RE-BIRTHING WRONGFUL BIRTH CLAIMS IN THE AGE OF IVF AND ABORTION REFORMS

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I. INTRODUCTION

"[S]piritually and morally, we are in no way keeping pace with technical advances."

—Lise Meitner, 1957[1]

"The law has everywhere a tendency to lag behind the facts of life."

—Justice Louis Brandeis[2]

In the last eighteen months, several states imposed restrictions on abortion.[3] All the while, use of modern reproductive techniques,

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1. RUTH LEWIN SIME, LISE MEITNER: A LIFE IN PHYSICS 375 (Univ. Cal. Press 1996).
2. THE WORDS OF JUSTICE BRANDEIS 115 (Solomon Goldman ed., H. Schuman 1953).
3. "From January through June 2019, 58 abortion restrictions have been enacted in 19 states, including 25 abortion bans." Nash et al., *State Policy Trends at Mid-Year 2019: States Race to Ban or Protect Abortion*, GUTTMACHER INSTITUTE (July 1, 2019), https://www.guttmacher.org/article/2019/07/state-policy-trends-mid-year-2019-states-race-ban-or-protect-abortion. Twelve states enacted some type of abortion ban while six protected or expanded access to it. *Id.* Georgia, Kentucky, Louisiana, Mississippi, and Ohio passed laws banning abortion, and at least five other states restricted it. *Id.* "Kentucky banned abortion for a diagnosis of a genetic anomaly." *Id.* "Arkansas, Kentucky, Missouri and Utah banned abortion of a fetus that has or may have Down syndrome." *Id. See also STATE POLICY UPDATES Major Developments in Sexual & Reproductive Health*, GUTTMACHER INSTITUTE (July 15, 2020), https://www.guttmacher.org/state-policy [hereinafter State Policy Updates] (tracking developments in abortion laws by state, including Utah's legislation in March 2020 which "would prohibit abortion if Roe v. Wade were overturned, except in cases of rape or incest, when a pregnant woman's life or physical health is severely endangered, or when the fetus has a lethal fetal anomaly"); *Abortion Battles: What Explains Donald Trump's War on Late-Term Abortions?*, THE ECONOMIST (Aug. 24, 2019), https://www.economist.com/united-states/2019/08/24/what-explains-donald-trumps-war-on-

including in vitro fertilization (IVF), is increasing[4]—along with botch-ups.[5] The majority of courts generally provide only limited recovery for claims arising therefrom.[6] These facets of societal interface are, perhaps surprisingly, related, and recent developments bode poorly for allowing

late-term-abortions. *But see* June Medical Services LLC v. Russo, 140 S. Ct. 2103 (2020) (the Supreme Court case decided on June 29, 2020, which might be portent of pushback, although Justice Roberts's "non-linear" tie-breaker decision (*see infra* notes 301 and 302) could be subject to various constructions); *Reproductive Rights in 2020:* June Medical Services v. Russo *and COVID-19*, PETRIE-FLOM LAW CENTER (July 16, 2020), https://petrieflom.law.harvard.edu/events/details/reproductive-rights-in-2020 (discussion of the Supreme Court's decision in *June Medical* and a dissection of the impact that COVID-19 has had on this field); State Policy Updates, *supra* note 3 (some state legislation is receiving judicial pushback, including Mississippi's six-week abortion ban). *See also* Frank McGurty, *Missouri Follows Alabama by Passing Restrictive Abortion Bill*, REUTERS (May 17, 2019), https://www.reuters.com/article/us-usa-abortion-missouri/missouri-follows-alabama-by-passing-restrictive-abortion-bill-idUSKCN1SN12N; *see* Jeremy Sharon, *As Abortion Fight Heats Up in US, Termination in Israel Remains Easily Accessible*, JERUSALEM POST (May 17, 2019), https://www.jpost.com/israel-news/as-abortion-fight-heats-up-in-us-termination-in-israel-easily-accessible-589923 (discussing Israel's regulations governing how abortions are approved); *see* Howard Wasserman, *Getting the Nomenclature Right*, PRAWFSBLAWG (May 16, 2019, 8:24 AM), https://prawfsblawg.blogs.com/prawfsblawg/2019/05/getting-the-nomenclature-right.html (explaining what next steps will occur after Alabama issued strict abortion laws in conflict with Supreme Court precedent). *See generally* Ariana Eunjung Cha, *How Religion Is Coming to Terms with Modern Fertility Methods*, WASH. POST (Apr. 27, 2018), https://www.washingtonpost.com/graphics/2018/national/how-religion-is-coming-to-terms-with-modern-fertility-methods/ (comparing the perception of abortion to IVF treatment in certain religious institutions).

4. Jakki Magowan, *Record Numbers of Single Women Seeking Fertility Treatment*, BIONEWS (May 13, 2019), https://www.bionews.org.uk/page_142822.

5. "[A]ccording to the government watchdog in Britain – the Human Fertility and Embryology Association, the number of very serious Category A or B blunders has increased more than fourfold since 2008. In 2010 some 564 serious errors occurred in British IVF centers only, which is more than ten every week. Apart from obvious wrong sperm, wrong embryo cases there are serious mistakes such as frozen sperm being removed from storage prematurely, dishes contaminated with 'cellular debris', in other words containing sperm from another man." *IVF Blunders, Mistakes or Errors – Just Not Rare*, IN-FERTILITY (JAN. 8, 2017), https://in-fertility.eu/2017/01/08/ivf-blunders/. *See also* Naomi Cahn, *When Fertility Clinics Get It Wrong*, FORBES (Aug. 8, 2019), https://www.forbes.com/sites/naomicahn/2019/08/08/when-fertility-clinics-get-it-wrong/#256fc2b71f4a; Michael Cook, *Ohio Family Devastated by IVF Error*, BIOEDGE (Aug. 11, 2019), https://www.bioedge.org/mobile/view/ohio-family-devastated-by-ivf-error/13166; Mike Foley, *Central Ohio Family Files Fertility Lawsuit After Shocking DNA Results*, WCBE (Aug. 7, 2019), https://www.wcbe.org/post/central-ohio-family-files-fertility-lawsuit-after-shocking-dna-results (discussing the Cartellone family's case where another man's sperm was allegedly used to conceive the couple's daughter); Adam Wolf & Naomi Cahn, *Fertility Centers Will Keep Inflicting Pain on Families Until the Government Steps In*, USA TODAY (Sept. 6, 2019), https://www.usatoday.com/story/opinion/2019/09/06/regulate-fertility-centers-spare-families-trauma-and-lawsuits-column/2054961001/.

6. Andrews v. Keltz, 15 Misc. 3d 940, 951–52 (N.Y. Sup. Ct. 2007); *see also* Collins v. Xytex Corp., No. 2015CV259033, 2015 WL 6387328, at *7 (Ga. Super. Ct. Oct. 20, 2015). Many similar casese have been dismissed, resulting in a complete lack of recovery for the injured parties. *See, e.g.*, Doe v. Xytex Corp., No. 2:16-06621 (C.D. Cal. Sept. 2, 2016); Doe 1 v. Xytex, No. 3:16-02935 (N.D. Cal. June 1, 2016); Doe v. Xytex, No. 8:16-cv-02091 (M.D. Fla. Jul. 21, 2016); Doe 1 v. Xytex Corp., No. 1:16-cv-01453 (N.D. Ga. May 4, 2016); Doe v. Xytex Corp., No. 1:16-cv-01729 (N.D. Ga. May 27, 2016); Doe v. Xytex Corp., No. 1:16-cv-01692 (N.D. Ohio Jul. 1, 2016); Norman v. Xytex Corp., 830 S.E.2d 267, 269–70 (Ga. Ct. App. 2019).

complete recovery for relevant claims in the future.[7] Sadly, the situation disproportionately affects women, especially single mothers.[8]

One might expect or hope that advances in medical technology would prompt increased vigilance on the part of the medical profession. In response to carelessly occasioned injury, one would hope the law would provide heightened recovery—if only to deter shoddy work.[9] This expectation might be especially appropriate in cases arising from IVF, a highly lucrative and profit-oriented business,[10] as opposed to medical/healing services mediated by the Hippocratic oath.[11] Nevertheless, in cases involving modern reproductive technology (either to foster or to prevent childbirth), medical doctors and their adjuvants (e.g., embryologists, sperm bank facilitators, geneticists) currently enjoy an unusual and protected status from liability, even as errors proliferate.[12] The reasons for and ramifications of this state of affairs are the basis for this Article.

Errors in IVF or failed reproductive procedures typically generate claims for "wrongful birth" if brought by the parents, or "wrongful life" if brought by the child.[13] With very rare exceptions, wrongful life claims are denied outright.[14] As to wrongful birth, recovery, by and large, is

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7. See the recent article of Luke Isaac Haqq, *Reconsidering Wrongful Birth*, 95 NOTRE DAME L. REV. REFLECTION 177, 181–182, 189 (2020) which devises means to strengthen bars to wrongful birth recoveries and advocates religious and conservative groups unite in their common interests to do so.

8. Ann Meier et al., *Mothering Experiences: How Single Parenthood and Employment Structure the Emotional Valence of Parenting*, 53 DEMOGRAPHY 649 (2016). *See also* Genevieve Roberts, *Denying Single Women IVF is a Cruel Policy that Belongs in the Past*, THE GUARDIAN (Aug. 20, 2019), https://www.theguardian.com/commentisfree/2019/aug/20/single-women-ivf-nhs.

9. Indeed, some "courts have expressed concern that refusing to recognize this cause of action [of wrongful birth] would frustrate the fundamental policies of tort law: to compensate the victim; to deter negligence; and to encourage due care." Keel v. Banach, 624 So. 2d 1022, 1031 (Ala. 1993) (citing Robak v. United States, 658 F.2d 471, 476 (7th Cir. 1981) (applying Alabama law)); Phillips v. United States, 508 F. Supp. 544, 550 (D.S.C. 1981) (applying South Carolina law); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 696 (E.D. Pa. 1978) (applying Pennsylvania law); Smith v. Cote, 513 A.2d 341, 348 (N.H. 1986); *but see* Blake v. Cruz, 698 P.2d 315, 318 (Idaho 1984) (noting that "[i]mposing liability on individual physicians vindicates the societal interest in reducing the incidence of genetic defects"),
superseded by statute, IDAHO CODE § 5-334 (2020), which bars liability. *See also* Vanvooren v. Astin, 111 P.3d 125, 127–28 (Idaho 2005).

10. Michael Cook, *Fertility Becomes a Global Money-Spinner,* BIOEDGE (Aug. 18, 2019), https://www.bioedge.org/bioethics/fertility-becomes-a-global-money-spinner/13181; *see also Seed Capital: The Fertility Business is Booming*, THE ECONOMIST (Aug. 10, 2019), https://www.economist.com/business/2019/08/08/the-fertility-business-is-booming.

11. Barbara Pfeffer Billauer, *The Sperminator as a Public Nuisance: Redressing Wrongful Life and Birth Claims in New Ways (A.K.A. New Tricks for Old Torts)*, 42 U. ARK. LITTLE ROCK L. REV. 1, 3 (2019) [hereinafter Billauer, *The Sperminator*].

12. *Id.* at 6.

13. *Id.* at 22–23.

14. *Id.* at 23–24; *see also, e.g.*, Elliott v. Brown, 361 So. 2d 546, 547 (Ala. 1978). In *Elliott*, the court addressed a wrongful life claim by a child born with serious deformities; the child's father had

limited,[15] and recovery for child-care costs for a healthy child is rarely countenanced,[16] although it does exist in several jurisdictions.[17] The reasons for limiting recovery can be traced to "public policy"

remained fertile after a negligently performed vasectomy. *Elliott*, 361 So. 2d at 546. The court held that a child did not have an action for wrongful life. *Id.* at 548 ("[T]here is no legal right not to be born and the plaintiff has no cause of action for 'wrongful life.'"). See *Zepeda v. Zepeda*, 190 N.E.2d 849, 851 (Ill. App. Ct. 1963), as the earliest wrongful life case which involved creation of illegitimate children.

15. For example, Maine has adopted a statute that provides: "Damages for the birth of an unhealthy child born as the result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child." Me. Rev. Stat. Ann. 24 § 2931(3) (1985). *See also* Keel v. Banach, 624 So. 2d 1022, 1030 (Ala. 1993).

16. *See, e.g.*, Emerson v. Magendantz, 689 A.2d 409, 413 (R.I. 1997).

17. In 1997, the court in *Emerson v. Magendantz* stated only two jurisdictions allowed full recovery for child-rearing of the healthy child: New Mexico and Wisconsin. *Id.* at 412 (citing Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 612 (N.M. 1991) and Marciniak v. Lundborg, 450 N.W.2d 243, 249 (Wis. 1990)). But it missed several others including *Custodio v. Bauer*, 59 Cal. Rptr. 463, 476–78 (Cal. App. 1st Dist. 1967), which also allowed complete or "full recovery,"—at least in theory—as did *Bowman v. Davis*, 356 N.E.2d 496, 499 (Ohio 1976). The *Emerson* court also failed to note both *Betancourt v. Gaynor*, 344 A.2d 336, 339 (N.J. Super. Ct. Law Div. 1975) (citing West v. Underwood, 40 A.2d 610, 611 (N.J. Ct. Err. App. 1945)), *disapproved by* P. v. Portadin, 432 A.2d 556, 559 (N.J. Super. Ct. App. Div. 1981), which held that "'any other loss or damage proximately resulting from' the negligent sterilization operation, including the costs, emotional upset and the physical inconvenience of rearing a child may be recovered at law" and *Bishop v. Byrne*, 265 F. Supp. 460, 465 (S.D. W. Va. 1967), holding that the damage issue is one for the jury, as did the court in Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971), *overruled* by Rouse v. Wesley, 494 N.W.2d 7, 10–11 (Mich. Ct. App. 1992), as *recognized* by Taylor v. Kurapati, 600 N.W.2d. 670, 685–86 (Mich. Ct. App. 1999). *See also* Ochs v. Borrelli, 445 A.2d 883, 885 (Conn. 1982) ("In our view, the better rule is to allow parents to recover for the expenses of rearing an unplanned child to majority when the child's birth results from negligent medical care."). In fact, the weight of the cases allowing recovery for wrongful birth appeared to serve as the harbinger for the decision in *Burns v. Hansen*, 734 A.2d 964, 968 (Conn. 1999), decided in neighboring Connecticut two years afterward. The *Burns* court noted: "In *Ochs v. Borrelli* (internal citations omitted), we concluded, unanimously, that a mother was entitled to recover not only for the expenses associated with the child's disability, a minor orthopedic defect, but also for the ordinary costs of raising a child born as a result of a negligently performed sterilization procedure." 734 A.2d at 968. By 2012, at least one additional jurisdiction—Oregon—allowed it as well, raising the tally of jurisdictions allowing full or expanded recovery to nine. *See* James Fishman, *Ariel and Deborah Levy Win Highly Controversial "Wrongful Birth" Suit*, SUNSTONE ONLINE (May 1, 2012), https://www.sunstoneonline.com/ariel-and-deborah-levy-win-highly-controversial-wrongful-birth-suit/ (discussing Levy v. Legacy Health Systems, No. 090507467 (Or. Cir. Ct. Multnomah Cty. Mar. 9, 2012)). Dicta in *Robak v. United States* confirms this view: "As the court noted in *Speck v. Finegold*, '[B]ut for the defendants' breach of duty to properly treat and advise the plaintiff-parents, they would not have been required to undergo the expenditures alleged.' These expenditures must include the costs of raising a normal child, for the Robaks would not have had to bear them but for defendant's negligence." 658 F.2d 471, 479 (7th Cir. 1981) (internal citation omitted). Better research on the part of the *Emerson* court might have persuaded it to follow these decisions. Other jurisdictions also allowed recovery at one time, but backtracked. Thus, in *Cockrum v. Baumgartner*, 425 N.E.2d 968, 971 (Ill. App. Ct. 1981), complete recovery was allowed but reversed in *Cockrum v. Baumgartner*, 447 N.E.2d 385, 391 (Ill. 1983), *cert. denied*. *See generally* Jennifer Mee, *Wrongful Conception: The Emergence of a Full Recovery Rule*, 70 WASH. U. L.Q. 887 (1992) (suggesting that full recovery for child-rearing expenses should be permitted in successful claims for wrongful conception).

determinants[18] arising from a judicial distaste for abortion,[19] and its progeny, the "sanctity of life" doctrine.[20] Thus, as abortion rights are squelched, hope for greater acceptance of complete recovery in wrongful birth cases wanes.[21]

Four other factors also negatively impact recovery: covert chauvinism by the courts, misapplication of the causation rule, a romanticized view of child-rearing,[22] and a failure to realize that the birth of an unintended child affects not only the parents as a unit but also the family as a whole and the mother as an individual. These factors must be exposed and dissected before reproductive claims are given equal treatment with other negligence claims.

While wrongful birth claims have been recognized in virtually all developed countries,[23] damages have been seriously circumscribed.[24]

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18. *E.g.*, Byrd v. Wesley Med. Ctr., 699 P.2d 459, 461 (Kan. 1985) (quoting the trial court's decision which noted that "'[a]ll three views [including limited recovery incident to damages accruing via pregnancy, complete recovery offset by emotional benefits of parenthood, and complete recovery without offset] present significant and challenging arguments that rest on a foundation of public policy'").

19. See *Robak* for the relationship between wrongful birth cases and abortion, which notes: "A case like this one is little different from an ordinary medical malpractice action. It involves a failure by a physician to meet a required standard of care, which resulted in specific damages to the plaintiffs. The government tries to separate this case from those of ordinary medical malpractice by raising political and moral questions concerning abortions, but the Supreme Court has already settled that issue." 658 F.2d at 476.

20. Barbara Pfeffer Billauer, *Wrongful Life in the Age of Crispr-Cas: Using the Legal Fiction of the Conceptual Being to Redress Wrongful Gamete Manipulation*, 124 PENN. ST. L. REV. 435, 469–70 (2020) [hereinafter Billauer, *Wrongful Life*]. *See also* Keel v. Banach, 624 So. 2d 1022, 1027 (Ala. 1993) ("'Upon what legal foundation is the court to determine that it is better not to have born than to be born with deformities? . . . We decline to pronounce judgment in the imponderable area of nonexistence.'") (quoting Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978)).

21. Billauer, *Wrongful Life*, *supra* note 20, at 441.

22. Blatantly anachronistic and chauvinistic views couched as Christian tenets have also been offered to oppose recovery for negligent acts resulting in healthy but unwanted children. *See* Haqq, *supra* note 7. Haqq's recent article which bemoans the lack of attention paid by Christians and pro-lifers to this situation, contending that there are "ethical" issues to overcome for parents who seek such redress, and noting, derisively, courts that respect awarding such damages. *Id.* at 181–82, 186–87, 189. Haqq levels his attacks under a public policy argument (at 189), advising that "Christian and other pro-life organizations need not challenge the federal reproductive rights directly yet can still make significant strides in recalibrating and redirecting reproductive policy in a *better* direction." *Id.* at 189 (emphasis added).

23. *E.g.*, Eisbrenner v. Stanley, 308 N.W.2d 209, 213 (Mich. Ct. App. 1981), *abrogated by* Taylor v. Kurapati, 600 N.W.2d 670, 685, 691 (Mich. Ct. App. 1999); Schroeder v. Perkel, 432 A.2d 834, 842 (N.J. 1981), *abrogated by* Hummel v. Reiss, 608 A.2d 1341, 1346–47 (N.J. 1992); Becker v. Schwartz, 386 N.E.2d 807, 813; (N.Y. 1978); Naccash v. Burger, 290 S.E.2d 825, 830 (Va. 1982); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 488 (Wash. 1983); James G. v. Caserta, 332 S.E.2d 872, 882 (W. Va. 1985).

24. Australia and South Africa are exceptions to this approach. *See* Chen Meng Lam, *Damages for Wrongful Fertilisation: Reliance on Policy Considerations*, 24 DEAKIN L. REV. 139 (2019). In the Singapore case of ACB v. Thomson Medical Pte Ltd [2017] 1 SLR 918, the court created a new cause of action, "loss of genetic affinity," and allowed partial recovery for child-rearing. In doing so, it partially overruled the lower court's decision which held that "the plaintiff [was] not entitled in law

Typically, recovery is limited to damages related to or arising out of pregnancy or limited by a damage reduction via an "offset" of the claimed emotional benefits attributed to rearing a healthy child.[25] These limitations on recovery accrue regardless whether the claim emerges from newer fertility procedures, including IVF, such as the Xytex cases,[26] switched sperm cases,[27] or switched embryo cases;[28] whether it stems from a failure to provide proper prenatal genetic testing, counselling, or interpretation of tests[29] resulting in the birth of an unhealthy child;[30] or whether it arises out of an improperly performed sterilization procedure[31] or a botched abortion,[32] resulting in an unwanted child—healthy or not.[33]

Similarly, virtually all states in the United States significantly limit recovery for wrongful birth claims,[34] and several states bar recovery outright.[35] Only a few courts see their way clear to allowing full recovery

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to claim damages for [the child's] upkeep in both contract and in tort." ACB v. Thomson Medical Pte Ltd [2015] 2 SLR 218.

