean only that women plaintiffs will have an easier time making their case. But we are not at that stage yet. We are still trying to get the cause of action, not implement it. In terms of persuading a legislature or court, the power of a gendered claim might help to sharpen the nature of what was at stake for either progenitor, even if in the end the formulation is gender neutral. Consider that other torts such as sexual harassment arose because of the reframing of gendered misconduct through examples highlighting the nonsense of categorizing gender-based bullying as “workplace flirtations” or “boys will be boys.” (And certainly boys did their fair share of sexually harassing boys.<sup>58</sup>)

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54. 417 U.S. 484, 494–98 (1974).

55. Judith Daar, ART and the Search for Perfectionism: On Selecting Gender, Genes, and Gametes, 9 J. Gender Race & Just. 241, 254–55 (2005).

56. Fox, *supra* note 4, at 178. If ever I longed for an extra footnote in a law review article, it was here.

57. Brennan Peterson et al., An Introduction to Infertility Counseling: A Guide for Mental Health and Medical Professionals, 29 J. Assisted Reprod. & Genetics 243, 245 (2012). In contrast, men appear “less emotionally affected and are more willing to consider treatment termination.” *Id.*

58. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (reviewing a claim in which the victim and alleged harassers were all men).

To understand the harm as gendered, and focusing for a minute on procreation denied, we might want to know why procreation is sought. Fox touches on this, but I want to say more about what is at stake when motherhood is denied by looking at why women seek it in the first place. Some reasons we glean from participant observation or from the lives of others around us. As I have noted elsewhere, women have children “to keep a marriage together, to meet social, spousal, or parental expectations, to experience pregnancy, or to pass on the family name, genes, or silver.”<sup>59</sup> In more academic terms, as Canadian sociologist Jean Veevers explained nearly forty years ago, in a pro-natalist society, these motivations also encompass moral and civic obligations, marital and sexual success, personal maturity, and normality.<sup>60</sup> And too, some women seek motherhood because they love children in general, or at least they love the *idea* of children and all that having one’s own baby is thought to portend.<sup>61</sup>

Of course, these factors play out differently for differently situated women and girls who must work with what they have. Consider the circumstances of some teenagers. In her ever powerful and insightful piece *Sapphire Bound!*, Regina Austin explained, “Teenage pregnancy is a product of the teens’ contradictory pursuit of romance, security, status, freedom, and responsibility within the confines of their immediate surroundings.”<sup>62</sup> Motherhood may not always produce the magical results that were hoped for—commitment from a sexual partner, a baby who coos more than it cries—but this kind of awakening is true for many new mothers. In her 1978 study of why women chose abortion, Kristen Luker found that her subjects—Bay Area women in their twenties seeking abortion—had decided to “take their chances” by deliberately having sex without contraception on the thought that a pregnancy might induce a stronger commitment (or even proposal) from their partner.<sup>63</sup> If that plan fizzled, legal abortion was available as a back-up.<sup>64</sup> Luker’s risk-taking, commitment-seeking cohort aside, we see how very much can be lost.

This is true for men as well as women. As Gay Becker states, infertility is often experienced “as an assault on gender identity.”<sup>65</sup> Some men suffer the loss of what is sometimes understood as the essence of

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59. Carol Sanger, *M Is for the Many Things*, 1 *S. Cal. Rev. L. & Women’s Stud.* 15, 48 (1992).

60. Jean E. Veevers, *Childless by Choice* 3–6 (1980).

61. See generally Gay Becker, *The Elusive Embryo: How Women and Men Approach New Reproductive Technologies* (2000) (providing and analyzing interviews with women who were trying to get pregnant and experiencing fertility challenges).

62. Regina Austin, *Sapphire Bound!*, 1989 *Wis. L. Rev.* 539, 560.

63. Kristin Luker, *Taking Chances: Abortion and the Decision Not to Contracept* 67, 70–71 (1978).

64. *Id.* at 1–2.

