

# A VIEW FROM THE CRADLE: TORT LAW AND THE PRIVATE REGULATION OF ASSISTED REPRODUCTION

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This Article has benefited from the thorough research assistance of Mary Cloutier. I am also grateful to Daniel Levitas and his colleagues at the *Emory Law Journal*. © Michele Goodwin 2010

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## INTRODUCTION

“*And this,*” said the Director opening the door, “*is the Fertilizing Room.*”<sup>1</sup>

Nadya Suleman—*mama non-grata*—has become a celebrity of sorts; she is known now as the infamous “octo-mom” for giving birth to octuplets through a sophisticated medical procedure involving forty-six doctors and extensive medical treatments for her infants.<sup>2</sup> Birthing octuplets is incredibly rare, but concern over Suleman’s pregnancy must be understood in context; high order multiple births are generally celebrated in the United States.<sup>3</sup> Typically, references to divine intervention, miracles, God, and religion attend multiple births, as in the cases of the McCaugheys, Masches, and Morrisons, to name but a few.<sup>4</sup> Setting Suleman’s case apart for many is the fact that she is the indigent mother of six other children, three of whom receive government assistance for various disabilities.<sup>5</sup>

However, the dynamics of Suleman’s case must not be examined in intellectual isolation. The frequency of large multiple births now dulls public excitement in anticipation of twins, triplets, and quadruplets. According to the Centers for Disease Control (CDC), the number of multiple births in the United States has skyrocketed over the past twenty years.<sup>6</sup> Based on the empirical

<sup>1</sup> ALDOUS HUXLEY, *BRAVE NEW WORLD 3* (First Perennial Classics 1998) (1932).

<sup>2</sup> Chris Ayers, *Octuplets Mother Nadya Suleman: I’ll Stop My Life for Them*, TIMESONLINE (Feb. 7, 2009), [http://www.timesonline.co.uk/tol/news/world/us\\_and\\_americas/article5679572.ece](http://www.timesonline.co.uk/tol/news/world/us_and_americas/article5679572.ece).

<sup>3</sup> For instance, thousands of glowing magazine and newspaper articles have been written about the McCaughey septuplets. More recently, the Masches and Morrisons (sextuplet parents) were hailed for their similarly large gestations. See, e.g., Emily Cook, *The Joy of Sextuplets*, MIRROR, Aug. 28, 2007, at 18 (describing the birth of the Masche sextuplets); *Dateline: Seven Turn Seven: McCaughey Septuplets Turn Seven* (NBC television broadcast Nov. 21, 2004) (noting that the septuplets were “famous from the moment they were born”); *The Today Show: Bryan and Jenny Masche Introduce One-Year-Old Sextuplets* (NBC television broadcast June 19, 2008) (presenting an interview in which Jenny Masche recounted both the near-death experience and subsequent joy that accompanied the sextuplets’ birth); see also Susan Reinhardt, *Oh, Baby! (and Baby, and Baby!)*; *Four WNC Families Blessed with Triplets in Recent Months*, ASHEVILLE CITIZEN-TIMES (Asheville, N.C.), July 7, 2002, at 1C; Tamie Ross, *McCaughey Septuplets Inspirational*, DAILY OKLAHOMAN (Okla. City, Okla.), Dec. 2, 2000, at 2B.

<sup>4</sup> See, e.g., Brian M. Christopher, ‘*Seven from Heaven*’: *Septuplets’ Father Tells Tales of Trial and Triumph*, INTELLIGENCER J. (Lancaster, Pa.), Feb. 25, 2000, at A1 (describing the McCaugheys’ belief that their septuplets are a blessing and that God is helping them spread the message that life is precious).

<sup>5</sup> Lorena Mongelli & Jeremy Olshan, *Octomom Web-Beg—Her New Site Seeks Charity for Her Brood*, N.Y. POST, Feb. 12, 2009, at 26 (“Suleman has] been getting \$490 a month in food stamps in addition to Social Security disability payments . . .”).

<sup>6</sup> See, e.g., Joyce A. Martin et al., *Births: Final Data for 2006*, NAT’L VITAL STATS. REP., Jan. 7, 2009, at 20, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57\\_07.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_07.pdf) (noting that from 1980 to 2004, the rate of twin births increased by 70% and that the rate of triplets and higher order multiple births “climbed more than 400 percent during the 1980s and 1990s”).

literature, it comes as little surprise to scholars that assisted reproductive technology (ART) is blamed for the “100-fold increase in the occurrence of multiple-infant births over the past two decades.”<sup>7</sup> Yet, it would surprise the general public that the probability of a multiple birth is less than two percent in the general population; however, with fertility treatments it is over thirty percent more likely that a multiple birth will result.<sup>8</sup> Data for 2005 and 2006 (the latest available) record the highest numbers of multiple births ever documented.<sup>9</sup>

According to the U.S. Department of Health and Human Services, there were 143,625 live multiple births in 2006, composed of 137,085 twin births, 6,118 triplet births, 355 quadruplet births, and 67 quintuplet and other higher order births.<sup>10</sup> Rising numbers of multiple births are an international trend that threatens the health of both mothers and infants.<sup>11</sup> With the rise in multiple births, government agencies in the United States and abroad report alarming rates of stillbirth, miscarriage, infant mortality, and perinatal mortality.<sup>12</sup> The increased use of ART is credited with stark increases in multiple births. In the United States, it is estimated that one percent of babies are born using reproductive technologies.<sup>13</sup> The trend in increased, high order, multiple births can be traced in the medical and public health literature, which indicates that the increase came in two distinct “reproductive waves.” For example, previous

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<sup>7</sup> *Multiple Births from In Vitro Down: Pregnancy, Live Birth Rates Still Going Up Despite Guideline Limitations*, WEBMD.COM, Apr. 14, 2004, <http://www.webmd.com/infertility-and-reproduction/news/20040414/multiple-births>.

<sup>8</sup> See *HealthWeek: Multiple Births* (PBS television broadcast Nov. 12, 1999), available at [http://web.archive.org/web/20040617042232/http://www.pbs.org/healthweek/featurep1\\_306.htm](http://web.archive.org/web/20040617042232/http://www.pbs.org/healthweek/featurep1_306.htm) (reporting on the growing number of couples using fertility treatments and the increasing number of resulting multiple births).

<sup>9</sup> Martin et al., *supra* note 6, at 83 tbl.39. The total number of multiple births (twin plus triplet-and higher-order births) peaked in 2006 at 143,625 (137,085 and 6,540, respectively). In 2005, the total was 139,816 (133,122 and 6,694, respectively); these numbers were higher than in any previous years. *Id.* It is worth noting, however, that triplet-and-higher-order births actually peaked in 2003 at 7,663; they totaled more than 7,000 each year from 1998 to 2004, but fell below 7,000 in 2005 and 2006. *Id.* Thus, the record number of overall multiple births (twin plus triplet plus higher order births) in 2005 and 2006 was due to an increase in *twin births*, and is not necessarily attributable to an increase in triplet and higher order births. *See id.*

<sup>10</sup> *Id.* at 20.