25. *See, e.g.*, Emerson v. Magendantz, 689 A.2d 409, 412 (R.I. 1997).

26. *See, e.g.*, Angela Collins v. Xytex Corp., No. 2015-cv-259033, 2015 WL 6387328 (Ga. Super. Ct. Oct. 20, 2015) *aff'd*, Angela Collins v. Xytex Corp., A16A1139 (Ga. Ct. App. 2016). *See also* Billauer, *Wrongful Life*, *supra* note 20, at 447.

27. *E.g.*, *ACB*, 2 SLR 218; *ACB*, 1 SLR 918; *see also* Sarah Gregory, *US Couple Launch Lawsuit After Ancestry Test Reveals Sperm Mix-up*, BIONEWS (Aug. 12, 2019), https://www.bionews.org.uk/page_144330; Cramblett v. Midwest Sperm Bank, LLC, 2017 IL App. 2d 160694U.

28. Perry-Rogers v. Fasano, 276 A.D.2d 67 (N.Y. App. Div. 2000); *see also* Perry-Rogers v. Obasaju, 282 A.D.2d 231 (N.Y. App. Div. 2001), *motion for leave to appeal dismissed*, 97 N.Y.2d 638 (2001).

29. *E.g.*, Greco v. United States, 893 P.2d 345, 348 (Nev. 1995).

30. Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978). *See also* the Israeli case of C.A.1326/07, Hammer v. Amit; C.A. 3828/10, Hammer v. Amit (overruling C.A. 518/82, Zeitsov v. Katz).

31. Emerson v. Magendantz, 689 A.2d 409, 410 (R.I. 1997). *See also* Simmerer v. Dabbas, 733 N.E.2d 1169 (Ohio 2000).

32. Miller v. Johnson, 343 S.E.2d 301 (Va. 1986); Jury Verdict Summary, Smith v. Tucker, No. TC013608, 2001 Jury Verdicts LEXIS. 46368 (Cal. Super. Ct. Dec. 10, 2001).

33. *Simmerer*, 733 N.E.2d at 1172.

34. Although half the states allow the claim, *see* Haqq, *supra* note 7, at 188, damages are limited to those directly involving the child's birth, and allowance of emotional distress is available in a handful of states. *See, e.g.*, Phillips v. United States, 508 F. Supp. 544, 550 (D.S.C. 1981); Miller v. Johnson, 343 S.E.2d 301, 304–05 (Va. 1986) (citing Naccash v. Burger, 290 S.E.2d 825, 829, 831 (Va. 1982)). *See also* Lloyd v. N. Broward Hosp. Dist., 570 So. 2d 984, 988 (Fla. Dist. Ct. App. 1990), *partly quashed by* Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992), where the court held that, in a wrongful birth action, "emotional distress is a natural consequence of the tort and is properly seen as an additional element of damage incident to the 'wrongful birth' claim." Other courts disagree. *See supra* note 17; *infra* note 37.

35. *See* Szekeres v. Robinson, 715 P.2d 1076, 1077 (Nev. 1986) (rejecting the claim outright); Norman v. Xytex Corp., 830 S.E.2d 267, 269 (Ga. Ct. App. 2019) (highlighting that "[t]he Supreme Court of Georgia has held that '"wrongful birth" actions shall not be recognized in Georgia absent a clear mandate for such recognition by the legislature.' . . . [and] that 'Georgia law recognizes only those claims in which the alleged negligence resulted in *un*desired conception'") (quoting Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 560 (Ga. 1990)); Order on Def.'s Mot. to Dismiss at 3 n.6, *Norman v. Xytex Corp.*, No. 2017CV298536 (Ga. Superior Ct. Fulton Cty. June, 13, 2018)); *see also* Wood v. U. of Utah Medical Ctr., 67 P.3d 436, 442 (Utah 2002) (relying on Utah

for what would otherwise be considered garden-variety negligence (or malpractice). This established tort doctrine ordinarily would require compensation for *all* foreseeable damages causally related to the defendant's negligence, including child-rearing costs of a healthy, but unwanted, child.[36] Not here.[37] Coincidentally (or perhaps not so), the major impact of this limitation on recovery falls on the mother.[38]

This aberrant state of affairs has frustrated and irritated scholars. Professor Dov Fox went so far as to propose a new paradigm and the creation of a new cause of action to deal with this untenable situation, which he calls reproductive negligence.[39] This search for a novel claim clearly demonstrates that the old malpractice schema isn't working. The real question, however, is: why? And following that, we need to ask what—short of a new cause of action—can be done about it? These are the questions this Article seeks to address.

In PART II, I review the conflicting legal analyses and identify various rationales utilized to limit recovery. These include exposing chauvinistic judicial behavior patterns, which suggest a latent misogyny masquerading as public policy. I also expose the skewed assessment courts use regarding causation. IN PART III, I delve into the policy aspects

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Wrongful Life Act, Utah Code Ann. §§ 78-11-23 to -25 (2002) which has since been repealed). *But see* Emerson v. Magendantz, 689 A.2d 409, 413 (R.I. 1997). *See also* Doherty v. Merck & Co., Inc., 154 A.3d 1202, 1205 (Me. 2017) (quoting Maine's statute, Me. Rev. Stat. Ann. 24 § 2931 (1985): "Wrongful birth; wrongful life 1. Intent. It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child."); *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assoc., Inc.*, 844 N.E.2d 1160, 1167 (Ohio 2006) (finding "the 'limited damages' rule applicable to wrongful-birth cases"); *Parents May Sue for Pregnancy, Birth Costs But Not Other Damages In 'Wrongful Birth' Actions*, SUPREME COURT OF OHIO CASE SUMMARIES (July 17, 2012) https://www.sconet.state.oh.us/PIO/summaries/2006/0303/040296.asp#:~:text=(March%203%2C%202006)%20In,from%20the%20pregnancy%20and%20birth (discussing *Schirmer*); Patricia Donovan, *Wrongful Birth and Wrongful Conception: The Legal and Moral Issues*, 16 FAMILY PLANNING PERSPECTIVES 64–65 (1984).

36. *But see* Robak v. United States, 658 F.2d 471, 479 (7th Cir. 1981) (allowing recovery for all damage related to the doctor's negligence, including costs associated with rearing a normal child).

37. "Among the jurisdictions that recognize the cause of action for wrongful birth, there is little agreement on the issue of damages, and a majority do[] not allow recovery for emotional distress." Keel v. Banach, 624 So. 2d 1022, 1029 (Ala. 1993). "It is generally recognized that, in a wrongful birth action, parents may recover [only] the extraordinary costs necessary to treat the birth defect and any additional medical or educational costs attributable to the birth defect during the child's minority." *Id.* at 1030.

38. *See* Claire Cain Miller, *Children Hurt Women's Earnings, but Not Men's (Even in Scandinavia)*, N.Y. TIMES (Feb. 5, 2018), https://www.nytimes.com/2018/02/05/upshot/even-in-family-friendly-scandinavia-mothers-are-paid-less.html.

39. Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. (2017) 161, 209–210 [hereinafter Fox, *Reproductive Negligence*]; *see generally* DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW 113–123 (2019) [hereinafter FOX, *BIRTH RIGHTS AND WRONGS*] (discussing the legal implications of medical negligence and its effects on the rights to choose when and how to have a family).

further, demonstrating their anachronistic impact—especially when judges determine the birth of a child to be such a societal blessing that it precludes complete recovery for negligence claims. In PART IV, I identify a new set of harms—those the physician's negligence causes to the family structure—sometimes called relational negligence,[40] and discuss other tort-based rationales that would support recovery, such as the eggshell-plaintiff doctrine.[41]

This Article is the first to identify and examine harms incident to wrongful birth beyond the direct child-parent relationship.[42] Here, I expand the focus to include the impact of the birth on the family unit as an additional harm that bears recompense. As such, the impact on both the parents and the siblings of the born child bears scrutiny. This expanded purview provides damages for rearing the unsought, but healthy, child along with a disabled one, muting the claims of "eugenic abortions"[43] and the objections of disability rights advocates.

In PART V, I conclude by highlighting the impact of the negligence on the parent in his or her individual capacity, noting concerns of deprivation of autonomy, liberty, and the pursuit of happiness. In most cases, the consequence of the negligent acts impacts mostly on the mother who is now saddled with the role of caretaker and thus deprived of a lifestyle she might have otherwise chosen. In her new (unwanted) role as *parent*, she is now deprived of not only her autonomy (having previously been denied the freedom to choose an abortion), but also control over her reproductive destiny. In addition to privacy—the right that birthed legalized abortion—she is also denied the liberty to design the life she chooses[44] and thus deprived of her right to the pursuit of happiness. This Article is the first I am aware of to address these individual autonomy concerns in the wrongful birth context.

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40. *See* Jenkins v. Best, 250 S.W.2d 680, 690 n.6 (Ky. Ct. App. 2007) (explaining that "relational negligence," which requires a duty of care be owed in relation to the plaintiff, is preferred to a "universal duty of care").

41. JACOB A. STEIN, 2 STEIN ON PERSONAL INJURY DAMAGES TREATISE § 11.1 (3d ed. 2020) (explaining that under the rule, "[a]n injured person is entitled to recover full compensation for all damages that proximately result from a defendant's tortious act, even if some or all of the injuries might not have occurred but for the plaintiff's preexisting condition, disease, or susceptibility to injury").

42. By the same token, at least seven legislatures and various courts have barred claims where but for the defendant's negligence, the plaintiff would have terminated the pregnancy via abortion. *See* Azzolino v. Dingfelder, 337 S.E.2d 528, 530 (N.C. 1985); *but see* Speck v. Finegold, 439 A.2d 110, 113–14 (Pa. 1981).

43. See Wendy F. Hensel, The Disabling Impact of Wrongful Birth and Wrongful Life Actions, HARV. C.R.-C.L. L. REV. 141, 173 (2005).

44. *But see* Michael Cook, *Is 'Reproductive Freedom' a Dinosaur*?, BIOEDGE (Aug. 25, 2019), https://www.bioedge.org/mobile/view/is-reproductive-freedom-a-dinosaur/13192.

II. BACKGROUND

A. Review of the State of the Law

Even before *Roe v. Wade*[45] enshrined into law a woman's right to control her reproductive destiny, courts grappled with repercussions of negligence that impinged on this right.[46] Following that landmark decision, cases addressing women's reproductive rights proliferated. Soon, two distinct categories emerged:[47] (1) women who did not want a child at all; and (2) women who wanted children, but only on the assumption they would be free from congenital disease.[48] Generally, where the defendant is a physician, the negligence should fall under one tort umbrella: garden-variety malpractice, as they all involve medical negligence—the failure to properly perform an abortion,[49] tubal ligation, or vasectomy,[50] or the failure to inform a parent of the likelihood that a child would carry a genetic disease—often depriving a woman of her right to have an abortion.[51] Nevertheless, as these cases developed and harms emerged, various classifications were designated to identify and segregate resultant claims. These classifications include wrongful

45. 410 U.S. 113 (1973) (upholding a woman's constitutional right to undergo an abortion during the first two trimesters of pregnancy).

46. *See* Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967), *abrogated by* Berman v. Allan, 404 A.2d 8 (N.J. 1979); *see also* Custodio v. Bauer, 59 Cal. Rptr. 463, 476–78 (Cal. App. 1st Dist. 1967). The *Custodio* court rejects claims "that the expenses of bearing a child are remote from the avowed purpose of an operation undertaken for the purpose of avoiding childbearing . . . . [or that] the compensation sought as 'damages for the normal birth of a normal child' [are tantamount to having] 'the physician . . . pay for the fun, joy and affection which plaintiff . . . will have in the rearing of this, defendant's [sic plaintiff's] fifth child.'" 59 Cal. Rptr. at 476–77. It notes the *Doerr* case which "makes it apparent that the compensation is not for the so-called unwanted child or 'emotional bastard [internal citation omitted],' but to replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income." *Id.* at 477 (citing Doerr v. Villate, 220 N.E.2d 767 (Ill. 1966); Case Note, *The Birth of a Child Following an Ineffective Sterilization Operation as Legal Damage*, 9 UTAH L. REV. 808, 812 (1965)).

47. While these cases may well impact the husband, either directly due to failed sterilization or subsequently due to his contribution to child-care, the primary impact is on the mother—and this Article will generally focus on the damages and harms to her.

48. *See* Billauer, *The Sperminator*, *supra* note 11, AT 20–21. *Compare* Fox, *Reproductive Negligence*, *supra* note 39, at 153; FOX, BIRTH RIGHTS AND WRONGS, *supra* note 39 (providing an alternative, tripartate formulation of reproductive harms).

49. Willis v. Wu, 607 S.E.2d 63, 66 (S.C. 2004).

50. Sorkin v. Lee, 78 A.D.2d 180, 181 (N.Y. 1980).

51. Some states have statutorily banned wrongful birth actions. *See, e.g.*, IDAHO CODE § 5-334(1) (2020): "A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted." Whether this includes wrongful sterilization cases is undetermined. At least eight other states have outlawed the cause of action as well. *Eliminating the Wrongful Birth Cause of Action*, PRESENTATION TO THE SENATE HEALTH AND HUMAN SERVICES COMMITTEE (Feb. 18, 2016), https://www.senate.texas.gov/cmtes/84/c610/021816-AllianceForLife-c3.pdf.

birth,[52] wrongful life,[53] wrongful conception,[54] and wrongful pregnancy.[55]

In an interesting outcome-determinative fashion, the classification of the case often dictated whether the claim would be allowed.[56] Under "normal" medical malpractice theory, by contrast, different guises of failures and breaches of the standard of care are important only to practitioners. Such breaches typically arise in cases dealing with a failure to diagnose, treat, or obtain informed consent.[57] Regardless what the breaches are called in the trade, all are covered—*legally*—under the aegis of medical malpractice. In other words, "malpractice" is the governing theory with *all* foreseeable injuries being compensated.[58] Perhaps the type of expert or proof might differ, but the sphere of recoverable injuries for amputating the wrong foot or botching an appendectomy is the same as for failing to diagnose or advise the patient they have a particular disease for which treatment is available.[59] Even foreseeable harms that might occur in the future, including "soft damages" such as future pain and suffering, are recoverable.[60] Yet, in the "wrongful birth" context, while the malpractice is committed under the traditional rubric of negligence an exception or niche is "birthed," splintering traditional claims into the three categories identified above:

52. Among the early wrongful birth cases was *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975). That case, like many that followed, involved a woman who contracted rubella during pregnancy and gave birth to a severely disabled child. *See also* Keel v. Banach, 624 So. 2d 1022 (Ala. 1993); Billauer, *Wrongful Life*, *supra* note 20, at 451–54, 459–465 (discussing policy implications).

53. In *Miller v. Johnson*, the court held that "[a] wrongful life action is a similar action brought by or on behalf of the defective child for the physician's failure to warn of potential defects or failure to prevent or terminate the pregnancy in light of known risks. Most courts have rejected this theory. . . ." 343 S.E.2d 301, 303 (Va. 1986). *See also* Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978).

54. These matters also proliferate internationally. *See, e.g.*, SA Strauss, *'Wrongful conception', 'wrongful birth' and 'wrongful life': the first South African cases*, 15(1) MED LAW (1996) 161–73. *See* Billauer, *The Sperminator*, *supra* note 11, at 23.

55. In *Chaffee v. Seslar*, the Supreme Court of Indiana recognized the tort of "wrongful pregnancy" resulting from medical malpractice where pregnancy resulted from a failed sterilization procedure but refused claims for child-raising as speculative. 786 N.E.2d 705, 709 (Ind. 2003).

56. See Kathleen Mahoney, *Malpractice Claims Resulting from Negligent Preconception Genetic Testing: Do These Claims Present a Strain of Wrongful Birth or Wrongful Conception and Does the Categorization Even Matter?*, 39 SUFFOLK U. L. REV. 773, 775–76 (2006).

57. *See, e.g.*, Wilkinson v. Vesey, 295 A.2d 676, 682 (R.I. 1972) (failure to diagnose); Sullivan v. Methodist Hospitals of Dallas, 699 S.W.2d 265, 274 (Tex. Ct. App. 1985) (failure to inform); Schmit v. Esser, 236 N.W. 622, 625 (Minn. 1931) (failure to treat).

58. *See* Shilkret v. Annapolis Emergency Hospital Ass'n, 349 A.2d 245, 247 (Md. 1975) (stating that the general principles of negligence also govern malpractice claims).

59. *See Sullivan*, 699 S.W.2d at 274.

60. *See, e.g.*, P.J. D'Annunzio, *$10M Verdict Reached in Lehigh County Med Mal Case*, THE LEGAL INTELLIGENCER (ONLINE) (Aug. 21, 2019), https://www.law.com/thelegalintelligencer/2019/08/21/10m-verdict-reached-in-lehigh-county-med-mal-case/; Kilpatrick v. Bryant, 868 S.W.2d 594, 599–601 (Tenn. 1993) (discussing the "loss of chance" doctrine).

wrongful birth, wrongful pregnancy, and wrongful conception.[61] This approach allows for truncated or limited recovery and generates conflicting decisions.

This damage-centered approach changes the focus from the negligent act to the type of damage claimed, i.e., the birth of the child. By tying the damage question solely to the health of the birthed child, other harms created by the negligence, such as emotional injuries, are excluded from consideration. These include harms transcending the child or affecting the plaintiff in her role other than as a parent. Understanding this narrow focus is crucial to resetting the paradigm, with the objective of re-implanting these claims into the traditional malpractice schema and expanding recoveries to include *all* foreseeable harms and sequelae.

B. The Arbitrary Categorization of Claims

Cases arising in this context often involve obstetrical or gynecological care (where women are involved) or urological care (where men are involved). Nevertheless, they are often categorized differently—with the nomenclature determining the outcome. (Interestingly, medically, one would be hard-pressed to validate any such distinctions.) Here, I overview the legal predicate for these differentiations.

Most commentators use the term "wrongful birth" to refer to parental claims incident to birthing an unwanted child, healthy or not.[62] The claim adheres regardless of whether the negligence involved failure *to prevent* the pregnancy or failure to allow the parents the right *to terminate* the pregnancy.[63] Some courts limit the umbrella term "wrongful birth" to claims encompassing pre-pregnancy harms involving only unhealthy children, and allow recovery[64] on a limited

61. "Actions in medical negligence surrounding an unplanned birth or the birth of a child with congenital birth defects result in three types of claims: wrongful life, wrongful birth, and wrongful pregnancy." Simmerer v. Dabbas, No. CV 95 05 1650, 1999 WL 459350, at *5 (Ohio Ct. App. July 7, 1999). *See* Mahoney, *supra* note 56, at 775.

62. *See, e.g.*, Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2017 (1987) (stating that wrongful birth claims arise from a medical professional's interference with a parent's right to elective abortion).

63. Per *Speck v. Finegold*, "a 'wrongful birth' claim is a claim brought by the parents in their own behalf to recover damages allegedly sustained as the result of an unwanted pregnancy and for the subsequent birth." 439 A.2d 110, 119 n.1 (Nix, J., dissenting) (1981).

64. *See* Lininger *ex rel.* Lininger v. Eisenbaum, 764 P.2d 1202, 1204 (Colo. 1988) (defining claim for wrongful birth as malpractice resulting in birth of unhealthy child); Viccaro v. Milunsky, 551 N.E.2d 8, 9–10 n.3 (Mass. 1990) (noting wrongful birth involves unhealthy children and wrongful conception or pregnancy involves healthy children); Harbeson v. Parke-Davis, Inc., 656 P.2d 483,

basis.[65] Other courts use the term to include healthy children born of pre-pregnancy malpractice and deny recovery altogether.[66] The latter event could occur by virtue of a failed sterilization[67] or a botched abortion.[68] But different courts refer to the same claim as wrongful pregnancy,[69] wrongful conception,[70] or wrongful birth, further leading to confusion.[71] Thus,

> [c]ourts have devised several terms to describe causes of action involving a physician's negligence that results in unplanned pregnancies or births. Some courts make a distinction between wrongful birth and wrongful pregnancy, also referred to as wrongful conception. According to these courts, wrongful birth is an action brought by the parents of a child born with birth defects while wrongful pregnancy is an action brought by the parents of a child born healthy. . . . [Some courts] use the term "wrongful pregnancy" for those cases where a failed sterilization procedure has resulted in the birth of a healthy child. . . . [Although others] . . . use the term "wrongful birth," . . . with regard to a wrongful pregnancy action.[72]

Another approach categorizes "wrongful birth" based on the result—in this case, an unhealthy child,[73] although the act causing the result may vary. Thus, a failure to test, detect, or properly interpret tests during or prior to pregnancy may result in the parents birthing a child with a genetic anomaly.[74] The negligent act may occur *in utero*, depriving the mother of the right to abortion,[75] or prior to conception, interfering

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488 (Wash. 1983) (distinguishing wrongful birth from wrongful conception based on health of child).