65. Becker, *supra* note 59, at 44.

masculinity, as potency gets confused with virility. Male-factor infertility profoundly affects a man's sense of self, drawing not only from his physiological failure to father but also from his inability to solve his wife's desire for a child. Complicated negotiations sometimes follow, as wives will "cover" for their husband's infertility in exchange for the husband's agreement to accept artificial insemination or adoption as a cure.<sup>66</sup> All of this suggests, certainly in the context of infertility treatment, that the emotional trade-offs and costs are in play even before we get to any reproductive negligence, which one imagines intensifies the suffering of the couple. Professional carelessness may well compound the gendered turmoil that steered the couple—each of them individually or as a marital unit—to medical intervention in the first place. The harms that reproductive negligence add to the emotional fragility wrought by infertility are difficult to unpack, but they remind us how much is at stake when troubled procreation is additionally and unnecessarily thwarted.

Why then have the harms of reproductive negligence gone unrecognized? One factor is the secrecy that has long accompanied pregnancy loss in any form: miscarriage, stillbirth, or abortion. For women, failure to produce offspring, whether involuntarily or deliberately, has been a marker of failure as a woman. We see this historically in the May 22, 1910 announcement in the *New York Times* that "Queen Victoria [of Spain] was delivered of an infant Prince stillborn at 4 o'clock this morning. . . . The body will be buried without ceremony in the royal pantheon of the Escorial Monastery. When told of her loss the mother wept. . . ."<sup>67</sup> The Queen's loss was noted, but the absence of ceremony served to lessen attention to the shame of it—shame not simply as disappointment, but shame as failure, sometimes of dynastic proportions.

Shame and secrecy also attach to infertility and to infertility treatment. Consider the case of Mr. and Mrs. G whose healthy triplets resulted from the Gs' participation in an in vitro fertilization (IVF) program at the Jewish Hospital of St. Louis. When a local television station showed a human-interest program showing the Gs, among others, attending an IVF "class reunion" sometime later, the Gs sued for invasion of privacy.<sup>68</sup> As background, recall that tort law requires that for the unbidden disclosure of personal information to be actionable, the disclosure must be such "that a reasonable person would feel justified in feeling seriously aggrieved by it."<sup>69</sup> And, while how a reasonable person would respond to any particular disclosure is a matter for a jury to decide, revelations in the areas of sex, medicine, and reproduction are commonly accepted as cause for a person to be seriously aggrieved. Thus,

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66. Judith Lorber & Lakshmi Bandlamudi, *The Dynamics of Marital Bargaining in Male Infertility*, 7 *Gender & Soc'y* 32, 34 (1993).

67. *Victoria's Son Stillborn*, *N.Y. Times*, May 22, 1910, at C3.

68. *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 492–93 (Mo. Ct. App. 1990).

69. Restatement (Second) of Torts § 652D cmt. c (Am. Law Inst. 1977).

in the *Y.G.* case, the appellate court reversed the trial court's pretrial dismissal of the Gs' claim.<sup>70</sup> In doing so, the appellate court broadcast the very kinds of information the Gs had dreaded in the first place, speculating as it did in voyeuristic detail about the couple's "bodily procreative secrets" and noting that recourse to an IVF program might indicate "the physical problems which exist with the couple's reproductive systems or that they are incapable of performing sexually."<sup>71</sup> Mr. and Mrs. G may have prevailed in their tort suit, but at the price of judicial (and public) speculation about their bodies and sex lives. Fox rightly notes that this sort of stigma may keep many instances of reproductive negligence "in the shadows" so that cases are not brought in the first place.<sup>72</sup>

The same dynamic has been true for miscarriage and, of course, for abortion. Linda Layne has chronicled how until the last twenty or so years, women who experienced miscarriages stayed utterly mum on the subject, never imagining that the same loss is experienced in some seventeen percent of all pregnancies, surely including some of those in one's own family or among colleagues and friends.<sup>73</sup> Until very recently, the silence around abortion has been similarly deafening, a burden women endure for the sake of their reputations, relationships, and safety. Mothers do not tell their daughters, friends keep it quiet from friends, and women often go out of town to a physician who does not know them.<sup>74</sup> For but one tort-related example of the consequences of publicity about a woman's abortion history, consider *Garcia v. Providence Medical Center*.<sup>75</sup> In that case, Mrs. Garcia brought a malpractice claim against a hospital seeking damages for emotional distress following the death of her infant son while in its care.<sup>76</sup> After permitting the defendant to introduce evidence that Mrs. Garcia had had three abortions in the years before her son's birth, the trial court ultimately ruled against her.<sup>77</sup> Mrs. Garcia appealed on the ground that evidence of her prior abortions

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70. *Y.G.*, 795 S.W.2d at 491.