<sup>11</sup> See Int’l Comm. for Monitoring Assisted Reprod. Tech., *World Collaborative Report on Assisted Reproductive Technology*, 2002, 24 HUM. REPROD. 2310 (2009).

<sup>12</sup> Valerie Beral & Patricia Doyle, *Births in Great Britain Resulting from Assisted Conception, 1978–87*, 300 BRIT. MED. J. 1229, 1229–33 (1990) (noting a significantly greater incidence of premature births, low birthweight infants, stillbirth, perinatal mortality, and infant mortality among multiple gestations, as compared to singletons, in Great Britain between 1978 and 1987); *see also* Martin et al., *supra* note 6, at 18 (noting the strong influence of the large increase in multiple births on low birthweight in the United States).

<sup>13</sup> *See, e.g.*, Anna Mulrine, *Making Babies*, U.S. NEWS & WORLD REP., Sept. 27, 2004, at 60, 62.

scholarship notes the near doubling of high order births (quintuplets and above) between 1989 and 1998, which could appropriately be considered the first wave.<sup>14</sup> The relatively rapid increase in high order births continued into the next wave, which occurred from 1999 to the present. During this second wave, multiple birth families—such as the Gosselins, Morrisons, and Maches—and individual mothers—such as Nadya Suleman—captivated the public’s attention.<sup>15</sup>

The Suleman case correctly exposes some harmful repercussions of maternal autonomy and choice, as well as the gaps in enforcement of ethical protocols within those medical communities practicing ART. However, most notably absent from the debate about the Suleman case and ART in general are the tort law implications. Is there nothing tort law has to say about the serious medical harms that befall ART babies and children? Tort law may in fact provide a desirable, muscular framework for addressing an area largely unplumbed by legal scholars and severely under-regulated by the government. This gap could be attributed to the conventional view that familial immunity should apply only to negligently and intentionally inflicted parental harms (thus narrowing the types of cases permissible within tort law), or the mistaken view that multiple births are generally safe and isolated.

This Article proposes a paradigm shift. It analyzes the viability of tort law to address the private and costly harms resulting from negligent application of ART. These harms include the intentional and negligent conception of children with significant disabilities. This Article articulates the need for a nuanced approach to tort law in the realm of child–parent conflict—an approach that shifts the social and economic burdens of infant and child harms to parents because they are best situated to avoid the risks of harm. This Article addresses a gap in socio-legal scholarship to unpack when, how, and why tort liability should apply to ART cases. It also anticipates the expanded application of tort theories in traditional intra-familial contexts.

Part I analyzes the rise in reproductive technologies, placing the expanded use of such treatments in the context of demands to aid infertile couples and

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<sup>14</sup> Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1736 (2008); *Premature Septuplets Make Medical History*, SEATTLE TIMES, July 14, 2001, at A2.

<sup>15</sup> See articles cited *supra* at notes 2–5 and *John & Kate Plus Eight: Episode Guide*, TLC.DISCOVERY.COM, <http://tlc.discovery.com/tv/jon-and-kate/episode-guide.html> (last visited May 13, 2010).

individuals in producing offspring.<sup>16</sup> It articulates a distinction within the delicate ART landscape, observing that reproductive technologies present some serious health harms but also surely help facilitate some aspects of social justice by accommodating careers for women and expanding parental opportunities for gay men and women. Part II illuminates the hidden costs of ART, examining its less desirable features, which include multiple births, low birthweight babies, and fetal birth defects. Part III offers a critique of current federal policy, exposing its weaknesses and inefficiencies. Part IV presents the socio-legal thrust of the Article, arguing that ethical and legal problems emerging from ART illuminate not only physician–patient conflicts of interests but also parental–fetal and parental–child conflicts of interest. These conflicts extend beyond the metaphorical, resulting in serious illnesses and even death in some cases. Accordingly, Part IV considers the role and applicability of tort law to regulate the private spheres of reproduction. Part V concludes the Article by explaining that greater emphasis on the fiduciary responsibilities of physicians to their patients and parents to their children could reduce adverse health outcomes for ART patients and their babies.

## I. AUTONOMY’S LIMITS

The CDC reports that the frequency of ART procedures in the United States has more than doubled over the past decade, from 81,438 operations in 1998, to 142,435 in 2007.<sup>17</sup> These figures represent a dramatic increase in the utilization of ART but fail to account for some reproductive treatments that involve aggressive hormone therapies to achieve fertilization and pregnancy. Interestingly, a practice that was not anticipated to become an industry is now deeply embedded in our culture.

Section A examines who uses and benefits from ART and why. It challenges the normative conclusions that ART is simply a means of addressing infertility since that response fails to account for the many fertile men and women who use reproductive services. Section B addresses empirical

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<sup>16</sup> Assisted reproduction also assists males who have a low sperm count. It could be said that assisted reproduction is really assisted fertilization. See S. Bhattacharya et al., *Conventional In-Vitro Fertilisation Versus Intracytoplasmic Sperm Injection for the Treatment of Non-Male-Factor Infertility: A Randomised Controlled Trial*, 357 LANCET 2075 (2001) (noting that intracytoplasmic sperm injection offers an acceptable alternative to in vitro fertilization (IVF) in the presence of male infertility factors).

<sup>17</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T HEALTH & HUMAN SERVS., 2007 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 63 (2009), available at [http://www.cdc.gov/art/ART2007/PDF/COMPLETE\\_2007\\_ART.pdf](http://www.cdc.gov/art/ART2007/PDF/COMPLETE_2007_ART.pdf) [hereinafter 2007 ART SUCCESS RATES].

trends, briefly describing the rise in ART services and making an uncontroversial claim: the rapid growth and frequency of ART prescriptions and treatments indicates the need to consider a broader legal landscape to address the harms and pitfalls that inevitably occur.

#### A. *Infertility: That Nasty Beast*

Reproductive politics have evolved alongside technologies that provide enhanced opportunities to parent. Indeed, cabined within the term “reproductive politics” is a broad set of reproductive considerations, including personal ones. When Dr. Harvey Stein refers to female evolution as “the nasty, politically incorrect son of a bitch that says, ‘I want young lionesses guarding the cubs’—it doesn’t know about careers and delayed childbearing,”<sup>18</sup> he exposes a growing tension among women, that pursuing a career may backfire against their hopes to mother.