65. Coleman v. Dogra, 812 N.E.2d 332, 336 (Ohio Ct. App. 2004).

66. *See* Billauer, *Wrongful Life*, *supra* note 20, at 439 n.14.

67. *See* Emerson v. Magendantz, 689 A.2d 409, 410 (R.I. 1997).

68. Miller v. Johnson, 343 S.E.2d 301 (Va. 1986); Jury Verdict Summary, Smith v. Tucker, No. TC013608, 2001 Jury Verdicts LEXIS. 46368 (Cal. Super. Ct. Dec. 10, 2001).

69. Simmerer v. Dabbas, 733 N.E.2d 1169, 1171 (Ohio 2000).

70. *See* Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981) (providing delineation of wrongful conception and wrongful negligent misrepresentation). The *Phillips* court noted that wrongful conception cases concern parental claims for an unplanned, yet healthy, child and situations involving negligent contraceptive distribution, sterilization, or abortion. The court did note cases involving an unwanted pregnancy with a child coincidentally born with a genetic abnormality. *See also* Taylor v. Kurapati, 600 N.W.2d 670, 676 (Mich. Ct. App. 1999) (explaining factual situations falling under wrongful conception heading).

71. James v. Caserta, 332 S.E.2d 872, 879 (W. Va. 1985).

72. *Id.* at 874–75 (citations omitted).

73. Greco v. United States, 893 P.2d 345 (Nev. 1995).

74. *Id.* at 348.

75. Where the parents are denied the right to abortion, several states have enacted legislation barring recovery. Mahoney, *supra* note 56, at 783–84; *see also* Simmerer v. Dabbas, No. CV 95 05 1650, 1999 WL 459350, at *12 n.3 (Ohio Ct. App. July 7, 1999) (noting Idaho, Minnesota,

with the parental exercise of a right to prevent pregnancy. Regardless of the timing of the act, the eventual harm is the same.[76] These cases are generally considered pure "wrongful birth" cases, and the terms "wrongful conception" or "wrongful pregnancy" are not applied.[77] In wrongful sterilization cases, however, the negligence only happens prior to conception.[78] Finally, we have a hybrid situation where negligent pre-conception genetic testing involves both pre-conception negligence and the missed opportunity to terminate the pregnancy.[79] In some cases, this timing of malpractice (pre or post conception) has been used as a defining criterion,[80] affecting outcome and resulting in even greater confusion.

In sum, all cases lumped under the rubric of wrongful birth (i.e., wrongful conception, wrongful pregnancy, or wrongful birth) pertain to a parent's cause of action for damages incident to the birth of an unwanted child.[81] Whether the child is born healthy or not (the outcome) often determines if child-rearing costs are recoverable,[82] even though the negligence (poor medical practice) and foreseeability of harm may be identical.[83] Often, the case appellation—which is dependent on the timing of the act—alone can determine whether recovery is allowable.[84] For this reason, Professor Kathleen Mahoney advocates care be given to clarifying the basis for the often haphazard classification of cases.[85]

Regardless what these cases are called, the genres affording the most difficulty are those involving failed sterilization or wrongful IVF. Here, the malpractice is blatant. The parent expends effort, time, and money to obtain medical assistance, either to avoid having a child or, in the case of IVF, to conceive a child with a particular genetic imprint. Suddenly a child appears, against—or different from—the parent's

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Pennsylvania, North Dakota, South Dakota and Utah as the six states which have statutes that prevent recovery where "but for the negligent diagnosis, the child would have been aborted").

76. *See Greco*, 893 P.2d at 348; Emerson v. Magendantz, 689 A.2d 409, 410–11 (R.I. 1997).

77. *See Phillips*, 508 F. Supp. at 545 n.1.

78. *See* Mahoney, *supra* note 56, at 784.

79. *See id.* at 776 (claiming that this situation belongs under a wrongful life framework).

80. *Id.* at 784.

81. *See generally* Billauer, *The Sperminator*, *supra* note 11, at 22–25 (discussing wrongful birth and wrongful life claims and associated cases).

82. Emerson v. Magendantz, 689 A.2d 409, 412 (R.I. 1997).

83. One court associated failed abortion with wrongful conception and improper sterilization with wrongful pregnancy—even though the outcome is exactly the same. *See* Kush v. Lloyd, 616 So. 2d 415, 417 n.2 (Fla. 1992).

84. *See* Mahoney, *supra* note 56, at 776–77; Haymon v. Wilkerson, 535 A.2d 880, 883–85 (D.C. 1987).

85. Mahoney, *supra* note 56, at 776–77.

specific intentions and in a manner unquestionably causally related to the defendant's negligence.[86] These cases often result in births of normal, healthy—but unwanted—children,[87] which are clear *res ipsa loquitur*-type injuries. Nevertheless, for centuries society deemed these harms not compensable,[88] a situation representing an obvious disconnect between law and today's society. Further, these societal values are constantly changing, and, as usual, the law is slow to catch up.[89]

III. ESTABLISHING RECOVERY GENERALLY: INJURY, DAMAGES, AND CAUSATION

A. The Basis for Denying Full Recovery

"To establish a prima facie case in an action for wrongful birth, it is necessary for the plaintiff to plead and prove actual injury."[90] Most cases addressing this issue focus on whether the child is born healthy or not.[91] Whether the child is born with a disability, however, should be irrelevant to the question of whether the full panoply of damages is recoverable. It may be that the *amount* of damages incidental to raising a disabled child may be higher than those incidental to raising a healthy child, but this discrepancy is not the crux of the issue. In fact, the prevalent view of making child-care costs recoverable only in the case of

86. *See, e.g.*, Cramblett v. Midwest Sperm Bank, LLC, No. 2-16-0694, 2017 Ill. App. Unpub. LEXIS 1302 at ¶ *3 (June 27, 2017). *See generally* Billauer, *Wrongful Life*, *supra* note 20, at 441, 460 (discussing children born with congenital disorders as a result of switched sperm or eggs in IVF facilities).

87. Doherty v. Merck & Co., Inc., 154 A.3d 1202, 1203 (Me. 2017). Alternatively, in negligent IVF cases, the child may be born with a genetic abnormality or different from the specification requested by the parent. *See* Billauer, *The Sperminator*, *supra* note 11, at 36–43 (discussing the *Xytex* cases).

88. In the IVF cases, where the child is born with genetic material with racial characteristics different than selected, the societal view is to deny recovery—although negligence was undoubtedly committed by the facility. But in at least two series of cases, a dozen or more children born via IVF appear to have contracted the propensity for autism via a single donor's genetic signature. *See* Ariana Eunjung Cha, *The Children of Donor H898*, WASH. POST (Sept. 14, 2019), https://www.washingtonpost.com/health/the-children-of-donor-h898/2019/09/14/dcc191d8-86da-11e9-a491-25df61c78dc4_story.html; *see also* Billauer, *The Sperminator*, *supra* note 11, at 36–43 (discussing the *Xytex* cases).

89. Emily L. Howell, et al., *What Do We (Not) Know About Global Views of Human Gene Editing? Insights and Blind Spots in the CRISPR Era*, 3 THE CRISPR JOURNAL 148, 149 (June 2020), https://www.liebertpub.com/doi/10.1089/crispr.2020.0004 (noting with regard to advances in gene-editing that "the discussion, however, continues to lag behind the quickly advancing scientific developments. . . .").

90. Keel v. Banach, 624 So. 2d 1022, 1026–27 (Ala. 1993).

91. Emerson v. Magendantz, 689 A.2d 409, 412 (R.I. 1997). *See infra* Part III, B. 4.

a disabled child—but not a healthy one[92]—raises the specter of eugenic-abortion, which, I suggest, should be studiously avoided.[93]

Beyond the nomenclature affixed to the claim which affects the award in some arbitrary fashion, three other rationales have been offered to constrain recovery. The first focuses on a warped view of the causation element of negligence. The second derives from a public policy rationale arising from the abortion/sanctity of life argument. The third is a misapplication of the negligence doctrine of *offset*, where the child born as a result of malpractice or negligence is held as ransom, reducing the award under a chauvinistic view of the joys of child-rearing and the beatitude of motherhood. This approach reflects a warped focus on whether the health of the child is determinative of parental injury. Thus, the birth of a "seriously deformed child" as the product of the negligence has been recognized as an injury sufficient for the parents to establish their claim and recover.[94] As to why this should be so for a "seriously deformed child"[95] but not a healthy one, the courts provide an idiosyncratic view,[96] focusing on the joys of parenting a healthy child, as if no such joys arise from parenting children with disabilities.[97] Nevertheless as stated above, while the costs incident to raising a disabled child might be higher than raising a healthy child, the type of harm caused to the parents is the same: infringement of the right to determine parentage.[98] It is this right that goes unnoticed by the majority of American courts.

B. A Better Approach

An alternative approach to addressing the situation, which also enlarges the scope of recovery, is to plainly call all these cases malpractice and hold the defendants to the general negligence/malpractice standard.[99] This approach would allow full

92. Mahoney, *supra* note 56, at 789.

93. *See* Sagit Mor, *The Dialectics of Wrongful Life and Wrongful Birth Claims in Israel: A Disability Critique*, 63 STUDIES IN LAW, POLITICS, AND SOCIETY 113, 120 (2014), http://law.haifa.ac.il/images/Publications/Sagit_Mor_-_The_Dialectics_of_WL_and_WB_-_Print.pdf.

94. Keel v. Banach, 624 So. 2d 1022, 1026–27 (Ala. 1993).

95. *Id.* at 1027.

96. *See* Lam, *supra* note 24, at 157–59.

97. Mor, *supra* note 93, at 131.

98. *See, e.g.*, Lam, *supra* note 24, at 158–59.

99. *See* Kush v. Lloyd, 616 So. 2d 415, 424 (Fla. 1992) (acknowledging courts abide by fundamental goals when awarding damages to compensate tort claimants); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 706 (Ill. 1987) (explaining the general rule of damages in a tort action), *overruled by* Clark v. Children's Meml. Hosp., 955 N.E.2d 1065, 1088 (Ill. 2011); *see also* Flannery v.

recovery for child-rearing costs for all children (healthy or not) as a foreseeable consequence of the negligent acts.[100] Indeed, some courts do follow this approach.[101] As Judge Kirby noted in the Australian *Cattanach* case, under ordinary principles of tort liability the burden of the loss should fall on the doctor whose negligence caused the damage, since the loss results from the doctor's acts.[102]

Courts following this approach take the position that a wrongful pregnancy action is really a traditional tort claim of negligence,[103] requiring the traditional analysis of duty, breach, harm, proximate cause, and measurable damages.[104]

> At least one court has taken the position that wrongful birth actions are not new actions, but actually fall within the traditional boundaries of negligence actions. [Noting that a] cause of action for wrongful birth is, in essence, an action for professional malpractice by a health care provider.[105]

But often decisions applying the malpractice conception fail to follow through on doctrinal rudiments, initially calling the case malpractice, but then refusing to allow recovery for all foreseeable damages.[106] Such recovery, they claim, would create a windfall for the plaintiffs—as the plaintiff would benefit from the "joy of raising the child" along with the pecuniary award for child-raising.[107] In so doing, these chauvinistic courts lose sight of (or ignore) the fact that the child may be one the parents never wanted or couldn't afford.[108]

United States, 297 S.E.2d 433, 435–37 (W. Va. 1982) (reciting general theory behind awarding damages for personal injury claims).

100. As the New Jersey Supreme Court stated in *Berman v. Allan*, "[a]s in all other cases of tortious injury, a physician whose negligence has deprived a mother of this opportunity should be required to make amends for the damage which he has proximately caused. Any other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses which, if born, would suffer from genetic defects." 404 A.2d 8, 14 (N.J. 1979).

101. *See* Garrison v. Med. Ctr. of Delaware Inc., 581 A.2d 288, 290 (Del. 1989) (refraining from use of wrongful birth label because claim presents traditional malpractice issues); Bader v. Johnson, 732 N.E.2d 1212, 1216 (Ind. 2000) (noting labels imply new torts and obscure malpractice analysis); Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assoc., Inc., 802 N.E.2d 723, 729 (Ohio Ct. App. 2003) (classifying parental prenatal claims under traditional negligence principles).

102. Lam, *supra* note 24, at 153 (discussing Cattanach v. Melchior (2003) 199 ALR 131, 172–73, 180 ¶¶ 150, 154, 179).

103. "Many courts have accepted wrongful birth as a cause of action on the theory that it is a logical and necessary extension of existing principles of tort law." *Siemieniec*, 512 N.E.2d at 705.

104. *Schirmer*, 802 N.E.2d at 729.

105. Keel v. Banach, 624 So. 2d 1022, 1026 (Ala. 1993) (internal citations omitted).

106. Simmerer v. Dabbas, 733 N.E.2d 1169, 1172–74 (Ohio 2000).

107. Emerson v. Magendantz, 689 A.2d 409, 413 (R.I. 1997).

108. *See id.*

The court in *Keel*[109] takes a bipolar view. It begins by noting that "[t]he basic rule of tort compensation is that the plaintiff should be put in the position that he would have been in absent the defendant's negligence."[110] The court goes on to "agree with the *Robak* court that a so-called wrongful birth case is in reality a medical negligence malpractice case . . . ."[111] Then it confuses the matter by saying, without explanation, that a "'case like this one is little different from an ordinary medical malpractice action. It involves a failure by a physician to meet a required standard of care, which resulted in specific damages to the plaintiffs.'"[112] And then, unexpectedly, the *Keel* court reverses itself and denies complete recovery.[113]

A morality-driven view led to a similar result in *Azzolino v. Dingfelder*,[114] steering the court to divorce the case from a conventional malpractice analysis. Therein, the court held that "in order to allow recovery [for wrongful birth] . . . courts must . . . take a step into *entirely untraditional analysis* by holding that the existence of a human life can constitute an injury cognizable at law,"[115] which the court refused to do.[116] The court in *Atlanta Obstetrics and Gynecology Group v. Abelson* agreed, pointedly refusing to recognize wrongful birth because it "[did] not fit within the parameters of traditional tort law."[117] Similarly, the court in *Becker v. Schwartz* stressed the policy implications pervading birth-related claims, even as it noted that malpractice law should otherwise govern.[118] The *Becker* court also noted that "[i]t borders on the absurdly obvious to observe that resolution of this question

109. *Keel*, 624 So. 2d at 1022.
110. *Id.* at 1029.
111. *Id.* at 1028.
112. *Id.* at 1028 (quoting Robak v. United States, 658 F.2d 471, 476 (7th Cir. 1981)).
113. *Id.* at 1030.
114. 337 S.E.2d 528, 533–37 (N.C. 1985).
115. *Id.* at 533–34. *But see* Lininger v. Eisenbaum, 764 P.2d 1202, 1206 (Colo. 1988) (assessing *Azzolino*'s suggestion that "'far from being "traditional" tort analysis, such a step requires a view of human life previously unknown to the law of this jurisdiction'") (citing *Azzolino*, 337 S.E.2d at 534). The *Lininger* court found a sufficient monetary burden, and disagreed with the *Azzolino* court which was "'unwilling to take any such step because [it was] unwilling to say that life, even life with severe defects, may ever amount to a legal injury.'" *Id.* (citing *Azzolino*, 337 S.E.2d at 534.).
116. *Azzolino*, 337 S.E.2d at 534. *See also* Coleman v. Garrison, 349 A.2d 8, 13–14 (Del. 1975) (denying parental recovery because of public policy to value human life), *overruled by* Garrison by Garrison v. Med. Ctr. of Delaware Inc., 571 A.2d 786 (Del. 1989) (allowing wrongful birth claim); Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 561 (Ga. 1990) (citing problem with viewing life as injury as reason to prohibit wrongful birth actions).
117. *Abelson*, 398 S.E.2d at 563.
118. "Irrespective of the label coined, plaintiffs' complaints sound essentially in negligence or medical malpractice. As in any cause of action founded upon negligence, a successful plaintiff must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party." Becker v. Schwartz, 386 N.E.2d 807, 811 (N.Y. 1978).

transcends the mechanical application of legal principles."[119] The court in *Emerson v. Magendantz* echoes this sentiment, noting its difficulty with "'rigidly and unemotionally . . . apply[ing] the tort concept that a tortfeasor should be liable for all of the costs he has brought upon the plaintiffs'" in "wrongful pregnancy" or "wrongful birth" cases.[120] Following other courts in deciding to not mechanically apply the rules of proximate cause and foreseeability, the *Emerson* court ruled that "'the legal limitation of the scope of liability is associated with policy—with our more or less inadequately expressed ideas of what justice demands.'"[121]

Boone v. Mullendore[122] is a prime example of how the appellation of the claim allowed the court to recraft the recovery package.[123] Thus, after explicitly stating the case is nothing more than a garden-variety malpractice case, the *Boone* court limits the damages to avoid compensation for healthy child-rearing on morality and policy grounds, noting that "'[t]he existence of a normal, healthy life is an esteemed right under our laws, rather than a compensable wrong.'"[124]

As to why reproductive negligence cases should, in some cases, be severed from malpractice and negligence cases that govern similar cases, no cohesive rationale exists, but the moral-policy-driven reasons which are idiosyncratically embraced appear to be a prime driver.[125]

1. Tunnel Vision Causation

In addition to identifying an injury or harm which is amenable to a damage claim, negligence law requires proof of a causal connection between the breach of the standard of care and the harm.[126] This

119. *Id.* at 810.

120. 689 A.2d 409, 413 (R.I. 1997) (quoting Cockrum v. Baumgartner, 447 N.E.2d 385, 390 (Ill. 1983)).

121. *Id.* at 413 (citing Johnson v. University Hospitals of Cleveland, 540 N.E.2d 1370, 1377 (Ohio 1989) which quotes W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 264 § 41 (5th ed. 1984)).

122. 416 So. 2d 718 (Ala. 1982).

123. In *Boone*, the sterilization procedure failed and the plaintiff subsequently conceived and gave birth to a healthy child. *Id.* at 719. The court "stated that this claim for *wrongful pregnancy,* unlike a claim for wrongful life, is more suited to a traditional medical malpractice, negligence action. [It] applied a traditional tort analysis of duty, breach of duty, proximate cause, and damage." Keel v. Banach, 624 So. 2d 1022, 1027 (Ala. 1993) (citing *Boone*, 416 So. 2d 718).

124. *Boone*, 416 So. 2d at 721 (quoting Wilczynski v. Goodman, 391 N.E.2d 479, 487 (Ill. Ct. App. 1979)).

125. *See* Gleitman v. Cosgrove, 227 A.2d 689, 702–03 (N.J. 1967), *abrogated by* Berman v. Allan, 404 A.2d 8 (N.J. 1979) (noting that the problems of wrongful conception and wrongful birth involve an evaluation not only of law, but also of morals, medicine and society).

126. Jones v. Newton, 454 So. 2d 1345, 1348 (Ala. 1984) (citing Mascot Coal Co. v. Garrett, 47 So. 149 (Ala. 1908)). *See also* Rutley v. Country Skillet Poultry Co., 549 So. 2d 82, 85 (Ala.1989).

connection is called the *causation* element in the cause of action.[127] As will be seen, the causation inquiry in reproductive negligence cases takes a different trajectory than in conventional malpractice cases.[128]

Under traditional malpractice, such as cases involving failure to diagnose cancer, the causation of the *underlying condition*, the cancer, is totally irrelevant.[129] The inquiry focuses on whether the physician's carelessness in failing to diagnose the condition altered the prognosis or outcome, irrespective of the baseline disease.[130] Alternatively, if the physician failed to perform an indicated procedure to remedy an underlying condition—again, which the physician did not create—recovery for ensuing damages is available and complete.[131]

In wrongful birth cases, by contrast, the focus centers entirely on the claimed harm (designated as the birthing of a child) which somehow elevates the entire claim into some sublime, sacred, and protected category. This effect preempts recovery or at least limits it, regardless whether the child's birth and subsequent care cause additional hardship to the plaintiff.[132] The fact that the doctor did not cause the congenital disease in these cases somehow excuses him or her from the negligence which he or she did, in fact, cause.[133] For example, in cases involving failure to test for genetic anomalies during pregnancy or failing to properly interpret these tests, causation is often approached differently than in other malpractice cases.[134] Because the defendant did not cause the genetic defect, s/he is shielded from liability, even if s/he acted negligently in performing the service requested, i.e., prevention of pregnancy.[135] Of course, in failure to diagnose cancer cases, the defendant did not *cause* the cancer, either. Yet, in the ordinary

127. The "elements for recovery under a negligence theory are: (1) duty, (2) breach of duty, (3) proximate cause, and (4) injury." *Jones*, 454 So. 2d at 1348.

128. *See* Simmerer v. Dabbas, 733 N.E.2d 1169, 1173–74 (Ohio 2000).

129. Kilpatrick v. Bryant, 868 S.W.2d 594, 600, 602 (Tenn. 1993) (noting the operative issue as whether the defendant's negligence caused "injuries which would not otherwise have occurred").