71. *Id.* at 491, 503.

72. Fox, *supra* note 4, at 152.

73. Linda L. Layne, *Motherhood Lost: A Feminist Account of Pregnancy Lost in America* 3 (2002); see also Emily Bazelon & Dahlia Lithwick, *I Went Full Out*, in *About What Was Lost* 54, 54, 56 (Jessica B. Gross ed., 2007).

74. Carol Sanger, *About Abortion* 46–60 (2017) [hereinafter Sanger, *About Abortion*] (analyzing the differences between abortion privacy and abortion secrecy); Willi Horner-Johnson et al., *Live Birth, Miscarriage, and Abortion Among U.S. Women with and Without Disabilities*, 10 *Disability & Health J.* 382, 385 (2017) (discussing a comparative study on pregnancy outcomes between women with disabilities and women without disabilities and finding that it is probable that women underreported intentional abortions).

75. 806 P.2d 766 (Wash. Ct. App. 1991).

76. *Id.* at 769.

77. *Id.*



should have been excluded.<sup>78</sup> The Washington State Court of Appeals agreed with her, noting that the hospital's claim rested on the implicit assumption "that if a woman has voluntarily consented to an abortion, she is less affected by the pain of the loss of a child than a woman who never voluntarily terminated a pregnancy."<sup>79</sup> A new trial was ordered.<sup>80</sup> The point here is that without more open discussion, the loss experienced from a miscarriage, or a stillbirth, or the abortion of a wanted pregnancy rarely registers as harm as a matter of social fact.<sup>81</sup> It is instead an embarrassment or loss to be endured privately. Without richer and more public accounts of pregnancy loss, there is insufficient cultural familiarity to figure the loss as a legal harm.

All this may seem peculiar because, in other contexts, tort law has gone out of its way to recognize the costs to a mother of losing a born child. In *Dillon v. Legg*, the California Supreme Court extended recovery to a mother who had witnessed her four-year-old daughter being struck dead by a negligent driver as the girl crossed the street to get home.<sup>82</sup> The general rule is that mere bystanders cannot recover damages absent physical injury to themselves.<sup>83</sup> Mrs. Dillon challenged the rule in her opening brief: "Could anyone be so callous, so naïve, so devoid of human experience not to understand the anguish that would result" when a mother sees her child from a safe distance mangled under an approaching car?<sup>84</sup> In the *Dillon* case, the court rethought the proposition in the context of motherhood, holding that not to permit recovery would "frustrat[e] . . . the natural justice upon which the mother's claim rests."<sup>85</sup>

Here, Fox might attend to yet another category of gendered reproductive negligence that has also been neglected in torts. These are the harms wrought against what Professor Jamie Abrams has identified as the "birthing woman," a transitional stage of reproductive activity distinct from either pregnancy or parenthood.<sup>86</sup> Abrams observes that historically, birthing women often expected to die during labor and rarely sued for physical harms that resulted from obstetric malpractice.<sup>87</sup> More

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78. *Id.*

79. *Id.* at 771.

80. *Id.*

81. The abortion of an unwanted pregnancy may register as loss but not harm in the sense of loss of control.

82. 441 P.2d 912 (Cal. 1968).

83. *Id.* at 924.

84. Appellant's Opening Brief at 16, *Dillon*, 441 P.2d 912 (No. 11-410) (on file with the *Columbia Law Review*).

85. *Dillon*, 441 P.2d at 914.