For example, a woman’s reproductive prime occurs barely beyond high school age and lasts through the time when most women are completing college and thinking about their careers. On the other hand, reproductive decline accelerates rapidly at the point that coincides with serious career demands in academia and elite professions in law, science, and medicine.<sup>19</sup> Dr. Stern’s raw observation captures this murky intersection of reproductive and career choices with wit and cold reality: although women’s options within the workplace have evolved, their biological clocks remain fixed. Maternal biology, it appears, cares very little about career dynamics. Thus, a paradox unfolds; numerous scientific studies confirm that after age thirty-five, women are reproductively “old,” while sociologically they are reaching stride in their careers, education, and achieving other indicators of success, such as home ownership.

Scientists refer to pregnancy after thirty-five as “delayed childbearing.”<sup>20</sup> In a study published by *Pediatrics*, researchers expose alarming health trends among mothers within this age cohort. According to Suzanne Tough and colleagues, pregnancies after thirty-five accounted for “78% of the change in [low birth weight] rate in the population and 36% of the change in preterm

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<sup>18</sup> Patricia Edmonds, *Making Babies*, WASHINGTONIAN, Dec. 2004, at 172, 175 (quoting Harvey Stern).

<sup>19</sup> At a recent breakfast meeting among women in senior leadership at Big Ten universities, two of the four women at my table shared that they felt compelled to hide their pregnancies from the deans of their departments.

<sup>20</sup> See Suzanne Tough et al., *Delayed Childbearing and Its Impact on Population Rate Changes in Lower Birth Weight, Multiple Birth, and Preterm Delivery*, 109 PEDIATRICS 399, 399 (2002).

delivery rate in the population.”<sup>21</sup> In addition, Tough’s study found that multiple birth rates increased with delayed childbearing, “by 15% for twins and 14% for triplets.”<sup>22</sup> Most startling are the findings on higher order multiple births. Delayed childbearing accounted for 69% of the increase in triplets.<sup>23</sup>

Delayed childbearing also increases the risk of chromosomal abnormalities: In more than 40% of pregnancies involving women over thirty, chromosomal abnormalities are present in the fetus, and abnormalities rise to about 70% in women forty and over.<sup>24</sup> The scientific research in this area leads to what may be unwelcome conclusions for many women: pregnancy after forty is less likely to occur, but when it does it poses higher risks (for mother and child) than when a woman is in early adulthood. Furthermore, in vitro technologies cannot reverse reproductive aging, and, more importantly, older women are unlikely to become pregnant even with the use of sophisticated reproductive technologies.

According to the CDC, as of 2002, approximately 12% of women of reproductive age (over 7.4 million women) in the United States have had either an infertility-related medical appointment or service at some point in their lives.<sup>25</sup>

It is well established in the scientific literature that fertility rates decline as women age.<sup>26</sup> Assisted reproductive technology may be perceived as a corrective to this aspect of aging, but such an interpretation would overstate ART’s capabilities. The increased use of ART, despite risks of increased multiple births and babies born with low birthweights, demonstrates in clear terms the overwhelming desire to become a parent. For many infertile women, ART may rescue them from the fate of never giving birth. For these women

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (noting, however, that “[w]hen in vitro fertilization pregnancies were excluded, the change was . . . 9% for triplets”).

<sup>24</sup> Edmonds, *supra* note 18, at 175.

<sup>25</sup> 2007 ART SUCCESS RATES, *supra* note 17, at 3. The data relied upon by the CDC comes from the 2002 National Survey of Family Growth. *Id.*; see also Johannes L. H. Evers, *Female Subfertility*, 360 LANCET 151, 151 (2002) (noting that subfertility affects “about 10%–15% of individuals in the western world”); Anne T. Fidler & Judith Bernstein, *Infertility: From a Personal to a Public Health Problem*, 114 PUB. HEALTH REP. 494, 496 (1999) (noting that as of 1995, “approximately 7% of married couples (more than two million couples) in the United States reported experiencing difficulty in achieving a pregnancy”).

<sup>26</sup> Evers, *supra* note 25.

and their partners, ART is more than a rational choice; it is a blessing.<sup>27</sup> Thus, it is no surprise that a growing number of women diagnosed as “infertile” rely on ART to conceive or to host babies that might not share their genetic material.<sup>28</sup>

### B. *The Mamas and the Papas*

Reproductive biotechnology has rapidly outpaced the development of legal frameworks to address it. Indeed, since the introduction of reproductive technology as a “market choice” for infertile couples in the 1980s, *reproduction* and *family* have taken on new medical, legal, and social meanings and constructions. Yet, the language of traditional or “natural” conception continues to dominate the language of assisted reproduction. The rapid growth of the reproductive industry has to some extent destabilized common legal understandings of “mother,” “father,” and “child.”<sup>29</sup> These conceptions fail to adequately describe the relationships and identities created by the new world of reproductive technology. A child born through reproductive technology might have as many as eight individuals contributing in some significant way to the reproductive process or possessing a recognized social interest during or after conception either as: a sperm donor, a surrogate carrier, an ova donor, the gestational carrier’s spouse if she is married (because in some states he becomes the legal father of the child until relinquishing guardianship), the persons who initiated the process, adoptive-embryo parents (such as the case with “Snowflake<sup>®</sup>” services,<sup>30</sup> which facilitate the adoption of cryopreserved embryos), and future step-parents. In the case of such adoptions of cryopreserved embryos, the future parents may utilize the services of a surrogate for gestational purposes, which adds further nuance and complexity to the birth legacies of those children. For each “parental” link there is a

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<sup>27</sup> See, e.g., Nuala O’Connor, *Open Letter to the Archbishop*, IRISH TIMES, Mar. 6, 1999, at 10 (responding to critics of ART by noting that her children, conceived with the help of in vitro fertilization, are blessings resulting from a “morally informed” decision to undergo infertility treatment).

<sup>28</sup> See, e.g., NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATIONS 1 (2009) (“Fertility drugs constitute a \$3 billion yearly business. In 2005 there were more than 130,000 in vitro fertilization cycles (IVF) in the United States, with over 50,000 babies born.”); Mulrine, *supra* note 13, at 61–62 (“In the past decade alone, the number of ART babies has quadrupled, from 10,924 in 1994 to 40,687 in 2001 . . .”).

<sup>29</sup> An elegant work by Martha Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003), describes the benefits of a reorganized understanding of family.

<sup>30</sup> Nightlight<sup>®</sup> Christian Adoptions, *Snowflakes<sup>®</sup> Frozen Embryo Adoption Program: Frequently Asked Questions by Adopting Families* 1 (2007), available at <http://www.nightlight.org/downloads/nightlight-embryo-overview.pdf>.

distinct psychological, social, and even biological role, but that role does not necessarily give rise to a legal right to have a relationship with the child in each instance.