130. Yet, even as held in *Becker*, courts deny complete recovery. *See* Becker v. Schwartz, 386 N.E.2d 807, 811 (N.Y. 1978) (noting that "[i]f it be assumed that under the facts at bar defendants, as physicians, owed a duty to the infants in utero as well as to their parents . . . defendants' breach of that duty may be viewed as the proximate cause for the infants' birth") (internal citation omitted).

131. *Kilpatrick*, 868 S.W.2d at 600. *See also Becker*, 386 N.E.2d at 807.

132. *Simmerer*, 733 N.E.2d at 1172.

133. *Id.*

134. Simmons v. Hertzman, 651 N.E.2d 13, 17 (Ohio Ct. App. 1994); *see also* Simmerer v. Dabbas, No. CV 95 05 1650, 1999 WL 459350, at *3 (Ohio Ct. App. July 7, 1999) (noting that "[f]or such cases, the real sticking point is the lack of causality between the failed sterilization and the birth defect itself[]").

135. *See* Christensen v. Thornby, 255 N.W. 620, 621 (Minn. 1934) (ironically noting that performing sterilization is not against public policy).

malpractice cases, the defendant is not cocooned from all foreseeable damages arising out of his or her negligence. In fact,

> [c]ourts initially resisted recognizing a cause of action for wrongful birth. The early cases befuddled the courts because, unlike traditional malpractice cases, nothing that the health care provider could have done would have prevented the harm to the child. The logic behind these early suits was that if the parents of the affected child had received proper counseling or diagnosis, they could have decided not to conceive or to seek an abortion. Early case law dealing with wrongful birth actions rejected the notion that the failure to warn the parents of a fetus' risk of serious defect was actionable because the physician was not the proximate cause of the defect. However, liability for a missed diagnosis in other areas of medicine was, and still is, common even though, in such cases, the physician did not cause the illness.[136]

The *Emerson* court also rejected the full-recovery rule that would allow child-care costs for a healthy child.[137] In doing so, the court stated that the "'strict rules of tort should not be applied to an action to which they are not suited, such as a wrongful pregnancy case, in which a doctor's tortious conduct permits to occur the birth of a child rather than the causing of an injury.'"[138]

The decision in *Keel v. Banach* further exemplifies the problem. There, the court recognized that a claim may lie for negligence which does not cause the underlying genetic defect, noting that

> [l]ike most of the other courts that have considered this cause of action, we hold that the parents of a genetically or congenitally defective child may maintain an action for its wrongful birth if the birth was the result of the negligent failure of the attending prenatal physician to discover and inform them of the existence of fetal defects.[139]

136. Keel v. Banach, 624 So. 2d 1022, 1024 (Ala. 1993) (quoting Lori B. Andrews, *Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks*, 29 HOUS. L. REV. 149, 152–53 (1992) (internal citations and footnotes omitted)).

137. Emerson v. Magendantz, 689 A.2d 409, 412 (R.I. 1997).

138. *Id.* at 413 (citing Johnson v. University Hospitals of Cleveland, 540 N.E.2d 1370, 1378 (Ohio 1989)).

139. *Keel*, 624 So. 2d at 1029. *See also* Canesi ex rel. Canesi v. Wilson, 730 A.2d 805, 811 (N.J. 1999).

But, then, the court circumscribes the injury to a "seriously deformed child."[140]

In fact, the nature of the wrongful birth tort has nothing to do with whether a defendant caused the underlying injury or harm to the child.

> The appropriate proximate cause question, therefore, is not whether the doctor's negligence caused the fetal defect; the congenital harm suffered by the child is expressly not compensable. Rather, the determination to be made is whether the doctors' inadequate disclosure deprived the parents of their deeply personal right to decide for themselves whether to give birth to a child who could possibly be afflicted with a physical abnormality[,][141] allowing recovery for both economic loss and emotional distress.

As Judges McHugh and Gummow pointed out in the Australian *Cattanach* case, "the relevant damage suffered by the [plaintiffs] is the expenditure that they have incurred or will incur in the future, not the creation or existence of the parent-child relationship."[142] Thus, the causation question should be whether the defendant's negligence was the proximate cause of the parents' actual harm: the deprivation of the option of avoiding conception, the foiled selection of a child with the genetic information of their choice, or the ability to make an informed and meaningful decision, either to terminate the pregnancy or give birth to a disabled child.[143] As Judge Kirby noted in the same case, "it [i]s not the birth of the child that constitute[s] the injury for which the plaintiffs had sued; rather they had sued for the economic harm inflicted upon them by the injury they had suffered as a consequence of the doctor's negligence."[144] Judge Kirby characterized the child-care claim not as a claim for economic loss but as a loss that was occasioned by the physical damage of unwanted pregnancy,[145] and allowed complete recovery.

This view has been adopted by some American courts. The court in *Robak v. United States* noted:

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140. "It has been recognized that the birth of a seriously deformed child results in injury to the child's parents." *Keel*, 624 So. 2d at 1027. *See also* Naccash v. Burger, 290 S.E.2d 825, 829–30 (Va. 1982); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 493 (Wash. 1983).

141. *Canesi*, 730 A.2d 805 at 811, 818–19 (holding that "[b]ecause in a wrongful birth action damages for the birth defect itself are not recoverable, the parents are not required to prove that the doctor's negligence caused the defect").

142. Cattanach v. Melchior (2003) 199 ALR 131, 151 ¶ 67.

143. Lam, *supra* note 24, at 153. *See Canesi*, 730 A.2d at 818–19.

144. Lam, *supra* note 24, at 153. (citing *Cattanach*, 199 ALR at 171 ¶ 148) (Kirby J)).

145. *Id.*

> A negligent act need not be the sole cause of the injury complained of in order to be a proximate cause of that injury. Moreover, the cause of action is not based on the injuries to the fetus but on defendant's failure to diagnose Mrs. Robak's rubella and inform her of the consequences.[146]

But not all courts agree. The tunnel vision pervading American courts which focuses solely on the birth of the child as the exclusive harm both limits recovery and perverts the causation analysis. Before recovery can be enlarged, that issue needs revisiting, which I do in PART IV.

2. Policy Grounds

a. Abortion and Sanctity of Life Policy

To sustain their narrow focus on a singular conglomerate of the defendant's negligence (the birth of the child and its impact on the parents as a unit, rather than as individuals), and to justify their bizarre causation analysis, the courts implement a policy-oriented approach.[147] "States that . . . prohibit one or more of the parental claims do so largely because of perceived policy concerns . . . [as] morality-dominated concerns prevent such legal systems from recognizing the presence of a legal injury or causation."[148] In addition to the morality arguments and sanctity of life policy,[149] the (legal) policy limiting liability (akin to *Palsgraf*'s legal/proximate causation doctrine[150]) is raised. This maxim holds that recovery must truncate somewhere along the chain of sequelae. I refer to this as the "truncation doctrine." This view asserts that the award saddled on the doctor must be limited on policy grounds, and derives from an antithetical view of abortion.[151] It is exemplified here by jurisdictions statutorily limiting recovery where, but for the defendant's negligence, abortion would have been utilized.[152] The propriety of using policy arguments to support common law doctrine will be dealt with in the following section. For now, we merely raise the idiosyncratic (and anachronistic) views proffered under this rubric.

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146. Robak v. United States, 658 F.2d 471, 477 (7th Cir. 1981).

147. *See* ACB v. Thomson Medical Pte Ltd [2015] 2 SLR 218 at [10, 16]. *See also* ACB v. Thomson Medical Pte Ltd [2017] 1 SLR 918 at [24].

148. Mahoney, *supra* note 56, at 780.

149. *See* Lam, *supra* note 24, at 143, 148; Coleman v. Garrison, 349 A.2d 8, 13–14 (Del. 1975), *overruled by* Garrison by Garrison v. Med. Ctr. of Delaware Inc., 571 A.2d 786 (Del. 1989).

150. Palsgraf v. Long Island R. Co., 162 N.E. 99, 101 (N.Y. 1928).

151. I have discussed this view elsewhere. *See* Billauer, *Wrongful Life*, *supra* note 20, at 465–69.

152. Garrison v. Med. Ctr. of Delaware Inc., 581 A.2d 288, 292 (Del. 1989).

In 1967, some six years before *Roe v. Wade*,[153] the court in *Gleitman v. Cosgrove* was able to resist awarding damages based on a refusal to compensate for the "intangible, unmeasurable, and complex human benefits of motherhood and fatherhood."[154] One reason courts were "'reluctant to recognize the wrongful birth cause of action'"[155] was that the post-conception remedy available—abortion—was at the time illegal.[156] This reasoning was no longer valid after *Roe*, which upheld a woman's constitutional right to undergo an abortion during the first two trimesters of pregnancy.[157] Thus, following *Roe*, *Gleitman* was overturned in *Berman v. Allan.*[158] Other courts post *Roe* however, still limited recovery for wrongful birth, even while noting that doing so would make *Roe* a pyrrhic victory.[159]

An offshoot of the abortion issue is the "sanctity of life" argument,[160] which also conflicts with the right to abortion.[161] The court in *O'Toole v. Greenberg* stated:

> This court has recognized the 'very nearly uniform high value' which the law and mankind have placed upon human life. In view of our society's acknowledgment of the *sanctity of life*, it cannot be said, as a matter of public policy, that the birth of a healthy child constitutes a harm cognizable at law. [cites omitted]. The moral, social and emotional advantages arising from the birth of a healthy child are to be preferred to the protection of purely economic interests. (*See*, Cardozo, The Paradoxes of Legal Science, at 57 [1927].)[162]

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153. 410 U.S. 113 (1973).

154. 227 A.2d 689, 693 (N.J. 1967), *abrogated by* Berman v. Allan, 404 A.2d 8 (N.J. 1979).

155. Keel v. Banach, 624 So. 2d 1022, 1024 (Ala. 1993) (pointing to "'[t]he value of genetic testing programs . . . [as generating] the opportunity of parents to abort afflicted fetuses, within appropriate time limitations'") (quoting Andrews, *supra* note 136, at 152–55) (internal citations and footnotes omitted).

156. *Id.*

157. *Id.*

158. 404 A.2d 8, 14–15 (N.J. 1979).

159. *See id.* at 14. *See also* Simmerer v. Dabbas, No. CV 95 05 1650, 1999 WL 459350, at *3 n.6 (Ohio Ct. App. July 7, 1999) (citing Bowman v. Davis, 356 N.E.2d 496 (Ohio 1976), which referred to a person's choice not to procreate as a Constitutional guarantee).

160. Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967), *abrogated by* Berman v. Allan, 404 A.2d 8 (N.J. 1979).

161. As Judge Flaherty stated, a public policy argument denying wrongful birth "cannot succeed because it squarely conflicts with the plaintiff's constitutional right as articulated in *Roe v. Wade* . . . to seek a termination of pregnancy . . . . Were the plaintiff merely free to seek the abortion but unable to seek a remedy at law for injuries consequent upon the negligent performance of that abortion, the right would be hollow indeed." Speck v. Finegold, 439 A.2d 110, 114 (Pa. 1981). *See also* Billauer, *Wrongful Life*, *supra* note 20, at 469–70.

162. 477 N.E.2d 445, 448 (N.Y. 1985) (quoting Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978)). *See* Pub. Health Tr. v. Brown, 388 So. 2d 1084, 1085 (Fla. Dist. Ct. App. 1980); Cockrum v. Baumgartner, 447 N.E.2d 385, 388 (Ill. 1983), *cert. denied sub nom.* Raja v. Michael Reese Hosp., 464

Another frame for this conviction is the "morally offensive" claim.[163] As Lord Millet in the *McFarlane* case noted, "[t]here is something distasteful, if not morally offensive, in treating the birth of a normal, healthy child as a matter for compensation."[164]

b. The Gift, Blessing, and Privilege Policy

Pregnancy and childbearing have been known to engender very powerful (and sometimes irrational) reactions in men.[165] So much so that in 1984, Octavia Butler published a science fiction story called *Bloodchild*.[166] "Calling it her 'pregnant man story,' Butler depicted how she thought men regarded childbirth. It was, in a word, gross."[167]

A cultural perspective, then, might help us understand how judges who sanctify child-rearing (and hence bar its recovery) avoid reconciling this position with the great lengths women go to avoid having children.[168] Until recent times, pregnancy and childbirth were significant causes of mortality[169] and morbidity, with post-partum depression, pre-eclampsia, and pregnancy-related diabetes being directly related to gestation.[170] The extent to which women go to avoid

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U.S. 846, 846 (1983); Weintraub v. Brown, 98 A.D.2d 339, 348–49 (N.Y. App. Div. 1983); Clegg v. Chase, 391 N.Y.S.2d 966, 968 (N.Y. Sup. Ct. 1977). *See also* Coleman v. Garrison, 349 A.2d 8, 14 (Del. 1975), *overruled by* Garrison by Garrison v. Med. Ctr. of Delaware Inc., 571 A.2d 786 (Del. 1989).

163. Macfarlane v. Tayside Health Board (1999) 2 A.C. 59 (HL) at 105; *see also* ACB v. Thomson Medical Pte Ltd [2015] 2 SLR 218 at [16] (quoting Macfarlane 2 A.C. at 111 (Lord Millet)).

164. *Macfarlane*, 2 A.C. at 105. *See also ACB*, 2 SLR 218.

165. *Men: Anger and Violence in Pregnancy*, RAISING CHILDREN NETWORK (AUSTRALIA), https://raisingchildren.net.au/pregnancy/dads-guide-to-pregnancy/early-pregnancy/men-anger-in-pregnancy (last visited July 11, 2020).

166. "Butler says she writes about a man 'choosing pregnancy in spite of as well as because of [pregnancy's] surrounding difficulties.'" Barbara Pfeffer Billauer, *Re-Vitalizing Wrongful Birth Claims: A Feminist-Tort Approach*, 1 n.1 (Apr. 7, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3367877 (citing OCTAVIA BUTLER, BLOODCHILD 30 (2d ed. 1996)).

167. *Id.* at 1.

168. *See* LAURA KAPLAN, THE STORY OF JANE: THE LEGENDARY UNDERGROUND FEMINIST ABORTION SERVICE 155 (2019) ("[w]omen confided in their counselors that they'd tried to abort with nail files and crochet hooks and mysterious pills that someone had given them").

169. Even today, we see mortality rates climbing in certain countries, including America—"putting it in the august company of Venezuela and Syria. . . . In America . . . black women . . . die from pregnancy-related complications at more than three times the rate that white women do." *The Pandemic is Making America Rethink Its Shunning of Midwifery*, THE ECONOMIST (June 18, 2020), https://www.economist.com/united-states/2020/06/18/the-pandemic-is-making-america-rethink-its-shunning-of-midwifery.

170. Lelia Duley, *The Global Impact of Pre-eclampsia and Eclampsia*, 33 SEMINARS IN PERINATOLOGY 130, 130–37 (June 2009) (noting that "over half a million women die each year from pregnancy related causes"). *See also Pregnancy Complications*, CDC, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-complications.html (last visited July 12, 2020); Li Chen et al., *Development of Postpartum Depression in Pregnant Women with Preeclampsia:*

pregnancy and its sequelae (i.e., having a child)[171] is proof enough of its non-benign status, amply illustrated by the dangers women risked in securing abortions pre-*Roe v. Wade*.[172] The impact of contraceptive failures[173] is further illustrative, as evidenced by a five million dollar class action suit against Qualitest Pharmaceuticals (regarding ineffective birth control pills) that resulted in gut-wrenching cases of unplanned pregnancies.[174] And, lest it be said that this desire is the product of modern feminism, the desire to avoid pregnancy is not new, nor is it the exclusive province of women. As far back as biblical times, the negative effects of pregnancy were understood, and the desire to prevent it was so strong that men were willing to risk the wrath of kin, clan, and God to prevent their wives from conceiving.[175]

Nevertheless, judges continue to view birth of a child as an unmitigated blessing,[176] one of life's greatest gifts,[177] a privilege, such as to deny recovery for its caretaking. A smattering of examples is telling. In one British case, Lord Gill noted "that the privilege of being a parent is immeasurable in money terms; and that the benefits of parenthood transcend any patrimonial loss."[178] This morality-driven view manifests in such dicta as: "Instinctively, the [traveler] on the Underground would

A Retrospective Study, BIOMED RESEARCH INT'L 1, 1 (2019), https://www.hindawi.com/journals/bmri/2019/9601476/.

171. Including couples avoiding sexual intercourse altogether. *See* CONSTANCE M. CHEN, "THE SEX SIDE OF LIFE": MARY WARE DENNETT'S PIONEERING BATTLE FOR BIRTH CONTROL AND SEX EDUCATION 56 (1996).

172. KAPLAN, *supra* note 168, at 155, 183.

173. *See* Troppi v. Scarf, 187 N.W.2d 511, 512 (Mich. Ct. App. 1971). As early as 1923, the Michigan Supreme Court recognized in *Van Kuelen & Winchester Lumber Co. v. Manistee & N.E.R. Co.*, "[t]he general rule of damages in an action of tort is that the wrongdoer is liable for all injuries resulting directly from the wrongful acts, whether they could or could not have been foreseen by him, provided the particular damages in respect to which he proceeds are the legal and natural consequences of the wrongful act imputed to the defendant, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated." 193 N.W. 289, 290 (Mich. 1923). *See also* Phillips v. United States, 508 F. Supp. 544, 545 n.1 (D.S.C. 1981); Gerald B. Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 19 JURIMETRICS J. 140, 140 (1978); William J. Cooper Jr., *Pregnancy after Sterilization: Causes of Action for Parent and Child*, 12 J. FAM. L. 635, 635 (1972).

174. Brad Jacobson, *Is Pfizer Liable for Pregnancies Caused by Faulty Birth Control?*, THE ATLANTIC (Feb. 21, 2012), https://www.theatlantic.com/health/archive/2012/02/is-pfizer-liable-for-pregnancies-caused-by-faulty-birth-control/252997/.

175. "Now Er, Judah's firstborn, was evil in the eyes of the Lord, and the Lord put him to death." *Genesis* 38:7. Rashi, the medieval biblical commentator, brings down Talmudical exegesis explaining: "[W]hy should Er waste his semen? So that she (Tamar, [his wife]) would not become pregnant and her beauty be impaired. [From Yev. 34b]" Rashi, *Bereishit – Genesis – Chapter 38*, CHABAD.ORG, https://www.chabad.org/library/bible_cdo/aid/8233/showrashi/true/jewish/Chapter-38.htm#_ (last visited Sept. 9, 2020).

176. Lam, *supra* note 24, at 148; *see also* FOX, *BIRTH RIGHTS AND WRONGS*, *supra* note 39, at 115 (citing Philips v. United States, 508 F. Supp 544, 549 (D.S.C. 1981)).

177. *See, e.g.*, Weintraub v. Brown, 98 A.D.2d 339 (N.Y. App. Div. 1983).

178. McFarlane v. Tayside Health Board [1997] S.L.T. 211, 216.

consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing."[179] Or consider: "It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth."[180]

These opinions are not limited to the other side of the Atlantic.[181] The court in *Weintraub v. Brown*[182] was not reticent in explaining its ruling:

> As a matter of public policy, we are unable to hold that the birth of an unwanted, but otherwise healthy and normal, child constitutes an injury to the child's *parents*, and is therefore, compensable in a medical malpractice action. Such a holding would be incompatible with contemporary views concerning one of life's most precious gifts – the birth of a normal and healthy child. We are loath to adopt a rule, the primary effect of which is to encourage, indeed reward, the *parents*' disparagement or outright denial of the value of their child's life.[183]

As the court in *Emerson* (discussed in depth below) stated:

> We are of the opinion that the public policy of this state would preclude the granting of rearing costs for a healthy child whose *parents* have decided to forego the option of adoption and have decided to retain the child as their own with all the joys and benefits that are derived from *parenthood*. Their decision to forego the option of releasing the child for adoption constitutes most persuasive evidence that the parents consider the benefit of retaining the child to outweigh the economic costs of child rearing.[184]

Or consider this particularly poignant (if idiosyncratic and anachronistic) paean to parenthood:

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179. McFarlane v. Tayside Health Board [1999] 2 A.C. 59, 82 (HL); *see* Lam, *supra* note 24, at 151.

180. Cattanach v. Melchior (2003) 199 ALR 131, 229 (Heydon J, minority opinion) (citing *McFarlane*, 2 A.C. 59 at 114). *See* Lam, *supra* note 24, at 156.

181. Even in South Africa, the courts fell into this quagmire, before being overruled. *See* Administrator, Natal v. Edouard 1990 (3) SA 581 (A).

182. 98 A.D.2d 339 (N.Y. App. Div. 1983).

183. *Id.* at 348–49 (emphasis added). Note the description of the event as impacting the plaintiffs as a *parental unit*. *See also infra*, quotes accompanying notes 188 and 196.

184. Emerson v. Magendantz, 689 A.2d 409, 413 (R.I. 1997) (citing Pub. Health Tr. v. Brown, 388 So. 2d 1084, 1086 (Fla. Dist. Ct. App. 1980)) (emphasis added); *see also* Fassoulas v. Ramey, 450 So. 2d 822, 822 (Fla. 1984).