86. Jamie R. Abrams, *Distorted and Diminished Tort Claims for Women*, 34 *Cardozo L. Rev.* 1955, 1957 (2013).

87. *Id.* at 1978-79.

recently, the fetus has become the primary patient in labor, similarly obscuring women's harms and their convictions about claiming them.<sup>88</sup>

*C. The Politics of Abortion*

Reproduction and the desires and practices that accompany acquiring children in the United States are not politically neutral issues. We are, and have been for nearly fifty years, in near manic agitation over abortion, the jewel in the political crown (from all directions). Moreover, the jewel is surrounded by a filigree of connected concerns about contraception, infertility, and sex. None of this is politically innocent. To focus just on abortion, we see that abortion suddenly seems to be about everything, and everything can quickly come to be about abortion.<sup>89</sup> Among the issues that may get swept into this maelstrom, or at least tainted by it, are Fox's efforts to compensate plaintiffs whose suffering included getting a child when none was desired, or getting the wrong kind of child when its sought-after particulars were negligently thwarted.

To see how the reach of political commitment in opposition to basic reproductive rights has already influenced lawmaking, I close this Response with three legislative examples. To warm us up, the first is a tort example addressed by Professor Fox: wrongful birth. Just to review, here is how a Rhode Island court explained denying recovery in a wrongful birth suit:

Make no mistake. These cases are not about birth, or wrongfulness, or negligence, or common law. They are about abortion. . . . For those who cannot accept the premise [that abortion is a legal choice for a woman], no one should ever be compensated for injury just because the choice of abortion has been thwarted.<sup>90</sup>

Pennsylvania was equally clear in abolishing its wrongful birth action.<sup>91</sup> The debate on the floor of the House was heated, as a pro-life legislator accused a supporter of the cause of action for having a "twisted sense of morality" that protects "those who would take the lives of the innocent . . . [while advocating that] it is more cruel to prevent an abortion than it is to kill an unborn baby."<sup>92</sup>

My second example comes from the law of vital statistics and the seemingly remote matter of documentation surrounding stillborn deaths. At least thirty-four states have enacted legislation known generally as

88. For a primer on the concept, see generally William L. F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *Law & Soc'y Rev.* 631 (1980).

89. Sanger, *About Abortion*, supra note 71, at 1–23.

90. *Schloss v. Miriam Hosp.*, No. C.A. 98-2076, 1999 WL 41875, at \*4 (R.I. Super. Ct. Jan. 11, 1999).

91. See generally John Lyons, *To Be or Not to Be: The Pennsylvania General Assembly Eliminates Wrongful Birth and Life Actions*, 34 *Vill. L. Rev.* 681 (1989).

92. *Id.* at 686 n.20.

“Missing Angel Acts.”<sup>93</sup> These are laws that authorize parents to request, and require the state to provide, a birth certificate for a stillborn child. The statutes were enacted in response to lobbying efforts by bereaved parents dissatisfied with the issuance of a stillborn death certificate, once the only official document that marked such deaths. The parents forcefully argued that a stillborn death certificate failed to capture the true nature of their loss—the loss to a parent of a child.<sup>94</sup> As these bills worked themselves through statehouses across the country, supporters of legal abortion registered their concern that granting birth certificates to children who had never lived might serve as yet another step in the ongoing legal process of equating prenatal life and life of born persons, and that this equation might, sooner or later, play its part in the recriminalization of abortion.<sup>95</sup> Drafting compromises in the text of the Missing Angel Acts were reached: The certificates were made available only upon the request of a parent, and abortions were explicitly excluded from their coverage.<sup>96</sup> At the same time, demonstrating that recognition of prenatal life can take on a life of its own, three states went further and granted dependent tax exemptions to the stillborn’s parents in the year of the birth.<sup>97</sup> My point here is not to disparage official efforts to make the lives of grieving parents easier, but rather to observe that abortion politics have an uncanny habit of shimmying into law in unexpected places, such as birth certificates. Similarly, tort reforms that might otherwise extend notions of liability for reproductive negligence may be seen as dangerous or unacceptable because of their explicit recognition that not all children are wanted and that people will take steps to prevent their births.