Assisted reproductive technology provides an open canvas on which to sketch the very complicated social and legal identities that spring forth from this mix of technology, biology, law, and commerce. For example, the reproductive journey of a child conceived through ART may be far more involved than a nine-month gestation. An ART child's legal parents might not be the biological parents, and the biological mother might not be the gestational parent who ultimately delivers the child. This in large part has to do with technology, including the internet, which provides a means for individuals to pick and choose players from across the world who will help to bring about the creation and gestation of a child. For example, a woman who desires to have a child might purchase sperm from a man in Brooklyn, obtain ova from a provider in California, and select a surrogate from a small town in Wisconsin. Each of these participants would have a unique legal—although not always biological—connection to the child, and depending on the state in which the surrogate lives, the woman who pieced together this complicated matrix may or may not have any legal relationship to the child until the gestational carrier (surrogate) relinquishes the child through adoption.

At least one commentator has characterized the rise in fertility-related services as a “flood[ing of] the market,”<sup>31</sup> a phenomenon that occurred in the 1980s and may be happening now.<sup>32</sup> Missing from that analysis is an examination of why the market is flooding as well as an assessment of who benefits and who is harmed by the robust utilization of ART. For example, some of this “flooding” may have benefited non-traditional ART patients, including gay men and women and single heterosexual men. Improved technology offers greater accessibility and reductions in procedure costs, resulting in greater competition within the market for ART services. However, with increased competition, physicians' and clinics' pecuniary interests may overshadow their fiduciary responsibilities.<sup>33</sup> This heightened financial interest—with limited (if any) accountability for mistakes or poor outcomes—

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<sup>31</sup> See Gina Kolata, *Fertility Inc.: Clinics Race to Lure Clients*, N.Y. TIMES, Jan. 1, 2002, at F1 (quoting Dr. Richard Rawlins, lab director for a reproductive care center in Chicago).

<sup>32</sup> See *id.*

<sup>33</sup> See, e.g., Michelle Oberman, *Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L. REV. 451 (2000); Sonia M. Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 MICH. J. GENDER & L. 217 (2009).

leads to aggressive marketing tactics to attract vulnerable, mostly cash-paying patients.<sup>34</sup>

ART discourse often uses the language of “choice” and “freedom,” which the technology does provide, but not without the potential for grave medical consequences and severe economic burdens.<sup>35</sup> In 2007, Frieda Birnbaum, a sixty-year-old psychologist, became the oldest woman to give birth to twins in the United States, doing so with the aid of ART.<sup>36</sup> She, like a growing population of ART users, was not childless; rather, she was the mother of three other children.<sup>37</sup> According to Birnbaum, “My daughter feels I should be living in Florida having a good life . . . . I hope when she’s older, she’ll see this and understand she has choices. I don’t feel like I’m 60.”<sup>38</sup>

Birnbaum is hardly alone in viewing ART as a matter of personal choice, unbounded by the constraints of age or rules of law. Days from her sixty-seventh birthday, Maria del Carmen Bousada de Lara, a Spanish woman who reportedly admitted to lying about her age to receive fertility treatments, gave

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<sup>34</sup> *Id.*

<sup>35</sup> See David BenEzra, *In-Vitro Fertilisation and Retinoblastoma*, 361 LANCET 273, 273 (2003) (“A high frequency of cytogenetic abnormalities and errors in cell-cycle regulation are detected in oocytes generated from IVF or intracytoplasmic sperm injection.”); Fiona Bruinsma et al., *Incidence of Cancer in Children Born After In-Vitro Fertilization*, 15 HUM. REPROD. 604, 604 (2000) (noting short-term complications associated with ART, but finding that children conceived using ART do not have a significantly increased risk of cancer relative to the general population); William M. Buckett et al., *Obstetric Outcomes and Congenital Abnormalities After In Vitro Maturation, In Vitro Fertilization, and Intracytoplasmic Sperm Injection*, 110 OBSTETRICS & GYNECOLOGY 885, 885 (“All ART pregnancies are associated with an increased risk of multiple pregnancy, cesarean delivery, and congenital abnormality.”); Nancy S. Green, *Risks of Birth Defects and Other Adverse Outcomes Associated with Assisted Reproductive Technology*, 114 PEDIATRICS 256, 256 (2004) (noting that increased risks associated with ART, such as prematurity, low birthweight, and infant mortality, are “directly attributable to the increased rates of multiple gestations”); Ozkan Ozturk & Allan Templeton, *In-Vitro Fertilisation and Risk of Multiple Pregnancy*, 359 LANCET 232, 232 (2002) (indicating that women who use IVF are at an increased risk of multiple pregnancies); B. Strömberg et al., *Neurological Sequelae in Children Born After In-Vitro Fertilisation: A Population-Based Study*, 359 LANCET 461, 461 (2002) (“Children born after IVF are more likely to need habilitation services than controls (odds ratio 1.7, 95% CI 1.3–2.2). For singletons, the risk was 1.4 (1.0–2.1). The most common neurological diagnosis was cerebral palsy, for which children born after IVF had an increased risk of 3.7 (2.0–6.6), and IVF singletons of 2.8 (1.3–5.8). Suspected developmental delay was increased four-fold (1.9–8.3) in children born after IVF. Twins born after IVF did not differ from control twins with respect to risk of neurological sequelae. Low-birthweight and premature infants were more likely to need habilitation than fullterm babies.”).

<sup>36</sup> *60-Year-Old Woman Gives Birth to Twin Boys*, FOXNEWS.COM, May 24, 2007, <http://www.foxnews.com/story/0,2933,274726,00.html>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

birth to twin boys in Barcelona.<sup>39</sup> Although a citizen of Spain, she traveled to California to receive her fertility treatment, while Birnbaum traveled to South Africa for hers.<sup>40</sup> More recently, Omkari Panwar, a seventy-year-old woman from a rural village in India, and her seventy-seven-year-old husband decided to spend their life savings to birth a son.<sup>41</sup> She gave birth to twins in June 2008.<sup>42</sup> More than likely, Mrs. Panwar will be adjusting to the “terrible twos” stage when this Article goes to press.

Three distinct issues surface in the narratives of women over fifty who have utilized ART. The first is that reproductive choices are autonomous, private decisions that should remain within the intimate family sphere outside the reach of government regulation. Second, natural selection cannot be easily reconciled with women’s contemporary physical, professional, or spiritual lives. Being fifty in 1950 offered a different view of the world and the roles and responsibilities of women. Where women once baked cookies for their grandchildren at that age, they now chair boards, preside over governmental agencies and corporations, and argue that they have just reached their stride.<sup>43</sup> According to Diane Aldrich, a fifty-year-old former school teacher from Maine now in a second marriage and raising a family, “I feel blessed that I am not waiting around pining for grandkids.”<sup>44</sup> In an interview with AARP magazine, Diane shared, “I feel energetic and revitalized—most days—by this brood.”<sup>45</sup> It could be argued that giving birth at sixty or seventy years old proves that a woman is physically fit to parent at that age. But such an interpretation of childbearing fails to consider the physical and mental health dynamics of motherhood. Finally, career choice and employment in highly competitive environments such as law firms, the accounting industry, and academia—which traditionally have been nearly exclusively male—have necessarily required delaying childbearing to achieve partnership, executive status, or tenure, at least for women of a certain generation.