> Every child's smile, every bond of love and affection, every reason for parental pride in a child's achievements, every contribution by the child to the welfare and well-being of the family and parents, is to remain with the mother and father. For the most part, these are intangible benefits, but they are nonetheless real . . . . We hold that such result would be wholly out of proportion to the culpability involved, and that the allowance of recovery would place too unreasonable a burden upon physicians.[185]

In *O'Toole v. Greenberg*, New York's highest court urged that "[t]o hold that the birth of a healthy child represents a legal harm would be to engage this court in the jurisprudentially improper task of recasting the immutable, intrinsic value of human life according to the financial burden thus imposed upon the *parents*."[186] The case of *Weintraub v. Brown* highlighted the hypocrisy when it held that the birth of an *unwanted* but otherwise healthy and normal child is one of life's most precious gifts(!).[187] (Notice that these cases couch the rewarding experience as vesting in *the parental unit*. Only one case even mentions the parents wearing their individual parental hats as mother and father.[188] The notion that a parent may also be a person with separate needs and a separate identity apart from the entity now unwillingly saddled with the role as parent seems to escape these courts.)

As Justice Kirby pointed out in *Cattanach*,[189] this argument (that birth is a blessing) "represents a fiction which the law should not apply to a particular case without objective evidence that bears it out."[190] "The

185. Rieck v. Med. Protective Co., 219 N.W.2d 242, 244–45 (Wis. 1974) (cited in Boone v. Mullendore, 416 So. 2d 718, 720 (Ala. 1982)).

186. 477 N.E.2d 445, 448 (N.Y. 1985) (holding "that the birth of a healthy child, as but one consequence of defendant's tortious conduct, does not constitute a harm cognizable at law").

187. Weintraub v. Brown, 98 A.D.2d 339, 348–49 (N.Y. App. Div. 1983); *see O'Toole*, 477 N.E.2d at 448. Further, it must be noted that a gift is generally something someone wants, not something someone tries to avoid having.

188. *Boone*, 416 So. 2d 718, 723 (Ala. 1982) (The court held that "there is no viable reason for exempting a physician from liability when his negligence proximately and wrongfully causes a patient to become pregnant. Because . . . [it] h[e]ld that the trial court erred in limiting the amount of damages recoverable to the out of pocket expenses of delivering, the holding of the trial court [wa]s reversed . . . . If . . . liability is established, the damages recoverable by the plaintiffs include: (1) compensation for the physical pain and suffering, and mental anguish of the mother as a result of the pregnancy; (2) the loss to the husband of the comfort, companionship, services, and consortium of the wife during her pregnancy and immediately after the birth; and (3) the medical expenses incurred as a result of the pregnancy."). *Cf.* Rieck v. Medical Protective Co., 219 N.W.2d 242, 244–45 (focusing on the joys, love, and affection that a child brings). The birth of a healthy child, and the joy and pride in rearing that child, are benefits on which no price tag can be placed. Wilbur v. Kerr, Ark., 628 S.W.2d 568, 570 (1982). This joy "far outweighs any economic loss [that might be] suffered by the *parents*." *Id.* (emphasis added).

189. Cattanach v. Melchior (2003) 199 ALR 131, 161.

190. *Id.* at 171.

notion of 'blessing' is an amorphous one and involves questions of a subjective nature. For example, how can this 'blessing' be measured objectively and accurately?"[191]

Thus, in real life terms, imagine a child of an abused family who takes pains to avoid having his or her own child, fearing that as a parent he or she might repeat their own parents' abusiveness.[192] Imagine further that this adult now finding himself or herself in the position they so desperately sought to avoid—now told that steps diligently taken to avoid having children weren't performed properly, and they are now the "proud parents" of twins. Or imagine a psychologically impaired person, too overwhelmed to take care of himself or herself about to be burdened with the care of another. Or take the case of a financially-strapped family already burdened with eleven children learning the mother is pregnant with a twelfth.[193] One is hard-pressed to consider the birth of this new child, even if healthy at birth,[194] as one of life's most precious gifts. And when the child is unplanned and unwanted, the mother's emotional disturbances following birth may be even worse,[195] including feelings of guilt or remorse.[196]

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191. Lam, *supra* note 24, at 155. Three Australian states have since enacted legislation to void child-rearing costs for healthy children. *See* CIVIL LIABILITY ACT 2003 (QLD) ss 49A and 49B(2). *See also* CIVIL LIABILITY ACT 2002 (NSW) s 71; CIVIL LIABILITY ACT 1936 (SA) s 67; ACB v. Thomson Medical Pte Ltd [2017] 1 SLR 918 at [83].

192. Personal communication between Author and one "J.C." who was abused as a child. JC's fear was that he might abuse his children, a fear substantiated by research "that abused children are more likely to repeat the cycle as adults, unconsciously repeating what they experienced as children." Melinda Smith et al., *Child Abuse and Neglect*, HELPGUIDE, https://www.helpguide.org/articles/abuse/child-abuse-and-neglect.htm (last updated June 2019). *But see* Arielle Duhaime-Ross, *Parents Who Were Physically Abused as Kids, Don't Go on to Abuse Their Kids: It's Not Inevitable*, THE VERGE (Mar 27, 2015), https://www.theverge.com/2015/3/27/8297493/child-abuse-intergenerational-transmission-violence (reporting on an article in SCIENCE disabusing the 'cycle of abuse' theory).

193. Barbara Pfeffer Billauer, *Abortion, Moral Law, and the First Amendment: The Conflict Between Fetal Rights & Freedom of Religion*, 23 WM. & MARY J. WOMEN & L. 271, 333–34 (2017) [hereinafter Billauer, *Abortion*].

194. In the case I witnessed, a family's eleventh child was institutionalized in a poorly staffed orphanage because the parents could not afford to keep her at home. At age five, the child was in essence a "feral child" for lack of care. She did not speak, was withdrawn and aggressive, but clearly bright. While this child may have been healthy at birth, at age five she certainly was not, neither mentally nor emotionally, as a consequence of parental neglect and lack of care.

195. The paradox of the holdings of these cases is that although some allow recovery for emotional distress (*e.g.*, Miller v. Johnson, 343 S.E.2d 301, 303 (Va. 1986) (citing Naccash v. Burger, 290 S.E.2d 825, 831 (Va. 1982)), some courts hold that the emotional *benefits* of child-rearing are so stellar, one would be hard-pressed to believe there could be a claim for emotional distress.

196. "[C]ourts recognizing this cause of action have rejected the argument that parents should choose among the various methods of mitigation—adoption, abortion, etc.—seeing the moral issues begin to make inroads into an already emotional and speculative process of determining damages. The issue is one 'which meddles with the concept of life and the stability of the family unit.'" Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982) (quoting Wilbur v. Kerr, 628 S.W.2d 568, 571 (Ark. 1982)). Nevertheless, while fearing to trespass on the sanctity of the family unit, the courts fail to

The policy arguments described above (the sanctity of life approach and "child as blessing" argument) also hearken back to the causation dilemma described earlier, where they are used to support curtailing recovery. So, while it is recognized that "'[e]very system of law must set some bounds to the consequences for which a wrongdoer must make reparation . . . . it is ultimately' a question of policy to decide the limits of [such] liability."[197] In these reproductive negligence cases, however, we find a desire to shield the doctor-defendant from large payouts deriving from the policy rationale described above. As the court in *Rieck* agreed:

> [t]o allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy and affection which plaintiff * * * will have in the rearing and educating of this, defendant's fifth child. Many people would be willing to support this child were they given the right of custody and adoption, but according to plaintiff's statement, plaintiff does not want such. He wants to have the child and wants the doctor to support it. In our opinion to allow such damages would be against public policy.[198]

Thus, courts refuse to allow damages because they "would otherwise be an unreasonable burden on the tortfeasor and an unjustified windfall for the *parent* or *parents* who would retain the *parental benefits* but transfer the financial responsibility to another."[199] Interestingly, similar rationale has also been adduced in the contraceptive failure cases.[200]

> To say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment.[201] [And] to say, **. . .** that the expense of bearing a child are

take cognizance of the impact this new—and unplanned for—child will undoubtedly have on this sacrosanct entity. *See infra* pt. III, B., 4.

197. LJ Griffiths in McLoughlin v. O'Brian [1982] 1 Q.B. 599, 623 (intro. rev'd on other grounds, McLoughlin v. O'Brian [1983] 1 A.C. 410).

198. Rieck v. Med. Protective Co., 219 N.W.2d 242, 245 (Wis. 1974) (quoting Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45–46 (Pa. Com. Pl. 1958)); *see infra* note 215 and accompanying text.

199. *Miller*, 343 S.E.2d at 306 (citing Kingsbury v. Smith, 442 A.2d 1003, 1006 (N.H. 1982)) (emphasis added).

200. *See* Edward R. Shohat, *Liability of a Pharmacist for Negligently Dispensing Oral Contraceptives*, 26 U. MIAMI L. REV. 456, 457 (1972). *See also* David J. Mark, *Liability for Failure of Birth Control Methods*, 76 COLUM. L. REV. 1187, 1199 (1976).

201. Troppi v. Scarf, 187 N.W.2d 511, 517 (Mich. Ct. App. 1971). *See also* IAN KENNEDY AND ANDREW GRUBB, MEDICAL LAW: TEXT WITH MATERIALS 936, 977 (2d ed. 1994); RICHARD ABOOD, PHARMACY PRACTICE AND THE LAW (4th ed. 1994).

> remote from the avowed purpose of an operation undertaken for the purpose of avoiding childbearing is a non sequitur.[202]

Nevertheless, this is the route most courts choose to take. Because the rationale is public policy-based, however, "it is not surprising that the same issue may elicit divergent judicial responses,"[203] "the validity of which remains, as always, a matter upon which reasonable men may disagree."[204]

It is important to note that exceptions to these policy articulations do exist. As one court stated:

> Some courts, and many judges in dissent, have urged that after *Roe v. Wade* (1973), 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, it is impermissible for a court to impose such values. . . . 'The choice not to procreate, as part of one's right to privacy, has become * * * a Constitutional guarantee. For this Court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations *except* those involving sterilization would constitute an impermissible infringement of a fundamental right.'[205]

In fact, "[s]ome courts have said that public policy now supports, rather than militates against, the proposition that parents should not be denied the opportunity to terminate a pregnancy."[206] Legislatively, we also have conflicting views:

> The Alabama legislature passed a new Medical Liability Act in 1987, regarding medical negligence causes of action. Nowhere in that Act are wrongful birth cases excluded as they are in laws passed in Missouri and Minnesota. We can only assume that the Alabama

202. Custodio v. Bauer, 59 Cal. Rptr. 463, 476 (Cal. App. 1st Dist. 1967).

203. Schroeder v. Perkel, 432 A.2d 834, 841 (N.J. 1981).

204. Becker v. Schwartz, 386 N.E.2d 807, 810 (N.Y. 1978); *see* Simmerer v. Dabbas, No. 18718, 1999 WL 459350, at *3 n.6 (Ohio Ct. App. July 7, 1999) (citing Williams v. U. of Chicago Hosps., 688 N.E.2d 130 (Ill. 1997)) (pertaining to a disabled child).

205. Simmerer, 18718, 1999 WL 459350 at *3, n.6 (quoting Bowman v. Davis, 356 N.E.2d 496, 499 (Ohio 1976) (emphasis added)), aff'd 733 N.E.2d 1169 (Ohio 2000). *See also* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Burns v. Hanson, 734 A.2d 964, 969 (Conn. 1999) (citing Ochs v. Borrelli, 445 A.2d 883, 885 (Conn. 1982)) ("We declined to carve out any exception, grounded in public policy, to the normal duty of a tortfeasor to assume liability for all the damages that he or she has caused. We held that any such exception would improperly burden the exercise of a constitutionally protected right to employ contraceptive measures to limit the size of one's family.").

206. Keel v. Banach, 624 So. 2d 1022, 1026 (Ala. 1993).

> legislature did not intend to exclude this class of negligence cases from resolution by the courts.[207]

This divergence in policy perspectives, which will be discussed in greater detail below, signals that reliance on public policy in the context of private rights of action is misplaced. In the context of wrongful birth cases, it is downright confused and confusing. And the discord produced by conflicting policy articulations is yet another reason that policy should be severely circumscribed as a basis for tort awards. This concept will be more fully developed in the following Part.

3. Chauvinism in the Courts

Because idiosyncratic moral policy is often the sole predicate upon which complete recovery is denied and yet the practice persists, one must inquire as to what is propelling this legal phenomenon. I suggest latent (and not so latent) chauvinism is a driving force.

"Chauvinism" is defined as "[e]xcessive or prejudiced support for one's own cause, group, or sex."[208] One might substitute the terms partiality, bias, or prejudice.[209] Certainly these attributes are the last we expect to find in judges. And yet when judges, without independent citation or support, articulate personal views under the guise of policy as a basis to determine rights of litigants, one is on notice to investigate the role these biases play in legal outcomes.

Litigators are charged with ferreting out biased jurors, both those whose prejudices are open and obvious, and those who merely trigger some unwholesome, albeit inchoate, reaction in the lawyer.[210] No such opportunity is given to recuse judges who have anti-women or anti-abortion biases. Nevertheless, it is suggested that merely pointing out such prejudices might be sufficient to constrain future adverse decisions. Hence, in that vein, I proceed.

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207. *Id.* at 1031.

208. *Chauvinism*, LEXICO.COM DICTIONARY, https://www.lexico.com/en/definition/chauvinism (last visited Aug. 13, 2020).

209. *Chauvinism*, LEXICO.COM THESAURUS, https://www.lexico.com/synonym/chauvinism (last visited Aug. 13, 2020).

210. *See* 28 U.S.C. § 1866 (2012) ("selection and summoning of jury panels"); *How Courts Work*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect/; Sara Kropf, *How to Pick a Fair Jury*, GRAND JURY TARGET (Oct. 9, 2018), https://grandjurytarget.com/2018/10/09/how-to-pick-a-fair-jury/.

It might be said that the judicial majority's view of child-bearing bliss[211] is centered on the imaginary Donna Reed family of the 1950s and 60s: the (stay-at-home) mother, (employed) father, and two kids. But how would the courts' views play out for a single mother—perhaps one without insurance? In 1994, almost one-third of all births were to unmarried women (up from 18% in 1980); 13.8% of women (12 million women under 65) were uninsured, and presumably a good portion of their children were, as well.[212] Not only are these judges imposing their (predominantly) male,[213] middle (or upper) class views on the litigants before them, but their views of parenthood are often completely different from other judges', and suggestive of chauvinism and bias.

In *Cattanach*, for example, the Australian High Court justices, Judge McHugh and Judge Gummow, pointedly note that, rather than an unmitigated blessing, bringing children into the world confers on parents moral and legal responsibilities.[214] These imposed obligations result in incurring undesired expenditures for which the parents should be compensated. They further use this assessment as a basis to cement the causal association necessary for recovery, noting that "[s]ince such expenditure was 'causally connected to the defendant's negligence' and 'the defendant [ought] to have reasonably foreseen that an expense of that kind might be incurred,' [child bearing costs for healthy children] should therefore be recoverable."[215]

Finally, as mentioned above, one additional manifestation of chauvinism is the courts' failure to consider the impact on the female plaintiff outside of her role as a parent. It must be noted that the gifts, blessings, and privileges that the courts identify adhere, they

211. The benefit offset (equipoisal offset) rule is concocted to reduce damages in those jurisdictions that permit some recovery. Thus, in a perverted application of the Restatement's offset rule, benefits the courts ascribe to child-rearing are used to reduce the injury undeniably caused by the negligence. That the benefits need to be of the same type as the harm (i.e., only economic benefits can offset economic harms, and emotional benefits cannot be somehow substituted instead) is conveniently overlooked by the courts. An additional perversion of the offset rule is its use in jurisdictions where only limited recovery is allowed. Initially, the offset rule was used by courts that held full recovery is allowed and then used the offset rule to, well, offset that full recovery. *See* Wuth v. Laboratory Corp. of Am., 359 P.3d 841, 855 (Wash. Ct. App. 2015) (upholding a jury verdict finding a net loss and noting that "the jury could have concluded either that Oliver's birth brought a 'net increase' or a 'net loss' to his parents"); RESTATEMENT (SECOND) OF TORTS § 920 (AM. LAW INST. 1979).

212. Institute for Women's Policy Research, THE STATUS OF WOMEN IN THE STATES NATIONAL REPORT FOR 1996 23, 35 (1996). In Texas, Florida, and Nevada, around 20% of women were uninsured. *Id.* at 23.

213. Although at least one female judge has refused to allow compensation for child-rearing. *See* Keel v. Banach, 624 So. 2d 1022, 1030 (Ala. 1993).

214. Cattanach v. Melchior (2003) 199 ALR 131, 150.

215. Lam, *supra* note 24, at 153 (citing *Id.* at 152) (quoting Nominal Defendant v. Gardikiotis (1996) 186 CLR 49, 54).

unabashedly assign to the "parental unit," not even to the plaintiff as mother, and certainly not in her individual capacity, which the courts insinuate is abandoned the moment she becomes a parent, willing or otherwise. The harm caused to the woman, the denial of control over her destiny, reproductive or otherwise, will be touched on in PART V.

4. A Case-Study: Emerson v. Magendantz

The underlying chauvinism found in these cases has yet to be recognized, let alone called out, notwithstanding a host of important feminist tort contributions to the subject.[216] Whether there is an element of misogyny involved should also be considered. To exemplify blatant (but hitherto unremarked on) anti-woman bias, I examine *Emerson v. Magendantz*[217] as a case study. While perhaps not the seminal case in the area, nor even a particularly important or well-cited one, the case is especially interesting in that it illustrates different recovery outcomes depending on whether a healthy or unhealthy child is produced—even if it is by the same negligent act. It also reveals a rare display of blatant sexism. Finally, it highlights other harms arising from the physician's negligence outside of simply the birth of the unwanted child and the child's relationship to its parents.

In 1997, after thirty-six states had sounded in judicially and some eight more legislatively barring recovery where abortion would have been the alternative, the State of Rhode Island heard the case of *Emerson v. Magendantz*.[218] The case concerns Diane and Thomas Emerson, who already had one child and determined they could not afford another.[219] The plaintiffs retained Dr. Henry Magendantz to prevent future pregnancies, and, in 1991, Dr. Magdendantz performed a tubal ligation on Ms. Emerson.[220] The operation was a failure.[221] In January 1992, Ms. Emerson gave birth to Kirsten, a child with congenital problems.[222] After the birth Ms. Emerson brought suit, claiming, *inter alia*, she suffered severe physical pain and emotional distress, required additional invasive medical treatment (and a second surgery), and sustained lost

216. *See, e.g.*, Martha Chamallas, *Unpacking Emotional Distress: Sexual Exploitation, Reproductive Harm, and Fundamental Rights*, 44 WAKE FOREST L. REV. 1109, 1119 (2009); MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 133–34 (2010); *reviewed at* 27 BERKELEY J. GENDER L. & JUST. 150 (2012).

217. 689 A.2d 409 (R.I. 1997).

218. *Id.* at 411, 422.

219. *Id.* at 410.

220. *Id.*

221. *Id.*

222. *Id.*

wages and diminished earning capacity.[223] Additionally, Ms. Emerson claimed that she and her husband have existing and future obligations to financially care for their daughter for which they sought recompense.[224] Her claims for recovery of child-rearing, like virtually all cases before and after, were denied, as was her claim for emotional distress.[225]

Arising fairly late in the history of wrongful birth cases, *Emerson* provides a fairly detailed, if notably incomplete,[226] summary of prior law.[227] Yes, the cause of action lies, says the court.[228] No, the full panoply of foreseeable damages will not be awarded—at least not for a healthy child.[229] After surveying the various damage options other courts took, the court decides that the limited recovery rule is the most appropriate.[230] But even along the continuum of courts allowing limited recovery, the *Emerson* court comes up short.[231] While allowing damages related to the pregnancy itself, it refuses to allow damages for emotional distress (although it does allow limited recovery, i.e., child-rearing costs

223. *Id.* at 410–11.

224. *Id.* at 411.

225. *Id.* at 412. Some courts do allow recovery for these aspects. *Id.* at 411–12. *See supra* note 34.

226. *See supra* text accompanying note 17 (claiming only two states allowed full recovery, the *Emerson* court obviously missed at least six other jurisdictions that did as well, either expressly or by way of dicta).

227. "Of the numerous courts that have considered this question, only one state court of last resort has declined to recognize a cause of action in tort arising out of the negligent performance of a sterilization procedure. . . . [But] [e]ven Nevada has suggested there may be an action for breach of warranty." *Emerson*, 689 A.2d at 411 (citing Szekeres v. Robinson, 715 P.2d 1076, 1079 (Nev. 1986)).

228. *Id.* at 413–14 (holding that, even though the Emersons' cause of action was a negligently performed medical procedure, they could not recover their full expenses incurred from that procedure).

229. *Id.* at 412 (adopting "the limited-recovery rule . . . save for the element of emotional distress arising out of an unwanted pregnancy that results in the birth of a healthy child").