My final example directly engages the issue of control over plans for the shape of one’s future that Professor Fox sets at the heart of the tort of reproductive negligence: advance directives or “living wills.” This form of legislatively sanctioned control connects not to birth but to death and dying. Advanced directives are understood generally to be a positive move, enhancing a person’s free will until the very end. Yet in recent years, more than half of states have enacted legislation denying effect to advance directives in cases in which the patient is pregnant at the time

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93. State Chart, M.I.S.S. Found., [http://www.missingangelsbill.org/index.php?option=com\\_content&view=article&id=76&Itemid=61](http://www.missingangelsbill.org/index.php?option=com_content&view=article&id=76&Itemid=61) [<http://perma.cc/SY5E-3L7W>] (last visited Oct. 5, 2017).

94. See Carol Sanger, “The Birth of Death”: Stillborn Birth Certificates and the Problem for Law, 100 *Calif. L. Rev.* 269, 272 (2012) [hereinafter Sanger, Stillborn Birth].

95. Carol Sanger, About Abortion: The Complication of the Category, 54 *Ariz. L. Rev.* 849, 851 (2012).

96. Sanger, Stillborn Birth, *supra* note 91, at 309.

97. Colleen Snyder, The Missing Angels Act: Recognizing the Birth of Stillborn Babies, 39 *McGeorge L. Rev.* 544, 545 (2008); see also Gina Harris, Tax Exemption for Stillbirths, Now I Lay Me Down to Sleep, <http://www.nowilaymedowntosleep.org/newsletter-stories/tax-exemption-for-stillbirths/> [<http://perma.cc/543D-VZMK>] (last visited Oct. 9, 2017).

the directive would otherwise spring into effect.<sup>98</sup> For example, the Minnesota statute states that “[i]n the case of a living will of a patient that the attending physician knows is pregnant, the living will must not be given effect as long as it is possible that the fetus could develop to the point of live birth with continued application of life-sustaining treatment.”<sup>99</sup> Michigan’s legislation provides that “[t]his . . . designation cannot be used to make a medical treatment decision to withhold or withdraw treatment from a patient who is pregnant that would result in the pregnant patient’s death.”<sup>100</sup>

The example shows how the state’s interest in ongoing prenatal life can override the desired control over end-of-life issues as arranged by a patient who is pregnant at the later point in time when the directive would come into play. Yet her wishes may not be only for her own death; she may have also taken into consideration her assessment of what was best for her child to be. No matter. The statutes deny effect and disrupt the stated wishes and plans of a competent adult. Advocates who oppose Fox’s clarification and explanation of procreative negligence may find support in the pregnancy provisos that now limit the force of advance directives. Greater attention to the politics in which doctrine must necessarily develop may clarify where atmospheric pitfalls lie for Fox’s argument.

#### CONCLUSION

There is of course a division of labor with regard to all scholarly work. If—shall we say when?—the tort under discussion comes into being, it will have been on account of the work of scholars, advocates, jurists, and those plaintiffs willing to put it all out there. *Reproductive Negligence* has taken us quite far into the process. I expect that in his forthcoming book, *Birth Rights and Wrongs*,<sup>101</sup> Fox’s materials will find more room to breathe so that he can make the case in greater detail and with even greater consequence.

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98. See Wendy Adele Humphrey, “But I’m Brain-Dead and Pregnant”: Advance Directive Pregnancy Exclusions and End-of-Life Wishes, 21 *Wm. & Mary J. Women & L.* 669, 676–77 & nn.33–37 (2015) (categorizing states based on their treatment of pregnancy in their enforcement of advance directives). See generally Timothy J. Burch, Incubator or Individual?: The Legal and Policy Deficiencies of Pregnancy Clauses in Living Will and Advance Health Care Directive Statutes, 54 *Md. L. Rev.* 528, 538 (1995) (discussing the questionable constitutionality of pregnancy clauses in directive statutes).

99. Minn. Stat. § 145B.13 (2017).

100. Mich. Comp. Laws Ann. § 700.5507(4) (West 2012).

101. Dov Fox, *Birth Rights and Wrongs* (forthcoming 2018).