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<sup>39</sup> Graham Keeley, *Family Turns Against World’s Oldest Mother*, 67, SUNDAY TIMES (London), Jan. 14, 2007, at 7; Beth Hale & Tom Worden, *World’s Oldest Mother Dies of Cancer Just Three Years After Giving Birth to Twin Boys, Sparking New Ethical Debate*, MAILONLINE, Sept. 1, 2009, <http://www.dailymail.co.uk/femail/article-1199866/Worlds-oldest-mother-dies-cancer-just-years-giving-birth-twin-boys.html>. Bousada de Lara died of cancer in 2009. *Id.*

<sup>40</sup> See Keeley, *supra* note 39; *60-Year-Old Woman Gives Birth to Twin Boys*, *supra* note 36.

<sup>41</sup> *Grandmother Aged 70 Gives Birth to Twins*, DAILY MAIL (London), July 4, 2008, at 33.

<sup>42</sup> *Id.*

<sup>43</sup> See Susan Crandell, *Oh Baby: A Growing Number of Older Men and Women Are Welcoming Newborns. What’s It Like to Be Changing Diapers at 50?*, AARP MAG., Sept. & Oct. 2005.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Yet it would be a mistake to read infertility as a diary affecting only women.<sup>46</sup> In 2004, a team of British researchers reported that “sperm counts have dropped by almost a third in a decade.”<sup>47</sup> The study, which involved 7,500 men who visited the Aberdeen Fertility Centre between 1989 and 2002, revealed that “average sperm concentrations fell by nearly 30 [percent].”<sup>48</sup>

Thus, women are not the exclusive force behind the fertility industry. The compelling narratives of women over fifty also resonate with gay families, for whom ART represents a civil-rights-type solution to combat biological discrimination. This is because ART provides an option for gay families in states that forbid homosexual adoption or ban gay families from becoming foster parents to children who desperately need clean, secure, loving homes. For gay men and women, ART provides options that neither state laws nor the laws of nature seem to support. In this way, ART helps to facilitate a standard of reproductive social justice by equalizing access to parenting.

There are other reasons to applaud the advancements in technology that expand options for individuals and families prepared to bring children into their lives. Parenting is a beautiful experience and might enhance greater tolerance and patience in society. Perhaps, unlike natural selection, those who can use their wealth to engage ART services may be more economically stable and responsible. One could imagine that wealthy ART parents might provide many desirable opportunities for their children, including housing in secure neighborhoods and access to successful schools. Such assessments seem reasonable in light of the fact that most users of ART generally have greater economic resources than “natural” parents.

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<sup>46</sup> Cf. Sam Lister, *Careful, Lads, That Laptop Might Burn Your Genes*, TIMES (London), Dec. 9, 2004, at 3 (warning teenagers and young men to curtail use of laptop computers in their laps because increased heat exposure may lower sperm counts and reduce long-term male fertility).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* Other factors that may contribute to male infertility include pesticides, obesity, drug and alcohol use, smoking, chemicals, and radioactive material. See, e.g., Marilyn Marchione, *Male Infertility Can Be Caused a Number of Ways*, MILWAUKEE J. SENTINEL, Oct. 30, 1995, at 8 (“Sometimes there’s a structural problem like undescended testicles, blocked ducts or testicular torsion, where the testicles are twisted within the scrotum. Infertility also can result from radiation treatment, chemotherapy or some surgeries. In 40% of cases, the cause of infertility is unknown.”); Jennifer Trueland, *Men Still Believe Infertility Is a Woman’s Problem*, SCOTSMAN, Sept. 13, 1999, at 5 (“Few men were aware that smoking and drinking could affect their fertility, only a quarter knew that being overweight could also be a factor, a quarter would change their lifestyle if diagnosed with infertility problems, while a fifth perceived it as an older person’s problem.”); Valerie Ulene, *The M.D.: A Guy Thing Too; Infertility Can Be Fairly Common in Men, but Often It’s Undiagnosed—and Untreated*, L.A. TIMES, July 7, 2008, at F3 (reporting that numerous factors impact male fertility, including genetic disorders as well as certain lifestyle behaviors such as smoking or excessive alcohol or drug use).

However, even the staunchest libertarians stop short of an absolute commitment to autonomy when third-party harms arise. As Richard Epstein writes in a recent column, “it hardly follows that an exclusive right must necessarily be an *unlimited* one. After all, my exclusive use of my own land doesn’t allow me to pollute my neighbors with impunity.”<sup>49</sup> Increasingly in ART cases, promoting the autonomy of a potential parent stands in sharp contrast to a body of medical evidence, indicating that choice in some instances results in poor decision making.

For example, compelling scientific data reveals a plethora of medical problems that may afflict children conceived through ART. These problems include mild-to-severe cognitive delays, low birthweight, hearing impairment, blindness, cerebral palsy, other disabilities, and death.<sup>50</sup> Such third-party harms to the conceived child indicate that while use of ART may be driven by autonomous decision making, those most affected by its outcome stand the potential to suffer greatly over a lifetime.

Reproductive treatments stimulate women’s ovaries and have been linked to risky multiple births. In June 2007, Brianna Morrison gave birth to six babies after using Follistim, a powerful fertility drug, along with other

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<sup>49</sup> Richard A. Epstein, *Can Parents Name Their Child ‘Adolf Hitler’?*, FORBES.COM, Jan. 27, 2009, [http://www.forbes.com/2009/01/26/hitler-cake-shoprite-oped-cx\\_re\\_0127epstein.html](http://www.forbes.com/2009/01/26/hitler-cake-shoprite-oped-cx_re_0127epstein.html).