230. *Id.*

231. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982); Keel v. Banach, 624 So. 2d 1022, 1030 (Ala. 1993) ("We conclude that the . . . items [that] are compensable, if proven [include]: . . . (3) loss of consortium; and (4) mental and emotional anguish the parents have suffered."); U. of Arizona Health Scis. Ctr. v. Super. Ct. of State In and For Maricopa County, 667 P.2d 1294, 1296 (Ariz. 1983) (describing a case where a negligent vasectomy resulted in the birth of a normal, healthy child, whose parents are unable to financially provide for her). "We see no reason why ordinary damage rules, applicable to all other tort cases, should not be applicable to this situation. By allowing the jury to consider the future costs, both pecuniary and non-pecuniary, of rearing and educating the child, we permit it to consider all the elements of damage on which the parents may present evidence." *Arizona Health*, 667 P.2d at 1301. *See also* Ochs v. Borrelli, 445 A.2d 883, 885 (Conn. 1982). *See generally* Kathryn C. Vikingstad, *The Use and Abuse of the Tort Benefit Rule in Wrongful Parentage Cases*, 82 CHI.-KENT L. REV. 1063 (2007).

for unhealthy children).[232] In supporting its ruling, the court raises the now-familiar trope of the child-blessing argument cited in *Rieck*.[233]

To sustain its limited recovery holding, the *Emerson* court uses, or rather misuses,[234] the offset rule by assigning idiosyncratic values to the two variables, harm and benefit, which are then used to offset one another.[235] Weighing the harms incident to the defendant's negligence (the birth of the child and costs of raising her) against (hypothetical) benefits of child-raising, the court arbitrarily, capriciously, and without factual evidence, eliminates the damages by concluding that, on balance, no harm accrues to these plaintiffs.[236] In so doing, it creates an "equipoisal offset"[237] (what others refer to as the benefit-offset), arriving at a null damage award, thereby cocooning the defendant from the full and foreseeable consequences of his negligence.[238] As the court in *Ochs v. Borrelli* noted:

> The defendants' initial argument founders on its premise that a recognition of the economic costs of parenthood is necessarily a negative judgment on the child who occasions them. We may take judicial notice of the fact that raising a child from birth to maturity is a costly enterprise, and hence injurious, although it is an experience that abundantly recompenses most parents with intangible rewards. There can be no affront to public policy in our recognition of these

232. *Emerson*, 689 A.2d at 414. *But see* Miller v. Johnson, 343 S.E.2d 301, 305 (Va. 1986) (citing Naccash v. Burger, 290 S.E.2d 825, 831 (Va. 1982); Keel v. Banach, 624 So. 2d 1022, 1030 (Ala. 1993) (holding that emotional distress suffered as a result of wrongful birth is compensable); *contra* Simmerer v. Dabbas, 733 N.E.2d 1169, 1174 (Ohio 2000) (holding that emotional distress suffered due to a child's birth defect is not recoverable).

233. *Emerson*, 689 A.2d at 413 (highlighting the "fun, joy and affection" that rearing a child brings) (quoting Rieck v. Med. Protective Co. of Fort Wayne, Ind., 219 N.W.2d 242, 245 (Wis. 1974) (quoting Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45–46 (Pa. Lycoming Ct. 1958))). *See supra* text accompanying note 198.

234. Use of the offset rule here is erroneous for two reasons. First, as others have pointed out, the offset rule cannot comingle costs and benefits valued in different currencies, or different types—economic harms can only be offset by other economic benefits, not emotional ones. The second and perhaps more grievous error, if only because it has yet to be recognized, is the court's sloppy use of doctrine. The offset rule is only to be applied if the courts conclude complete recovery is warranted; in other words, it is an offshoot of the complete recovery rule, which is then used to reduce it. Here, the courts rule that the approach is the limited recovery rule—they need no further rationale to support their limited resolution of damages. Only the desire to incorporate the chauvinistic offset provision could account for the court's integration of that concept. *See infra* pt. IV and especially quote accompanying note 295.

235. *Emerson*, 689 A.2d at 413–14.

236. *Id.* at 419 (Bourcier, J., concurring in part and dissenting in part) ("the so-called unwanted pregnancy . . . [that the majority believes] transforms itself into a total joy or blessing that then serves to absolve the negligent physician from practically all liability to his victim patient is indeed a total joy or blessing, but only for the . . . [negligent] physician").

237. *See supra* note 211.

238. *Emerson*, 689 A.2d at 413 (holding that parents deciding to "forego the option of adoption" meant that child-rearing costs were not foreseeably caused by the defendant's negligence).

> costs and no inconsistency in our view that parental pleasure softens but does not eradicate economic reality.[239]

In addition to depriving the plaintiffs of recovery (restorative justice), the holding vitiates the deterrence function of the tort of negligence. Interestingly, although recognizing two other courts that allowed compensation for healthy child-rearing[240] (but failing to either find or mention several others who do likewise), the court refuses to follow this approach.[241]

It must be noted that the use of the offset rule in *Emerson* is erroneous both from a legal point of view[242] and from a policy perspective:

> In assessing damages it is not permissible in principle to balance the benefits to one legal interest against the loss occasioned to a separate legal interest. Justice Kirby agreed that such set off was inappropriate because emotional benefits and burdens cannot be measured at the beginning of life and are different in quality from the costs involved in rearing a child . . . . He was not convinced by arguments that the calculation of the value of considerations such as joy and love is not possible or that the child might be emotionally harmed by such litigation. He stated that the argument that the birth of every child is a blessing is a fiction that should not apply to a particular case without objective evidence to support it.[243]

Perhaps the most telling sign that the court's failure to countenance the damages of child-rearing reflects a culturally borne disrespect for women is the way it refers to the parties. The defendant is referred to throughout by his status, "defendant;" the plaintiff, is referred to exclusively by her given name, Diane, throughout.[244] In modern times, such behavior would be called out as sexist.[245] That this decision was written in 1997, almost a decade after the American Bar Association published its first report on *The STATUS OF WOMEN IN THE LEGAL*

239. 445 A.2d 883, 885–86 (Conn. 1999).
240. *Emerson*, 689 A.2d at 412.
241. *See supra* note 17.
242. *See supra* note 234.
243. Cordelia Thomas, *Claims for Wrongful Pregnancy and Damages for the Upbringing of the Child*, 26 U. N.S.W. L.J. 125, 147 (2003).
244. *Emerson*, 689 A.2d at 410–14; *see also, e.g.*, Salinetro v. Nystrom, 341 So. 2d 1059, 1060–61 (Fla. Dist. Ct. App. 1977) (referring to the female plaintiff-patient exclusively by her given name and the male doctor-defendant exclusively by his title and surname throughout).
245. *See, e.g.*, Patricia Friedrich, *What's in a Title? When it Comes to 'Doctor,' More Than You Might Think*, THE CONVERSATION (Dec. 5, 2019, 7:39 AM EST), https://theconversation.com/whats-in-a-title-when-it-comes-to-doctor-more-than-you-might-think-127979.

PROFESSION,[246] raising for the bar and bench all the manifestations of paternalism and sexism, is telling.

As a final note, could it be that, as Ms. Butler illustrated in *Bloodchild*, men find pregnancy and the act of childbirth so disgusting that they are willing to compensate for its suffering, but the cooing baby (who, parenthetically, usually carries the father's name) is too precious a commodity to encourage its termination by refusing child-rearing costs?

IV. POLICY IN PRACTICE AROUND THE WORLD

A. The Propriety and Perversity of Policy Reliance

As reliance on policy permeates these cases, focus is shifted away from the negligent acts of the defendant to the sanctity of the new child's life or the blessing of its rearing. These "treasures" become the unfortunate underpinning for denying complete recovery to the parents. Yet even as it has been stated that, "[g]enerally, policy considerations—the question of what public policy requires in the context of the[se] case[s]—have played an important role in the decisions, . . . the reliance on policy has frequently been subject to criticism."[247] Nevertheless, its use in these cases continues unabated. The romantic (and hardly realistic) view that the birth of a healthy, but unwanted, child is an "unmitigated blessing", and hence not subject to compensation illustrates the impropriety of basing tort decisions on public policy grounds.[248]

In fact, some judicial theorists claim that formulation of the issue along policy grounds is, *per se*, improper:

> The core of the concept of public policy is that it involves arguments about the public or common good. . . . [But] courts are wary of relying on public policy in judicial reasoning because it is often seen as a "cover for uncertain reasoning."[249]

As an overarching premise, some scholars opine that use of policy as the determining factor in private law cases is objectionable, since its central

246. The American Bar Association published its first report on *The Status of Women in the Legal Profession* in 1988. ABA COMMISSION ON WOMEN IN THE PROFESSION, CHARTING OUR PROGRESS: THE STATUS OF WOMEN IN THE PROFESSION TODAY 4 (2006).

247. Lam, *supra* note 24, at 148.

248. *See supra* text accompanying note 176.

249. Lam, *supra* note 24, at 161 (quoting James D. Hopkins, *Public Policy and the Formation of the Rule of Law*, 37 BROOK. L. REV. 323, 333 (1971)).

purpose "cuts against the logic of the judicial adjudication, especially in cases involving a dispute between private individuals."[250] In other words, "[w]hereas public policy focuses on what is good for the public or common good, the purpose of judicial adjudication is to correct the injustice between the parties in the particular dispute"[251] and hence it should not be determinative in the context of private disputes.[252] Furthermore, what inures to the public good "is often not a matter of complete consensus and changes with the times,"[253] a fact that will be exemplified below. Thus, lugging policy declarations emanating from, let's say, 1978[254] into the present time is not only anachronistic from a social perspective, but fails to address changes in technology which birthed some of the current lawsuits.

Scholar Chen Meng Lam notes three factors that render reliance on public policy doctrines (even if a uniform policy could be articulated) inapt in these cases:

> The challenge of public policy is that it requires courts to balance the common good and individual justice. Society is changing faster than laws can adapt. Rapid developments in technology have created possibilities for medical treatment and procedures that raise complex moral and ethical issues. Reproductive negligence, . . . [such as IVF], is [but] one example.[255]

Specifically, in the last half decade, greater deference has been given to individual rights, privacy, and the right of autonomy.[256] The common good now often takes a back seat to protection of individual rights. Hence, the bipolar structure of private law requires the court to reconcile any community interests that it takes into consideration with the need to do justice between the disputing parties.[257] This state of affairs has yet to be recognized by the policy invoked in reproductive

250. *Id.* (citing UKM v. Attorney General [2019] 3 SLR 874, 923 at [108]; Ross Grantham and Daryn Jensen, *The Proper Role of Policy in Private Law Adjudication*, 68(2) U. TORONTO L.J. 187, 191 (2018)).

251. Lam, *supra* note 24, at 161, 161 n.144 (citing *UKM*, 3 SLR at 923).

252. *Id.* at 161.

253. *Id.* at 162.

254. The year the seminal case of Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978) was decided, and five years after Roe v. Wade, 410 U.S. 113 (1973).

255. Lam, *supra* note 24, at 162.

256. *See generally* AMNON CARMI ET AL., CASEBOOK ON BIOETHICS FOR JUDGES 8–12 (2016) (noting the importance of consideration of the UNESCO Declaration of Bioethics in judicial opinions around the world).

257. Andrew Robertson, *Constraints on Policy-Based Reasoning in Private Law*, THE GOALS OF PRIVATE LAW 261, 274 (Andrew Robertson & Tang Hang Wu eds., 2009). *See also* Lam, *supra* note 24, at 163.

negligence cases, as will be seen below. Further, the emergence of novel technologies has created legal quagmires in the reproductive field for which the law is out of touch,[258] such as vastly increased use of IVF in the last decades.[259] Indeed, cryogenic transport of sperm, a major contributor to the increased transglobal IVF use, was not available until after 1990.[260] And while at one time the majority of Americans were against abortion,[261] the tide has now turned. Recent surveys show that for the first time a statistically significant majority of the American population (56%) are pro-choice (up from 51%), while only 36% are pro-life.[262]

Finally, the moral/religiously-based policy that drives reproductive negligence cases comes in the form of judicial say-so[263] rather than objective sociological surveys or studies.[264] This type of judicial *ipse dixit* is criticized on the grounds that opinions "should be founded on empirical evidence, not mere judicial assertion."[265] Justice Kirby in *Cattanach* specifically cautioned against "overwhelming legal analysis with emotion,"[266] a warning with particular resonance in the face of the beatific proclamations regarding child-rearing used to deny full recovery. And as one justice pointedly stated: "[A] judge's personal 'distaste' for assessing damages in an upkeep claim is no reason to

258. See Judge McBurney in his decision in *Collins v. Xytex Corp.*, No. 2015 CV 259033, 2015 WL 6387328, at *2 (Ga. Super. Ct. Oct. 20, 2015).

259. Billauer, *The Sperminator*, *supra* note 11, at 9–10; *see also* Barbara Pfeffer Billauer, *Savior Siblings, Protective Progeny, and Parental Determinism in the age of CRISPR-Cas*, CHI.-KENT L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3627576.

260. Billauer, *The Sperminator*, *supra* note 11, at 9.

261. *See* Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) (stating that a majority of states, which reflect the majority of the people's opinions in those states, prohibited or restricted abortion throughout the previous century).

262. *Most Voters Don't See a Threat to* Roe v. Wade, RASMUSSEN REPORTS (Jan. 23, 2019), http://www.rasmussenreports.com/public_content/politics/current_events/abortion/most_voters_don_t_see_a_threat_to_roe_v_wade; *see also* Billauer, *Wrongful Life*, *supra* note 20, at 470. Additionally, we see that notwithstanding prevailing abortion sentiments and regulations worldwide, alternative avenues for abortion are avidly pursued (such as drug-induced means) by women, aided by counter-culture organizations. *See Abortions are Becoming Safer and Easier to Obtain—Even Where They are Illegal*, THE ECONOMIST (Mar. 5, 2020), https://www.economist.com/international/2020/03/05/abortions-are-becoming-safer-and-easier-to-obtain-even-where-they-are-illegal.

263. *See* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 5 (KATHRYN M. STANCHI, LINDA L. BERGER & BRIDGET J. CRAWFORD EDS., 2016) (noting that "[a] judge's worldview may inform the choices that the judge makes about the doctrinal bases for an opinion").

264. *E.g.*, Muller v. Oregon, 208 U.S. 412, 420–21, 420 n.1 (1908) (discussing a woman's right to contract to work).

265. *See* Judge Kirby's opinion in Cattanach v. Melchior (2003) 199 ALR 131, 173.

266. *Id.*

decline such a claim if the application of legal principles allows recovery."[267]

Optimally, in outcomes properly based on policy grounds, we should expect consistency, otherwise we might legitimately suspect an outcome-determinative bias—in other words, a judicial variant of "selective enforcement."[268] When we see opposite views addressed to the same situation, we should be on notice to suspect idiosyncratic and selective use of policy is at play. Thus, surprisingly (or perhaps not so), we find that pregnancy and its aftermath (i.e., a child) is not always viewed as an unmitigated blessing. In fact, in some situations, the U.S. Supreme Court has ruled childbirth to be so heinous an event that conduct leading to it legally constitutes deterrent behavior(!).[269]

The case of *Michael M. v. Superior Court of Sonoma Cty.*[270] is illustrative. Therein, a criminal law punishing males who had sexual intercourse with an underaged female was challenged on equal protection grounds because the converse provision was omitted, i.e., that females who entice underage men were not punished.[271] In rejecting the claim, the Supreme Court acknowledges that men and women are not similarly situated in the context of sexual intercourse and child-bearing.[272] It notes that pregnancy, which carries the risk of bearing a child, is a deterrent force in itself.[273] This force is so strong, the Court says, that pregnancy is considered to be equal in deterrent effect with criminal penalties (i.e., prison) levied against men.[274]

In wrongful birth cases, however, courts refuse to grant compensation for these very same events (pregnancy and its aftermath)—even though the thought of another unwanted mouth to feed in a penurious family might be equally burdensome or even

267. Lam, *supra* note 24, at 154 (citing *Id.* at 211(Callinan J)).

268. Selective enforcement typically refers to when a person is treated differently, compared with someone similarly situated, and that selective treatment is based on impermissible and discriminatory considerations. *See, e.g.*, Zahra v. Town of Southold, 48 F.3d 674, 683 (2d Cir. 1995) (noting that "(1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person") (quoting FSK Drug Corp. v. Perales, 860 F.2d 6, 10 (2d Cir. 1992)).

269. *E.g.*, Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464, 473 (1981).

270. *Id.* at 464.

271. *Id.* at 466.

272. *Id.* at 471.

273. *Id.* at 473. "[T]he risk of pregnancy itself constitutes a substantial deterrence to young females." *Id*; *see Feminist Legal Theories*, THE BRIDGE, https://cyber.harvard.edu/bridge/CriticalTheory/critical3.htm (last visited July 19, 2020).

274. *Michael M.*, 450 U.S. at 473.

traumatic to the parents as an unwanted pregnancy from sexual dalliance.

B. Policy and the Change in Societal Views

Recognizing the inaptitude of using policy to base legal decisions becomes especially important when societal views are in flux. Such sociological tsunamis often accompany times of rapid technological change or paradigmatic social change, such as the emergence of the rights of women.[275] Hence, one gets the feeling the *Emerson* decision (written in 1997) was mined from the distant past, where children were alternatively regarded as an economic blessing (another pair of hands), emotional balm, or a religious injunction.[276] By 1985, however, this was no longer social sentiment around the civilized world. As one court memorably stated:

> A healthy baby is so lovely a creature that I can well understand the reaction of one who asks: how could its birth possibly give rise to an action for damages? But every baby has a belly to be filled and a body to be clothed. The law relating to damages is concerned with reparation in money terms and this is what is needed for the maintenance of a baby.
>
> . . .
>
> I do not accept that it is part of our culture that the birth of a healthy child is always a blessing. It may have been the assumption in the past. I feel quite satisfied that it is not the assumption today.[277]

As early as 1939, it was realized that family circumstances could flip the balance when it came to abortion approval. That year the U.K. Birkett Committee observed that "in cases of poverty or unemployment, the task of maintaining another child may be felt to be intolerable. . . . [Even] [a]mong parents of moderate or comfortable means, fear that a lowering of the family's standards may result from the advent of another child. . . ."[278]

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275. CHEN, *supra* note 171, at xiv-xxv, 281–303.

276. "Be fertile and multiply." *Genesis* 1:28.

277. Thake v. Maurice (1984) 2 All E.R. 513, 526–27 (holding that public policy would not prevent recovery of expenses arising from the birth of a healthy child, and awarding damages for the child's upkeep to its seventeenth birthday).

278. Rebecca J. Cook, *Contraception and Abortion: Legal Distinctions and Dynamics, in* THE BEGINNING OF HUMAN LIFE 163, 168 (FRITZ K. BELLER & ROBERT F. WEIR EDS., SPRINGER SCI. & Bus. Media Dordrecht 1994).

Perhaps the effect of World War II in Europe, which generated a greater need to utilize women's talents and services, birthed greater respect for their stature and the need to free them from the rigors of child-rearing.[279] Thus, following *Roe v. Wade* when American courts were rejecting child-rearing costs,[280] British courts were more accommodating. Some judges viewed damages for child-rearing compensable and expressly rejected the child-benefit notion.[281] The court in *Benarr v. Kettering Health Authority*[282] allowed damages for the future private education of a child following a negligent vasectomy, since private education was what the child could expect in that particular family.[283] In *Allen v. Bloomsbury Health Authority*,[284] the judge held that if a child was born as a consequence of negligent termination of a pregnancy, recovery would lie for negligence. The opinion in *MacFarlane* is illustrative:

> The mother could recover damages for the foreseeable loss and damage . . . [including] economic loss being (i) 'the financial loss she suffers because when the unwanted child is born she has a growing child to feed, clothe, house, educate and care for until the child becomes an adult,' and (ii) loss of earnings because she has to look

279. *See, e.g.*, SHANNON BAKER MOORE, *WOMEN WITH WINGS: WOMEN PILOTS OF WORLD WAR II* 14 (2016) (noting the unusual and idiosyncratic role of women to the war effort in the U.S. compared to the role of women in the U.K. war effort). *See* Ministry of Defense & Prime Minister's Office, 10 Downing Street, *The Women of the Second World War*, UK GOV (Apr. 16, 2015), https://www.gov.uk/government/news/
the-women-of-the-second-world-war ("From 1941, women were called up for war work, in roles such as mechanics, engineers, munitions workers, air raid wardens, bus and fire engine drivers. At first, only single women, aged 20-30 were called up, but by mid-1943, almost 90 per cent of single women and 80 per cent of married women were working in factories, on the land or in the armed forces. There were over 640,000 women in the armed forces, including The Women's Royal Naval Service (WRNS), the Women's Auxiliary Air Force (WAAF) and the Auxiliary Territorial Service (ATS) . . . ").