<sup>50</sup> See, e.g., N.Y. STATE TASK FORCE ON LIFE & THE LAW, ADVISORY GROUP ON ASSISTED REPRODUCTIVE TECHNOLOGIES, QUESTIONS AND ANSWERS ABOUT INFERTILITY AND ITS TREATMENT 53 (1998), available at <http://www.health.state.ny.us/publications/1128.pdf> (“[C]hildren from multiple births have a much higher chance of prematurity and low birthweight. Premature babies may suffer from several longterm medical problems that require extraordinary care or may even result in early death. Low-birthweight and premature babies are more likely to need prolonged hospitalizations after birth and to develop cerebral palsy, mental retardation, blindness and deafness than normal weight infants.”); Valentine Akande & Deirdre J. Murphy, Correspondence, *Neurological Sequelae in In-Vitro Fertilisation Babies*, 359 LANCET 717, 718 (2002) (“IVF is strongly associated with caesarean section delivery, as is method of delivery and cerebral palsy at lower gestational ages and in twin pregnancies.” (citations omitted)); Green, *supra* note 35 (highlighting risks associated with ART); P.O.D. Pharoah & T. Cooke, *Cerebral Palsy and Multiple Births*, 75 ARCHIVES DISEASE IN CHILDHOOD: FETAL & NEONATAL ED. 174–77 (1996) (“Multiple birth babies are at increased risk of cerebral palsy.”); Jennita Reefhuis et al., *Fertility Treatments and Craniosynostosis: California, Georgia, and Iowa, 1993–1997*, 111 PEDIATRICS 1163 (2003) (“This is the first study that has found associations between fertility treatments and craniosynostosis. However, the numbers are small; therefore the results should be viewed with caution.”); Meredith A. Reynolds et al., *Trends in Multiple Births Conceived Using Assisted Reproductive Technology, United States, 1997–2000*, 111 PEDIATRICS 1159, 1159 (2003) (“Multiple birth is associated with poor infant and maternal health outcomes, including pregnancy complications, preterm delivery, low birth weight, congenital malformations, and infant death.”).

treatments.<sup>51</sup> When it became clear during gestation that the fetuses were at serious risk, Morrison's doctors encouraged her to selectively reduce the number of fetuses.<sup>52</sup> With selective reduction her doctors expected that most of the fetuses would survive to viability, but without the procedure it was clear that some if not all would die either *in utero* or after birth.<sup>53</sup> Morrison and her husband refused to follow the physician's advice.<sup>54</sup> Each baby was in critical condition after birth; each was subjected to a battery of medical tests and treatments; and five required ventilators to breathe.<sup>55</sup> Six weeks after their births, all but one had died.<sup>56</sup>

Unfortunately, the scholarship in this domain often fails to scrutinize the limits of maternal autonomy and choice. In an admittedly landmine-filled space, feminist scholars (as well as those in other fields) neglect the opportunity to offer an internal critique of reproduction, choice, and the impact of ART on third parties—particularly the babies born using ART. The risks associated with ART extend beyond medical considerations. At the Sixth Annual Wells Conference on Adoption Law in 2010, two panels were devoted to the topic of “The Impact of Assisted Reproduction on Families.”<sup>57</sup> Lynne Marie Kohm, a professor of family law, noted that couples who use reproductive technologies suffer higher rates of divorce than their counterparts who conceive by traditional means.<sup>58</sup> Often those physicians who provide ART services play a complicated role in the lives of their patients—they serve

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<sup>51</sup> See *3d Sextuplet Dies, 3 in Critical Condition*, CHI. TRIB., June 17, 2007, at C10; Associated Press, *Third Minnesota Sextuplet Dies*, FOXNEWS.COM, June 18, 2007, <http://www.foxnews.com/story/0,2933,282732,00.html>.

<sup>52</sup> Colleen Carroll Campbell, Editorial, *Facing an Agonizing Decision, Parents Choose Principle over Pragmatism*, ST. LOUIS POST-DISPATCH, June 21, 2007, at C9; Peter J. Smith, *Couple Chooses Life and Sextuplets*, LIFESITENEWS.COM, June 12, 2007, <http://www.lifesitenews.com/ldn/2007/jun/07061207.html>.

<sup>53</sup> *Special Delivery: Morrison Sextuplets Born Early*, WCCO.COM, Jun. 12 2007, <http://wcco.com/topstories/Brianna.Morrison.sextuplets.2.368106.html>.

<sup>54</sup> “For us,” Ryan Morrison said, “there’s no difference between a fetus that’s undeveloped and a baby.” *Id.*

<sup>55</sup> See *12 Babies, 2 Mothers, 2 States—All in 1Day*, CHI. TRIB., June 12, 2007, at 10.

<sup>56</sup> Associated Press, *Fifth Minn. Sextuplet Dies*, MSNBC.COM, July 23, 2007, <http://www.msnbc.msn.com/id/19919224/>.

<sup>57</sup> *The 6th Annual Wells Conference on Adoption Law. The Future of the Family: Modern Challenges Facing Adoption Law*, CAPITAL UNIV. LAW SCH., Mar. 11, 2010, <https://culsnet.law.capital.edu/LawReview/Wells/Agenda.asp>.

<sup>58</sup> Lynne Marie Kohm, John Brown McCarty Professor of Family Law, Regent Univ. Sch. of Law, Remarks, *The Impact of Artificial Reproduction on Marriage, Divorce and Children: A Guide to Understanding the Issues in Self-governed Personally Responsible Decision-making*, *The 6th Annual Wells Conference on Adoption Law, The Future of the Family: Modern Challenges Facing Adoption Law*, CAPITAL UNIV. LAW SCH., Mar. 11, 2010, <https://culsnet.law.capital.edu/LawReview/Wells/Abstracts.asp#Panel1>.

as “pregnancy advocates,” harboring significant financial interest in the process, yet they are also responsible for their patients’ health. Indeed, endocrinologists benefit from the procedures whether their patients become pregnant or not. And to the extent that physicians desire to increase the likelihood of their patients becoming pregnant, more embryos than one are likely to be implanted. While the American Society of Reproductive Medicine (ASRM) offers guidelines that warn against implanting more than two embryos per cycle, if a patient wishes to have more implanted, 55% of doctors feel compelled to follow their patients’ desires.<sup>59</sup>

To be sure, this Article does not advocate banning assisted reproduction. It can, when controlled, be a relatively safe method to achieve pregnancy. Indeed, advocating the prohibition of ART and related services would be the equivalent of proposing the removal of all cars from roadways simply because some people drive recklessly. However, reckless driving—or, in this case, reckless reproduction—deserves serious scrutiny as the impacts extend beyond the reproductive ambitions of the potential parents. Reckless reproductive behavior impacts the health of babies, diverts scarce medical resources to high order births, and imposes significant economic costs in both public and private spheres. More specifically, reckless driving and reckless reproduction cannot be justified under a choice or autonomy framework. Instead, reckless reproduction often exposes the ethical misdeeds and negligent acts of those who help facilitate the pregnancies—both physicians and ART patients.

## II. THE HIDDEN COSTS OF REPRODUCTIVE AUTONOMY

As described above, ART’s appeal must be considered within broader legal, economic, medical, and social constructions. The seductive appeal of the technology can veil the less desirable aspects of this type of reproductive process. The hidden burdens of ART include aggressive hormone treatments consisting of daily injections of hormones that hyperstimulate the ovaries so dramatically that women produce up to ten or more times the number of ova in a typical month. A child borne using ART may also bear significant burdens as she is more likely to be born in a cluster (or multiples) and, as a result, to have a low birthweight.<sup>60</sup>

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<sup>59</sup> Robert M.L. Winston & Kate Hardy, *Are We Ignoring Potential Dangers of In Vitro Fertilization and Related Treatments?*, 4 NATURE CELL BIOLOGY (FERTILITY SUPPLEMENT) S14 (2002).

<sup>60</sup> See Green, *supra* note 35 (“[M]ost of the adverse outcomes associated with ART are directly attributable to increased rates of multiple gestations.”); *Fertility Treatments Increase Risk to Fetus*, PULSE, Mar. 18, 2002, at 20 (comparing a United States study and an Australian study that looked at the risk of

Multiple births necessarily translate to low birthweight and often require cesarean operations, thereby exposing fetuses and mothers to health risks.<sup>61</sup> The possibility of a multiple birth is less than 2% in the general population. However, with fertility treatments, the likelihood is more than 30%.<sup>62</sup> Because patients frequently consent to the risks associated with multiple births, and because they often are encouraged by physicians to pursue ART, important social policy questions must be addressed: What role should the government assume in the delivery of ART services? What is the role of tort law? And, perhaps most importantly what questions should be asked about prenatal harms and risks? Section A describes the high failure rate associated with reproductive technologies. Section B stresses the risks involved, and section C analyzes the racial, class, and religious implications of high-volume pregnancies.

### A. *Reproductive Gamble: ART's High Failure Rate*

To better understand what motivates women to utilize ART services, the causes of their infertility must be better understood. As discussed earlier, maternal age<sup>63</sup> is an irrefutable dynamic, but other factors contribute to maternal infertility, including poor health, high levels of environmental

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complications with babies conceived through ART and those conceived naturally); Martin et al., *supra* note 6, at 2; *Multiple Births from In Vitro Down*, *supra* note 7.

<sup>61</sup> The scientific literature establishing the connection between increased multiple births and ART is well-vetted and provides a different lens through which to view ART and the associated risks (to the gestator and fetus(es)), which are not always benign. See, e.g., T. Bergh et al., *Deliveries and Children Born After In-Vitro Fertilisation in Sweden 1982–95: A Retrospective Cohort Study*, 354 LANCET 1579, 1583 (1999) (attributing increased medical complications for IVF women to increased multiple deliveries and observing that the complications were “not caused by the in-vitro-fertilisation technique per se, but by the insertion of more than one pre-embryo per transfer”); Green, *supra* note 35; Karin A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, 1 U. ST. THOMAS J.L. & PUB. POL’Y 100, 103 (2007) (“The health risks complicated by multifetal pregnancies include severe gestational hypertension . . . .”); *Pregnancy Health Center: Multiple-Birth Pregnancies: What Can I Expect?*, PENN MEDICINE, [http://www.pennmedicine.org/health\\_info/pregnancy/000199.htm](http://www.pennmedicine.org/health_info/pregnancy/000199.htm) (last visited June 21, 2010) (detailing maternal health risks of multiple pregnancy such as gestational diabetes, high blood pressure, and postpartum hemorrhaging, as well as risks for infants, including low birth weight, birth defects, or death).

<sup>62</sup> See *HealthWeek*, *supra* note 8.

<sup>63</sup> See, e.g., Dawn P. Misra & Cande V. Ananth, *Infant Mortality Among Singletons and Twins in the United States During 2 Decades: Effects of Maternal Age*, 110 PEDIATRICS 1163 (2002); Reefhuis et al., *supra* note 50; Reynolds, *supra* note 50 (noting that among the problems arising with increased maternal age are “the risk for multiple birth among naturally conceived pregnancies”); Tough et al., *supra* note 20 (suggesting increases in low birthweight and preterm delivery are related to delayed childbearing); Stephen P. Spandorfer, *The Impact of Maternal Age and Ovarian Age on Fertility*, THE INTERNATIONAL COUNCIL ON INFERTILITY INFORMATION DISSEMINATION, INC., <http://www.inciid.org/article.php?cat=& id=489> (last updated Oct. 12, 2003) (“Age is the most important single variable influencing outcome in assisted reproduction.”).

toxins,<sup>64</sup> and a history of sexually transmitted diseases.<sup>65</sup> Numerous studies paint a discouraging portrait of reproductive outcomes for women who suffer from these socio-medical histories, including sterility, infertility, higher incidences of miscarriage, congenital abnormalities in their children, and other traumas.<sup>66</sup> Among this group are women willing to gamble on the possibility of conceiving using ART.

However, ART cannot correct emotional traumas associated with infertility and difficulty conceiving, and women who expect it to do so overestimate the sophistication of the technology and the skills of their physicians. They risk not only their own health but also that of their children. In some populations, ART constitutes reproductive roulette; conception might occur, but multiples rather than a singleton might result. For others the gamble will be whether any pregnancy will result. For example, Dr. Keith Blauer's claim that his clinic can help almost every couple achieve a pregnancy "if they're willing to use the technologies" is illusory.<sup>67</sup> Such aggressive fertility claims distort reproductive realities and misinform patients; ART's failure rate is estimated to be 70%.<sup>68</sup> Other boastful claims are equally misleading. While a surrogate

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<sup>64</sup> Exposure to dangerous environmental agents contributes to sterility, cancers, infertility, and other illnesses. See, e.g., Robert L. Brent, *Environmental Causes of Human Congenital Malformations: The Pediatrician's Role in Dealing with These Complex Clinical Problems Caused by a Multiplicity of Environmental and Genetic Factors*, 113 PEDIATRICS 957 (2004) (identifying environmental drugs, chemicals, and physical agents that have caused congenital malformations); Robert L. Brent et al., *A Pediatric Perspective on the Unique Vulnerability and Resilience of the Embryo and the Child to Environmental Toxicants: The Importance of Rigorous Research Concerning Age and Agent*, 113 PEDIATRICS 935 (2004); Robert W. Miller, *How Environmental Hazards in Childhood Have Been Discovered: Carcinogens, Teratogens, Neurotoxicants, and Others*, 113 PEDIATRICS 945, 945 (2004) ("Review of the literature reveals that environmental hazards cause adverse health effects that include sterility, infertility, embryotoxicity, low birth weight, skin lesions, neurodevelopmental defects, immunologic disorders, cancer, and fear of late effects.").