280. *See supra* notes 9 and 10; Pub. Health Tr. v. Brown, 388 So. 2d 1084, 1085–86 (Fla. Dist. Ct. App. 1980) ("[I]t is a matter of universally-shared emotion and sentiment that the intangible but all-important, incalculable but invaluable 'benefits' of parenthood far outweigh any of the mere monetary burdens involved."). *See also* Pressil v. Gibson, 477 S.W.3d 402, 409–10 (Tex. Ct. App. 2015) (explaining how some American courts are still rejecting child-rearing costs as recently as 2015).

281. *See* Emeh v. Kensington and Chelsea & Westminster Area Health Auth. [1984] 1 Q.B. 1012 (C.A.) at pp.1021–22 (agreeing with *Thake* in refusing to accept the argument that public policy prevents recovery of damages for maintaining a child); Allan v. Greater Glasgow Health Bd. [1998] S.L.T. 580 at pp.583–85 (rejecting public policy arguments; the judge also seeing no reason why the cost of rearing a child should not in principle be provided for).

282. [1988] Lexis Citation 2129.

283. *Id.* at 2–4.

284. (1992) 1 All E.R. 651 (Q.B.D.).

> after the child[,] . . . [and awarding damages for] the cost of maintaining the child until she was 18, and child-minding costs.[285]

By 1999, however, for some unexplained reason, the sentiment in the U.K. had changed. After *Macfarlane and Another v. Tayside Health Board* (Scotland),[286] compensation for child-rearing costs and post-birth income was no longer countenanced.[287] Australian and South African courts, however, continue to honor a woman's right of autonomy[288] and hence allow these cases. As to why we find such enlightened opinions "Down Under" is hard to tell, other than to note that Australia was at the vanguard of recognizing women's rights.[289] Perhaps not surprisingly, over time and in tandem, legal decisions also sounded more and more devoutly feminist.[290] As early as 1993, Australian courts were allowing child-raising costs,[291] although at least at this point the award was discounted by a quarter to reflect the cooing-child benefit offset.[292] By

285. Macfarlane v. Tayside Health Board (2000) 2 A.C. 59 (H.L.) (citing *Allen*, 1 All E.R. at pp. 651–52). *See also* Robinson v. Salford Health Authority (1992) 3 Med L.R. 270; Crouchman v. Burke (1997) 40 B.M.L.R. 163 (Q.B.D.) at pp.177–80 (both *Robinson* and *Crouchman* followed the decision in *Bloomsbury*).

286. 2 A.C. 59 (noting this "is not the result . . . of 'public policy' to a rule which would otherwise produce a different conclusion; it comes from the inherent limitation of the liability relied on").

287. *Id.*

288. Lam, *supra* note 24, at 152, 159.

289. Over a quarter of a century before America gave the vote to women, women's suffrage was given to women in Australia.

> Australia led the world in extending the vote and the right to stand for public office to women. Women's suffrage was an early objective of the women's rights movement in Australia and began to be legislated in the late nineteenth century. South Australia was the first state to extend voting rights to women in 1894. Western Australia followed in 1899. In 1902, the federal government passed the Commonwealth Franchise Act, which allowed women to vote in federal elections and to stand for federal parliament. This made Australia the first country in the world to extend full political participation rights to women (New Zealand had granted the vote to women in 1893, but did not extend the right to stand for public office to women until 1919). By 1911 all the Australian states had also granted women the right to vote in state elections.

Fernanda Dahlstrom, *Women's Rights in Australia*, GO TO COURT PTY LTD., https://www.gotocourt.com.au/legal-news/womens-rights-in-australia/ (last visited July 19, 2020). *See also* WOMEN'S RIGHTS IN AUSTRALIA: AN INTRODUCTION FOR PEOPLE WHO CAME TO AUSTRALIA AS REFUGEES 51 (2d ed. 2016), https://www.arts.unsw.edu.au/sites/default/files/documents/2_Womens_Rights_WEB.pdf

290. It is possible that the involvement of Judge Kirby has affected the outcome. Judge Kirby is heavily involved in Bioethics and Bioethics Training for Judges, among other of his activities serving on the Editorial Board of CARMI'S CASEBOOK ON BIOETHICS FOR JUDGES, *supra* note 256, which champions the UNESCO Universal Declaration on Bioethics and Human Dignity, including the Right of Autonomy. *See also* Sherson & Assocs. v. Bailey [2000] NSWCA 275; Cattanach v. Melchior (2003) 199 ALR 131, 181 (Hayne J); Melchior v. Cattanach (2001) 217 ALR 640.

291. Dahl v. Purnell (1992) QDC 349.

292. *Id.*

1995, the case of *CES v. Superclinics Pty. Ltd.* (Australia) provided another, at least partial, victory when Judge Kirby determined that difficulty in assessing damages should not mean such damages would not be awarded.[293] Noting that courts are frequently required to assess future economic and noneconomic loss, he determined that wrongful birth damages could be awarded on a case-by-case basis.[294] He also pointedly noted that it should not be assumed that the birth of a healthy child is always a blessing.[295]

By 2003, the *Cattanach* case resulted in a resounding victory for women's rights.[296] Therein, the Australian High Court, in awarding full recovery for the rearing of a healthy child, held that the unplanned child was not the harm for which recompense was sought.[297] Instead, the Court held that the financial losses resulting *from the birth* were the harm.[298]

V. CRYSTALLIZATION OF NEW HARMS: BROADENING THE BOX

A. Relational Negligence and Holistic Damages

The *Cattanach* case insinuates another consideration into the analysis: the impact on the family unit:

> Whilst accepting that the values respecting the importance of human life, the stability of the family unit and the nurture of infant children are an essential aspect of the welfare of the community, they could perceive no general recognition that such values denied the award of damages for rearing a child. . . . Justice Kirby concurred with this view stating that Australian law should not go down the path of distinguishing between healthy and disabled children.[299]

Following Judge Kirby's approach, and taking a decidedly neo-feminist (i.e., non-linear) look[300] at the Emerson family unit, gives us yet

293. (1995) 38 NSWLR 47, 76.
294. *Id.* at 77.
295. *Id.*
296. *See* Cattanach v. Melchior (2003) 199 ALR 131, 145.
297. *Id.* at 151 [68].
298. Thomas, *supra* note 243, at 146. Sadly, since the case was decided 125 legislative restrictions have rolled back the advances provided in *Cattanach* in three Australian jurisdictions. *See* Lam, *supra* note 24, at 157.
299. Thomas, *supra* note 243, at 164.
300. Feminist tort writings have added unique perspectives to these cases. Here, I take a more holistic and integrational approach, looking at the impact of the negligence not just regarding the experiences of the plaintiff, but on a broader class of persons for which the plaintiff has responsibility, in this case, the family unit. The opposite of linear thinking is systems thinking. *See*

another perspective:[301] one somewhat broader than the more limited, linear one usually embraced. Here, I graft onto the analysis a new shoot: a holistic/integrational approach. Under standard negligence law, proximate (legal) cause focuses on a direct connection between one effect and one cause.[302] However, one effect can have multiple causes and one cause can have multiple effects,[303] and these are generally embraced under the full umbrella of negligence recovery. Under this approach, the harms suffered by Diane Emerson are not merely those occasioned by Kirsten's birth, but the effects of Kirsten's birth on the entire family, of which Kirsten is just one part. These harms, in turn, additionally affect the child's mother. So far, we have seen the *offset* rule balancing benefit and harm in a bi-modal fashion: the joys of parenthood

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Scott Miker, *Linear Thinking Versus Systems Thinking*, SCOTTMIKER.COM, https://www.scottmiker.com/linear-thinking-versus-systems-thinking (last visited July 25, 2020) ("The problem with linear thinking is that it is too narrow. It ignores the complex system and instead focuses on an aspect of a system. Reality says that there is much more at any given time than a simple start and finish or cause and effect. Yet linear thinking leads us to believe that is all we need to know or understand."). Another term for linear thinking is circular thinking. *See* also Kim Hudson, *Are You a Circular or a Linear Thinker?*, Two Ways of Knowing (Nov. 3, 2017), https://2wkblog.com/2017/11/03/are-you-a-circular-or-a-linear-thinker-2/ (noting that "men on average lean towards linear thinking while women are more circular"). And feminist theory is associated with non-linear thinking. *See* Jennifer Purvis, *Grrrls and Women Together in the Third Wave: Embracing the Challenges of Intergenerational Feminism(s)*, *16 NWSA J. 93–123* (2004) (noting "the unidirectional, linear (masculinist) logic of cause-effect"). *Cf.* Suzanne M. Spencer-Wood, *Nonlinear Systems Theory, Feminism, and Postprocessualism*, 2013 J. ARCH. 1 (noting that "[n]onlinear systems theory demonstrates that current . . . analysis of patterns and processes is incomplete and so partial that our understanding of culture and cultural processes . . ., [and] is seriously compromised"). Further "feminist research on domestic reform exemplifies a nonlinear process of cultural transformation initiated by individuals and propagated in small-scale women's socio-political organizations that developed into large-scale organizations and global networks creating major cultural change[] . . . by transforming their cultural context." *Id.* at 10 (citing Suzanne M. Spencer-Wood, *Diversity in 19th Century Domestic Reform: Relationships Among Classes and Ethnic Groups*, THOSE 'OF LITTLE NOTE': GENDER, RACE AND CLASS IN HISTORICAL ARCHAEOLOGY 175–208 (E. M. Scott ed., 1994); Suzanne M. Spencer-Wood, *Strange Attractors: Non-linear Systems Theory and Feminist Theory*, SOCIAL THEORY IN ARCHAEOLOGY 112–126 (M. B. Schiffer ed., 2000)). *See supra* note 263, 273.

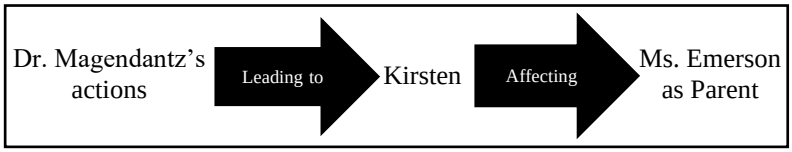
301. Leslie Francis & Patricia Smith, *Feminist Philosophy of Law*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2017), https://plato.stanford.edu/entries/feminism-law/. *See* Jody Michaels, *Linear Thinkers: Overcoming Leadership Challenges*, JODY MICHAEL ASSOCIATES, https://www.jodymichael.com/blog/linear-thinkers-overcoming-leadership-challenges/ (last visited July 25, 2020) ("Linear thinking is an analytic, methodic, rational and logical thinking style. A linear process moves forward like a line with a starting point and an ending point, and our brains often want to make simple straight connections in sequential order. . . . [By contrast] non-linear thinking which is an intuitive, creative, artistic and emotional thinking style [is] known as right-brained (the seat of creativity). It's less-restrictive thoughts expand in multiple directions which allows for multiple points of logic rather than just one answer. Non-linear thinkers don't work in straight lines or sequential manners. Instead, they make connections and draw conclusions from unrelated concepts or ideas.").

302. Barbara Pfeffer Billauer, *The Causal Conundrum: Examining Medical-Legal Disconnect in Toxic Tort Cases from a Cultural Perspective or How the Law Swallowed the Epidemiologist and Grew Long Legs and a Tail*, 51 CREIGHTON L. REV. 319, 342 (2018).

303. *See id.*

set off against hardships of child-rearing. American courts have notoriously turned a blind eye to the impact on other members of the family unit who are certain to be affected by the birth of this unwanted child that the parents tried so hard to avoid having.[304] This relational harm constitutes another aspect to be evaluated when considering damages in wrongful birth cases.

Let's return to the *Emerson* case and depict diagrammatically how the court looks at the negligence, causation, and injury.



The decision looks at the harms affecting Ms. Emerson in a direct, linear (typically male) mode of thinking.[305] However, it must be recalled that Ms. Emerson is not only Kirsten's mother, and her damages are not confined to only harms she sustains in that role. Diane Emerson is now the mother of two children—and in that capacity she has multiple forces acting on her. It's not just the harm of Kirsten's birth, but also the harm of having two children dependent on her, for which Ms. Emerson now seeks recompense.[306] Furthermore, the older sibling, too, has needs, costs, and legally cognizable rights[307]—including a right to her parent's affection.[308] This right has been compromised by the birth of her sister

304. *See, e.g.*, Emerson v. Magendantz, 689 A.2d 409, 411–12 (R.I. 1997).

305. *Id.* at 414.

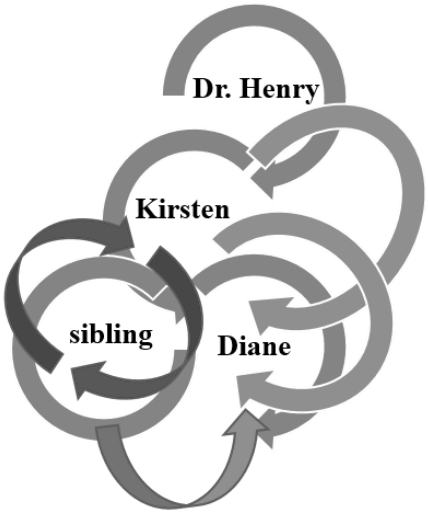
306. *See id.* at 411.

307. *See* Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 181 (1916). "As early as 1916, Dean Pound criticized the common law's failure to protect the familial rights of children. . . . '[A] child has an interest . . . in the society and affection of the parent, at least while he remains in the household. But the law has done little to secure these interests.'" Johnny Parker, *Parental Consortium: Assessing the Contours of the New Tort in Town*, 64 MISS. L.J. 37, 46 n.31 (1994). This conception is changing. *See* Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 703 (Mass. 1980) (recognizing a claim for loss of parental consortium). "The child suffers damages to emotional interests emanating from the parent-child relationship and has the right to bring an action for loss of parental consortium to recover for these damages" if the parent suffered a compensable injury. Parker, *supra* note 307, at 59.

308. "Most children are dependent on their parents for emotional sustenance." Theama by Bichler v. City of Kenosha, 344 N.W.2d 513, 521 (Wis. 1984). *See also* Annotation, *Child's Right of Action for Loss of Support, Training, Parental Attention, or the Like, Against a Third Person Negligently Injuring Parent*, 11 A.L.R. 4TH 549, § 2[a] (1982). Note that the right of consortium is fairly recent. The first case allowing a wife to recover for loss of her husband's consortium was Hipp v. E. I. Dupont de Nemours & Co., 108 S.E. 318, 323 (N.C. 1921). *See also* Hitaffer v. Argonne Co., 183 F.2d 811, 820 (D.C. Cir. 1950), *overruled on other grounds by* Smither & Co. v. Coles, 242 F.2d 220, 226 (D.C. Cir. 1957); Dini v. Naiditch, 170 N.E.2d 881, 893 (Ill. 1960).

and her sister's demands on her mother.[309] Thus, not only does Kirsten's presence negatively impact the family's financial situation, it detracts from the care available to her older sibling, and in an on-going spiral it escalates the negative impact that sibling has on Kirsten. This sibling interaction further acts as a stressor on Ms. Emerson, which also has a cascading impact.

This impact of future children on pre-existing family members is a legally *and* socially recognized stressor. According to the Guttmacher Institute, "counter to common political and dramatic narratives, many if not most American women receiving abortions do so for reasons related to the wellbeing—often financial—of the children they already have."[310] In some countries the intrafamilial impact—if serious enough—is an acceptable reason for abortion even if otherwise unavailable,[311] in the U.K., permitting abortion up until twenty-four weeks.[312]



309. "The reality is that children often suffer mentally and emotionally where there has been serious and permanent injury to the parent." Parker, *supra* note 307, at 53.

310. Lizzy Francis, *Who Gets Legal Abortions in America? Mothers.*, FATHERLY, https://www.fatherly.com/love-money/who-gets-abortions-mothers/ (last updated May 12, 2019, 4:32 P.M.).

311. Billauer, *Abortion*, *supra* note 193, at 309.

312. Abortion Act 1967, c. 87.

> Since the 1967 Abortion Act became law in April 1968, millions of women have had access to safe, legal abortion in Britain. The Abortion Act made abortion legal when two doctors agree in good faith (a) that the continuance of the pregnancy would involve . . . risk of injury to the physical or mental health of . . . any existing children in [a pregnant woman's] family . . .

Jennie Bristow, *Britain's Abortion Law What It Says, and Why*, BRITISH PREGNANCY ADVISORY SERVICE 4 (May 2013), http://www.reproductivereview.org/images/uploads/Britains_abortion_law.pdf.

Fig 2. The Multi-fold Impact of Coerced Pregnancies on the Mother

The "joys" of Kirsten then are compromised not only by diapers and tantrums, but also by her impact on the entire family—harmful stressors that Diane Emerson and her husband sought to avoid.[313] The net bliss the court assigns to the Emersons can only be rank speculation. While Kirsten may indeed confer all manners of delights, those benefits must be balanced against the competing needs of the existing child and the family unit. That the Emersons made a conscious decision to avoid adding to their family demonstrates that they felt they were ill-equipped to balance a life with a new child along with the existing one, given their resources, both economic and otherwise. One is hard-pressed to understand why they should be denied the opportunity to bring their subjective (emotional) and objective (financial) considerations before a jury rather than having their claim summarily dismissed at this early procedural stage merely because the judges who are not charged with raising the child think it's such a wonderment.

And what about claims by siblings themselves when they suffer damage? Practically speaking,[314] one cannot ignore the impact on the older sibling. In some jurisdictions the harm to which Ms. Emerson is subjected (and recall, she has legally suffered some harm) also impacts her older child, even if only emotionally. For this that child should be entitled to redress in the form of the loss of parental consortium,[315] which "seeks to protect the child's interest in mental and psychological well-being."[316]

B. Third-Party Beneficiary Status

Generally, both negligence and medical malpractice claims require the existence of a duty or professional relationship between the

313. Emerson v. Magendantz, 689 A.2d 409, 419 (R.I. 1997).

314. Various avenues of feminist theory come to our aid here, as well as practical reasoning and perspectives of non-feminists. Widening the lens to include examining other interests at stake (what I call "holistic-integrationist theory") also impacts resolution. *See generally* Linda L. Berger et al., *Introduction to the U.S. Feminist Judgments Project*, 995 SCHOLARLY WORKS 3, 15 (2016).

315. Alaska's model instruction is illustrative, addressing non-economic loss by the children of the plaintiff. "The child(ren) claim(s) that an injury to the [plaintiffs] . . has damaged the relationship between the parent(s) and child(ren). You may make an award for the fair value of the loss of the enjoyment, care, guidance, love and protection that the child(ren) (has) (have) suffered or are reasonably probable to suffer in the future." ALASKA PATTERN JURY INSTR. CIV. 20.09 (1990). *See also* OKLA. UNIF. JURY INSTR. CIV. 4.8 (2d ed. 1993).

316. Parker, *supra* note 307, at 72. *See also* Robert J. Cooney & Kevin J. Conway, *The Child's Right to Parental Consortium*, 14 J. MARSHALL L. REV. 341, 349 (1981).

parties.[317] When the scope of the injured parties is not direct but is circumscribable,[318] recovery has been allowed under the theory of third-party beneficiary status.[319] For the most part, these cases arise out of contract,[320] legal or accountant malpractice,[321] or in business cases.[322] But doctrinally there should be no reason to disallow affected siblings from instituting suit in a medical malpractice action.[323] Furthermore, existing children should be able to raise derivative claims to the mother's cause of action.[324] Should these damage claims be brought by existing children, courts might be hard-pressed to invoke the same rationale they've used to deny child-rearing damages when raised by a parent.

C. The Eggshell Plaintiff and Feminist Tort Theory

Trying to excuse its lack of substantiation for the romanticized view of parenting, the *Emerson* court notes "that the life of the law is not logic but experience."[325] Yet, this maxim is selectively deployed by ignoring Ms. Emerson's experiences, i.e., those that led her to seek sterilization in

317. Grossman v. Barke, 868 A.2d 561, 566 (Pa. Super. Ct. 2005) (noting that "'when a plaintiff's medical malpractice claim sounds in negligence, the elements of the plaintiff's case are the same as those in ordinary negligence actions[]'") (quoting Toogood v. Owen J. Rogal, D.D.S., P.C., 824 A.2d 1140, 1145 (Pa. 2003)).

318. *See* FOX, BIRTH RIGHTS AND WRONGS, *supra* note 39, at 81 (discussing duty to those outside the direct ambit of the initial doctor-patient relationship).

319. *Sipple v. Connections Cmty. Support Programs, Inc., No.* N17C-11-290 VLM, 2018 WL 3956477, at *3 (Del. Super. Ct. Aug. 15, 2018).

320. *Id.* at *3; Seaver v. Ransom, 120 N.E. 639, 642 (N.Y. 1918); RESTATEMENT (SECOND) OF CONTRACTS § 302 (*AM. LAW INST.* 1979). *See also* Hawkins v. McGee, 146 A. 641, 643 (N.H. 1929).

321. Guy v. Liederbach, 459 A.2d 744, 746 (Pa. 1983).

322. *See* RESTATEMENT (SECOND) OF TORTS *§ 552 (AM. LAW INST. 1977).*

323. Deborah Alley Smith, *Claims by Non-Clients Against Professionals – Third Party Beneficiary, Negligence and Negligent Misrepresentation*, CHRISTIAN & SMALL, ATTORNEYS AND COUNSELORS (June 30, 2015), http://csattorneys.com/claims-by-non-clients-against-professionals-third-party-beneficiary-negligence-and-negligent-misrepresentation/.

324. Michael A. Mogill, *And Justice for Some: Assessing the Need to Recognize the Child's Action for Loss of Parental Consortium*, 24 ARIZ. ST. L.J. 1321, 1350 n.176 (1992); *see also* Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 692, 696 (Mass. 1980) (noting "a child has a right to recover for loss of a parent's society caused by a defendant's negligence" if the child is a minor who is dependent on the parent both economically and "in filial needs for closeness, guidance, and nurture"). As Justice Quirico noted,

> I concur with the general conclusion reached in part 1 of the court's opinion that, as a general principle of the law of torts, one who by his tortious conduct causes personal injury to another should be liable in damages to the minor dependent children of the victim for the resulting interference with the parental relationship existing between the victim and the minor children.

Id. at 703 (Quirico, J., concurring in part, and dissenting in part).

325. Emerson v. Magendantz, 689 A.2d 409, 413 (R.I. 1997).

the first place. Feminist tort theory also touts the importance of "experience" as a decision-driver in negligence actions.[326] The question, then, becomes whose experience governs: the moms' or the men's (a.k.a. the judges)?[327] Actually, we need not import feminist tort theory to arrive at a just (and pro-woman) resolution. Standard tort law will suffice, if properly utilized.

To give our chauvinistic decision-makers some deference, perhaps epidemiologically speaking the *general population* experiences parenthood with ecstasy and rapture and, perhaps overall, parental blisses and misses are in equipoise.[328] Legally speaking, however, one takes the plaintiff as one finds her,[329] also known as the "eggshell plaintiff rule."[330] Returning to the *Emerson* case, by way of example, we evaluate Diane Emerson's claims through her field of vision, based on how she suffered—not through some moralistic normative view imposed by the judiciary. The issue should pivot around the experiences of Diane Emerson—who is charged with child-raising—with her experiences superseding those of the judges, some of whom never experienced pregnancy and for the most part aren't Moms-in-Chief. In fact, one might attribute the court's bipolar opinion (allowing some avenues of recovery, denying others) precisely to the fact that men often regard child-birth as "yucky"[331] and hence compensable, while child-raising is romanticized, focusing on smiles and not diaper-changing, thus denying a compensable injury.

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326. Martha Chamallas, *Feminist Legal Theory and Tort Law, in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 386, 387 (Robin West & Cynthia Grant Bowman eds., 2019); *see* DAVID ROSENBERG, THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY 51 (Harvard Univ. Press 1995).

327. "The unstated norms in tort doctrines still tend to be based on men's life experiences." Chamallas, *supra* note, 326, at 387. *See* Martha Chamallas, *Feminist Legal Theory and Tort Law* 3 (OHIO ST. L.J., Working Paper No. 448, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198115.

328. Meier, *supra* note 8, at 649 ("Much of the literature comparing parents with those without children indicates a happiness advantage for those without children. . . . Single mothers report less happiness and more sadness, stress, and fatigue in parenting than partnered mothers.").

329. *See* Self v. Johnson, 124 So. 2d 324, 324–25 (La. Ct. App. 1960); Sonson v. J.C. Penney Co., 65 A.2d 382, 384 (Pa. 1949); Kan. City S. Ry. Co. v. Akin, 210 S.W. 350, 354 (Ark. 1919). *See also* Gary L. Bahr & Bruce N. Graham, *The Thin Skull Plaintiff Concept: Evasive or Persuasive*, 15 LOY. L.A. L. REV. 409, 410 (1982).

330. Salopek v. Friedman, 308 P.3d 139, 147 (N.M. Ct. App. 2013).

331. "Yuck factor" is a bioethical term coined by Arthur Caplan. Charles W. Schmidt, *The Yuck Factor: When Disgust Meets Discovery*, 116 ENVTL. HEALTH PERSPS. A524, A525 (Dec. 2008). "Most people instinctively reject fearsome or repugnant things, especially when those things are unfamiliar. If shared by masses of people, that collective repugnance can fuel a social force with the power to shape environmental and public policy." *Id.* Such might be said of a male view of pregnancy and child-raising.

The Emersons, as individuals, claim their reality is different from the fairy-tale worlds of judges earning a respectable income.[332] In Ms. Emerson's mind, the negative aspects of additional child-raising outweighed the positives.[333] So significant were these negatives—to her—that she subjected herself to the risks of tubal ligation (twice, it turns out), including risks of "damage to the bowel, bladder or major blood vessels; [r]eaction to anesthesia; [i]mproper wound healing, or infection; [and] [c]ontinued pelvic or abdominal pain."[334] The court or a jury may later find that she has not established hardship, but there is no reason to deny her the opportunity to try. That the Emersons may be super-sensitive to demands of a second child, that they might need greater financial resources to adequately care for their children than others, is irrelevant. The Emersons determined they did not want to encumber themselves with an additional child.[335] They claim the demands of two children would be harmful to them.[336] That's all that is necessary. The harms-benefits *for these parents* are not in equipoise.[337]

Let's return to the seminal case of *Becker v. Schwartz*, mentioned at the outset, which involved the birth of a "mongoloid child[]."[338] There, the court was called on to determine the viability of both wrongful life and wrongful birth claims.[339] Rejecting the former, it allowed the latter,[340] and because the child was congenitally afflicted with Down's syndrome, the court allowed child-care recovery.[341] What it refused to countenance, however, were the mother's claims for emotional distress.[342] Mrs. Becker, the mother, was thirty-eight at the time of her child's birth[343] and perhaps overwhelmed with the idea of raising a child so seriously affected at this age. It has been said that while some individuals confronted by tragedy respond magnificently and become

332. *See* Emerson v. Magendantz, 689 A.2d 409, 410 (R.I. 1997).
333. *See id.* at 410–11.
334. *See* Mayo Clinic Staff, *Tubal Ligation*, MAYO CLINIC (Mar. 29, 2018), https://www.mayoclinic.org/tests-procedures/tubal-litigation/about/pac-20388360.
335. *See Emerson*, 689 A.2d at 410.
336. *Id.*
337. *See* Ochs v. Borrelli, 445 A.2d 883, 885–86 (Conn. 1999).
338. Becker v. Schwartz, 386 N.E.2d 807, 808 n.1 (N.Y. 1978).
339. *Id*. at 809, 811.
340. *Id*. at 811, 814.
341. *Id.* at 814.
342. *Id.* at 813 (citing Howard v. Lecher, 366 N.E.2d 64 (N.Y. 1977)).
343. *Id.* at 808.

exemplary parents, others do not.[344] The Beckers did not.[345] They settled their suit for the amount they had spent on foster care and subsequently put their mongoloid child up for adoption.[346] Perhaps if the Beckers had been awarded the right to emotional damages, they might have had the resources to care for the child at home. Perhaps not. But in view of the lack of follow up studies regarding the status of families affected by wrongful life and birth claims and denied child-care recovery, we only have the sanctimonious proclamations of moral certitude by courts and anecdotal evidence, such as the case involving the Beckers.

VI. CONCLUSION

A. In a Nutshell

We see in these cases a concerted judicial effort to impose a religious (anti-abortion) view on damage recovery in reproductive negligence cases. Recovery for child-care costs, especially for a healthy child, cannot be sanctioned, say these judges, because life is a great gift—any life, tormented or not. That medical experts are now more concerned with the quality of life than the sanctity of life eludes these judges.

Trying to wiggle out from providing a cogent rationale for their holdings, perhaps admitting their policy-based rationale wanting, judges pass the buck to philosophers.[347] The court in *Becker v. Schwartz* plainly admitted this tactic, noting: "[w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly left to the philosophers and the theologians."[348] In response, philosophy Professor David Heyd calls this, in effect, poppycock:

> . . . [T]here is really nothing to know here, even for philosophers . . . We do not understand "the unknown" simply because there is nothing to understand [about it] . . . [and] *no one* has anything

344. Wolf Wolfensberger & Frank J. Menolascino, *A Theoretical Framework for the Management of Parents of the Mentally Retarded, in* PSYCHIATRIC APPROACHES TO MENTAL RETARDATION 475, 483 (Frank J. Menolascino ed., 1970).

345. ELENA O. NIGHTINGALE & MELISSA GOODMAN, BEFORE BIRTH: PRENATAL TESTING FOR GENETIC DISEASE 84 (Harvard Univ. Press 1990); Lesley Oelsner, *Baby in Malpractice Suit Was Put Up for Adoption*, N.Y. TIMES, Feb. 17, 1979, at 23.

346. Oelsner, *supra* note 345, at 23.

347. *See* David Heyd, *Are "Wrongful Life" Claims Philosophically Valid? A Critical Analysis of a Recent Court Decision*, 21 ISR. L. REV. 574, 583 (1986) (exposing judges who hide behind the philosopher's curtain even as they rely on social and moral reasoning to make their decisions).

348. *Becker*, 386 N.E.2d at 812.

> interesting to say; . . . the logic of the matter and the conceptual coherence of the claim should concern *both* philosophers and judges.[349]

At least one court even called the "fear to tread" argument nothing more than court-admitted incompetence.[350]

This Article explores how judges use bogus arguments to deny financial recovery for child-rearing of healthy children. Their tactics include misuse of the causation doctrine and outdated or outmoded policy arguments. For the most part, the policy propaganda can be bifurcated into two strata: fear of abortion along with artificial reliance on the sanctity of life (which is irrelevant in IVF negligence cases), and characterizing raising a child as the pinnacle of life's pleasures such as to outweigh or at least equal any vicissitudes incident thereto. After demonstrating the lack of resonance these paeans to parenthood provide, I illustrate opposing views from other countries, raising countervailing considerations. I then discuss the rank impropriety of using policy when individual rights and liberties are concerned.

Even where plaintiffs evidence a burning desire to have a child and go to extreme lengths to do so, e.g., seeking IVF services,[351] recovery is limited on the basis of policy favoring life—any life—over a woman's desire to sculpt her reproductive destiny.[352] This brings us to the second focus of this essay: the courts' inability to recognize harms created by negligence that impact on the entire family unit. In this context, I raise the "eggshell plaintiff doctrine" (or what might be considered the feminist theory of experiential reasoning) to focus on the harms as experienced by the particular plaintiffs.[353]

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349. Heyd, *supra* note 347, at 583–84 (emphasis in the original). It should be noted that Professor Heyd personally opposes the wrongful life claim but on different grounds than espoused by the judiciary. Personal communication from David Heyd, Professor, The Hebrew University of Jerusalem, to Barbar Pfeffer Billauer, Author, (Jan. 2019).

350. "[T]he [*Becker*] court declared itself incompetent to decide whether it is better never to have been born than to have been born with even gross deficiencies. . . . " Speck v. Finegold, 439 A.2d 110, 115 (Pa. 1981) (citing *Becker*, 386 N.E.2d at 807). *See* Billauer, *Wrongful Life*, *supra* note 20, at 473, 478.

351. Lam, *supra* note 24, at 158.

352. *Id.* at 148.

353. Chamallas, *supra* note 326, at 368–87.

B. Autonomy, Liberty, and the Pursuit of Happiness

1. Impact on the Family Unit

It must be highlighted that if it does exist, this court-conferred blessing, gift, or privilege of child-rearing falls on the *parental unit*, or a *parent*.[354] Defining the injury solely predicated as the child's birth enables courts to label this event as a blessing, rather than as an event the parents went to great lengths to avoid. Further, courts ignore the effect on parents as individuals, the mother as a woman, the father as a man, or the family unit as a whole, which may be comprised of siblings who undoubtedly also would be affected.[355]

2. Recognition of Individual Rights

As society evolves, the rights of the individual have been given even greater prominence.[356] Yet, in the above-mentioned cases, not only do "[c]ourts continue[ ] to ignore newly arisen social needs[,] [t]hey appl[y] complacently eighteenth century conceptions of the liberty of the individual. . . ."[357] Attempting to influence the judicial liturgy, the courts disavow the basic tenants on which our country was founded. Thus, as President Truman once wrote:

> The central theme in our American heritage is the importance of the individual person. From the earliest moment of our history we have believed that every human being has an essential dignity and integrity which must be respected and safeguarded. Moreover, we

354. Shirley P. Burggraf, *How Should the Cost of Child Rearing be Distributed?*, 36 CHALLENGE MAGAZINE, Oct. 1993, at 48, 49–50 (discussing generally the societal burdens placed on mothers).

355. *See* Mogill, *supra* note 324, at 1322.

356. *See* Roberto Andorno, *Article 3: Human Dignity and Human Rights, in* THE UNESCO UNIVERSAL DECLARATION ON BIOETHICS AND HUMAN RIGHTS: BACKGROUND, PRINCIPLES AND APPLICATION 91 (Henk A. M. J. ten Have & Michèle S. Jean eds., 2005) ("The interests and welfare of the individual should have priority over the sole interest of science or society."). *See generally* Leonir Chiarello, *The Emergence and Evolution of the Concepts of Human Rights and Human Security*, CENTER FOR MIGRATION STUDIES (Oct. 13, 2015), https://cmsny.org/publications/chiarello-human-rights-and-human-security/ (citing Graziano Battistella, *Migration and Human Rights: the Uneasy but Essential Relationship*, MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHTS 47–68 (Ryszard Cholewinski, Paul de Guchteneire, & Antonoine Pécoud eds., 2009)) (noting that "the theory of natural law[], . . . recognizes the individual rights of each person independent of the state to which he or she belongs" (Battistella, 2009)).

357. THE WORDS OF JUSTICE BRANDEIS, *supra* note 2, at 121.

> believe that the welfare of the individual is the final goal of group life.[358]

3. Constitutional Right of Procreation

A few judges have even stated that refusal to recognize wrongful birth claims would impermissibly burden the constitutional rights involved in conception, procreation, and other familial decisions.[359]

4. Personal Feelings of Judges

It appears that many feel that being a parent is more rewarding than a career—at least for the woman.[360] The *Emerson* court's holding, for example, denied fulfillment of Ms. Emerson's personal interests to avoid second-time motherhood.[361] These judges' rulings are reflective of their personal feelings.[362] This is not legal doctrine nor even religious fatwa, and judges should not be permitted to transfer their idiosyncratic beliefs onto others.[363]

5. Autonomy and Happiness

Thus, Ms. Emerson's right of autonomy has been infringed by the court's refusal to countenance *the reasons* she sought out pregnancy-prevention in the first place.[364]

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358. PRESIDENT TRUMAN'S COMMITTEE ON CIVIL RIGHTS, REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 4 (1946), https://www.trumanlibrary.gov/library/to-secure-these-rights#3.

359. *E.g.*, Speck v. Finegold, 408 A.2d 496, 501–02 (Pa. Super. Ct. 1979). *See also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

360. Emerson v. Magendantz, 689 A.2d 409, 419 (R.I. 1997) (Bourcier, J., with Flanders, J., concurring in part and dissenting in part) (noting that the "joy or blessing rule" adopted by the majority ignores the detriments suffered by young people who must give up professional opportunities to care for a child).

361. *Id.* at 413–14 (adopting a damages rule that does not allow recovery for emotional damages resulting from the birth of a healthy child despite the parent's desire to limit the size of their family).

362. *Id.* at 419 (Bourcier, J., with Flanders, J., concurring in part and dissenting in part) (noting "[t]he joy or blessing rule . . . is in my humble opinion nothing more than a judicial mirage").

363. *Feminist Legal Theories*, THE BRIDGE, https://cyber.harvard.edu/bridge/CriticalTheory/critical3.htm (last visited Aug. 13, 2020) ("Methodologically, this special treatment [of] cultural feminist work often criticized the assumption of autonomy pervading Western economic, social, and political theory. . . .").

364. *See* Burton v. State, 49 So. 3d 263, 265–66 (Fla. Dist. Ct. App. 2010) for a picture of the slippery slope should courts be allowed to interfere with a woman's reproductive choices and constrain her autonomy. *See also* FOX, BIRTH RIGHTS AND WRONGS, *supra* at 39, at 14, 17, 19 (noting that "[r]eal reproductive autonomy is about clearing away barriers to choice, whether legal . . . , economic . . . , or social" and discussing choice pregnancy as impacting on a sense of identity).

The impact of a court's decision on a woman's autonomy,[365] including the systematic undervaluation or disregard for her needs, can no longer be ignored.[366] The responsibility of children and child-caring that the *Emerson* court saddled on Ms. Emerson deprives *her* of the choice of how she wants to lead her life, including building a career, perhaps.[367]

It has been said that "liberty has come to mean the right to enjoy life, . . . to pursue happiness, in such manner that the exercise of the right in each is consistent with the exercise of a like right by every other of our fellow citizens."[368] Nevertheless, in addition to trampling the right of autonomy and freedom needed for a woman to make her own lifestyle choices, the courts trample on the liberty and pursuit of happiness guarantee that our founders sought to bestow.

Whether these rights are constitutionally protected in this context may well be a subject that will confront a future Supreme Court. For now, it behooves us to be alert to signals triggered by impingements on abortion rights. This trend pervading state legislatures indicates a willingness to shackle women and prevent them from controlling their own lives that will bleed over into other related claims. To paraphrase Justice Brandeis:

> In old[en] times the law was meant to protect each citizen from oppression by physical force. But we have passed to a subtler civilization; from oppression by force we have come to oppression in other ways. And the law must still protect a [wo]man from the things that rob [her] of [her] freedom, whether the oppressing force be physical or of a subtler kind.[369]

Looking at abortion in a broader context means recognizing that availability of abortion also promotes, protects, and fosters the liberty and freedom of the mother. These rights are eligible for protection under a constitutional right of privacy and a bioethical concern for

365. Autonomy is an enumerated right under Article 5 of the UNESCO Universal Declaration on Bioethics and Human Rights. Donald Evans, *Article 5: Autonomy and Individual Responsibility, in* THE UNESCO UNIVERSAL DECLARATION ON BIOETHICS AND HUMAN RIGHTS: BACKGROUND, PRINCIPLES AND APPLICATION 111 (Henk A. M. J. ten Have & Michèle S. Jean eds., 2009). And while autonomy is recognized as a protected right, at least in many countries, the right to control one's destiny (biological or otherwise), which can be equated with the fundamental and enunciated right of the pursuit of happiness, should enjoy even greater protection—at least in the U.S.

366. Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 585–87 (1993).

367. Emerson v. Magendantz, 689 A.2d 409, 410 (R.I. 1997).

368. THE WORDS OF JUSTICE BRANDEIS, supra note 2, at 95–96.

369. *Id.* at 89.

autonomy,[370] but there is more. Rather than looking at abortion via the lens of privacy, this Article suggests that the practice should be regarded as a means to ensure another constitutionally protected right—liberty and freedom—along with another right recognized by the UNESCO declaration—the right of Human Dignity.[371] While this modality of thinking also enlarges the feminist theory of "experiential" determinants,[372] I claim that the malpractice resulting in the birth of an unwanted child deprives a mother of the right to direct her own biological destiny because she has now, against her wishes, become a *mother.* The role and responsibility that accrues with motherhood requires a woman (or any parent) to direct her energies and resources to raising a child. This responsibility should not be minimized. However, it may be incompatible with a woman's developing herself and honing her potential contributions to society. Forcing the woman to abdicate this right to self-determine her own fate, to pursue her own happiness, should be compensable in its entirety. Some might claim this is selfish. But there is a litany of childless women whose selfless contributions to society should not be discounted or minimized.[373]

As Justice Brandeis once stated, "[t]he 'right to life' guaranteed by our Constitution is now being interpreted according to demands of social justice and of democracy as the right to *live*, not merely to exist."[374]

Let's take a final look at *Emerson*. It is tempting not to call this decision blatantly sexist if only because that would mean many other jurisdictions are similarly guilty. So, let's take a *sotto voce*[375] approach and illustrate the situation by recrafting the facts. Let's assume Ms. Emerson had cancer and didn't want to saddle her husband with the costs/efforts of raising another child, and for that reason she decided on sterilization. What if she died? And what if Mr. Emerson, the surviving parent, was the sole plaintiff seeking child-raising costs? Would the verdict be the same?

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370. Evans, *supra* note 365, at 113.

371. Andorno, *supra* note 356, at 91. *See* Fernand Keuleneer, *"Wrongful Birth", Liability and Indemnification: An Uneasy Fit*, INSTITUT EUROPÉEN DE BIOÉTHIQUE, https://www.ieb-eib.org/ancien-site/pdf/article-keuleneer-wrongful-birth.pdf (last visited July 20, 2020).

372. Chamallas, *supra* note 326, at 386–87.

373. *E.g.*, Lise Meitner (physicist, *see supra* note 1), Dr. Alice Hamilton, Rebecca Gratz, Lilian Wald, Jane Addams.

374. THE WORDS OF JUSTICE BRANDEIS, *supra* note 2, at 67 (emphasis in original).

375. To say something under the breath, often for dramatic emphasis. *Sotto voce*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/sotto%20voce (last visited July 10, 2020).