<sup>65</sup> See CDC, CDC FACT SHEET: CHLAMYDIA (2007), available at <http://www.cdc.gov/std/chlamydia/STDFact-Chlamydia.htm>. Other well documented risks associated with sexually transmitted diseases include hysterectomy, subfertility, ectopic pregnancies, and chronic pelvic pain. See Robert L. Brent & Michael Weitzman, *The Pediatrician's Role and Responsibility in Educating Parents About Environmental Risks*, 113 PEDIATRICS 1167, 1171 (2004) ("Sexually transmitted disease can . . . cause infertility or sterility, and increase the risk of cervical cancer."); Evers, *supra* note 25 (finding that women who delay childbirth may face increased exposure to sexually transmitted diseases); Nadereh Pourat et al., *Medicaid Managed Care and STDs: Missed Opportunities to Control the Epidemic*, 21 HEALTH AFF. 228, 229 (2002) ("[T]he burden of illness from STDs is exacerbated by infertility, pregnancy complications, cancer, and a greater susceptibility to HIV infection."); Brian M. Willis & Barry S. Levy, *Child Prostitution: Global Health Burden, Research Needs, and Interventions*, 359 LANCET 1417 (2002) (asserting that child prostitutes are at high risk for infectious disease, which can have a negative impact on the health of their future infants).

<sup>66</sup> See, e.g., Brent et al., *A Pediatric Perspective*, *supra* note 64.

<sup>67</sup> Edmonds, *supra* note 18, at 174 (quoting Dr. Keith Blauer).

<sup>68</sup> See Mulrine, *supra* note 13, at 64.

can successfully carry a baby to term, that is not the same as magically making an infertile woman pregnant. For women with unlimited resources, Blauer's clinic can offer reproductive choices that will not reverse infertility but rather provide opportunities to experience the birthing process or export the process altogether.<sup>69</sup> In other words, after a family has made numerous unsuccessful attempts to use their own biological supplies, they will often purchase eggs from younger, healthier women. As clinics compete for clients, factors such as prior success rates can be influential in a patient's decision making. But this process also can be manipulated, as some clinics may refuse to "treat" women who are least likely to become pregnant (often because of age or other circumstances). Screening out the most difficult cases thus heightens success rates.<sup>70</sup>

Assisted reproductive technology success rates are surprisingly low despite the increased frequency of its use across age groups in the United States and its high costs. Only a fraction of live births will result from ART services. For women under 35, only about 40% will experience a live birth after an in vitro fertilization (IVF) cycle.<sup>71</sup> As women age, the probability of achieving a pregnancy that results in a live birth through IVF significantly declines.<sup>72</sup> At age forty, only 17% of women using IVF services will achieve a live birth after an IVF cycle,<sup>73</sup> and for women over forty-four, the live birth rates and singleton live birth rates are close to 2%.<sup>74</sup>

### *B. Reproductive Roulette: High Stakes and Medical Risks of ART*

If ART can be medically complicated for resulting offspring, painful for women, and expensive, why do so many women and men play in such a high-

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<sup>69</sup> Other clinics also highlight their surrogacy services. Alternative Reproductive Resources, a Chicago egg donation and surrogacy agency, promotes surrogacy as an option for ordinary people. *The Surrogacy Journey: Not Just for the Wealthy*, LAW & HEALTH WKLY. 380 (2009). However, a typical surrogacy costs \$30,000–\$100,000. *Id.* To afford surrogacy, blue-collar worker "John" got two second jobs, and he and his wife took out a home equity loan, borrowed money from their parents, and cut back on vacations. *Id.*

<sup>70</sup> See, e.g., *Federal Reports Show Most Fertility Clinics Break Rules; Fewer Than 20 Percent Abide by Guidelines for Embryo Implantation*, GRAND RAPIDS PRESS (Mich.), Feb. 21, 2009, at A2 (citing competition among clinics to post good success rates). *But see* Mulrine, *supra* note 13, at 61 (highlighting the Sher Institutes for Reproductive Medicine in Las Vegas, which takes "some of the toughest cases"). The Sher Institutes is "headquarters for one of the largest chains of infertility clinics in America" and is known as a place of last resort for thousands of patients, including one Florida couple who spent \$200,000 but were unable to conceive a child. *Id.*

<sup>71</sup> 2007 ART SUCCESS RATES, *supra* note 17, at 32.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 29.

<sup>74</sup> *Id.*

stakes arena? It is unclear whether ART patients would agree *ex post* that the benefits outweigh the risks, and it is equally uncertain whether the full import of the risks associated with ART are known *ex ante*.<sup>75</sup> Despite known risks and low rates of achieving pregnancies,<sup>76</sup> an ART gestation is the closest simulation to a traditional pregnancy. For thousands of men and women, this is a critical factor in creating a family.

Unlike adoption, ART provides an opportunity for biological connection between the prospective parent and child. By contrast, adoption—particularly when it is trans-racial—exposes biological differences, which can otherwise be hidden within ART. Assisted reproductive technology maximizes the opportunity to select traits that match a family's profile. Many scholars refer to this as "choice." Some choices, however, come at a greater cost to the prospective parent and child. With ART pregnancies, the health of the potential mother, surrogate (if one is used), and potential fetus(es) are all implicated and potentially compromised.<sup>77</sup>

### 1. *The Complications*

The complications associated with ART may not be obvious to those women who utilize the technology. For example, with each fertility attempt (or egg retrieval), a potential mother subjects herself to the complications of general anesthesia.<sup>78</sup> These risks are well documented and acknowledged within the medical community. However, even surgical complications are typically overlooked in popular culture, thereby leading to the false perception that no risk—or very limited risk—is associated with assisted reproduction. For example:

A survey of in-vitro fertilisation clinics seeking recalled instances of serious morbidity and known fatalities revealed a wide variety of

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<sup>75</sup> See, e.g., Jane Bradbury, *Could Chromosome Analysis Improve IVF Success Rate?*, 356 LANCET 1497 (2000).

<sup>76</sup> For example, in one clinic, for women over forty, 16.1% of cycles resulted in live births. 2007 ART SUCCESS RATES, *supra* note 17, at 135.

<sup>77</sup> See Reefhuis et al., *supra* note 50, at 1163 (finding an "association between fertility treatments and craniosynostosis"); Strömberg et al., *supra* note 35 (reporting that children conceived after IVF are at high risk for cerebral palsy and estimating that IVF children are subject to three times the risk for developing the disorder).

<sup>78</sup> See, e.g., Sandra Coney, *Long-Term Effects of Assisted Conception*, 345 LANCET 976 (1995); Evers, *supra* note 25; Peter J. Neumann, *Should Health Insurance Cover IVF? Issues and Options*, 22 J. HEALTH POL., POL'Y & L. 1215, 1226 (1997) (noting the medical risks that IVF poses to women, including anesthesia-related complications).

complications, including two deaths because of the accidental failure to deliver oxygen during general anaesthesia, visceral injuries during egg retrievals, pelvic abscesses, serious infections, five serious vascular complications (one with residual hemiplegia), torsion of the ovary, and cancers discovered during or after treatment.<sup>79</sup>

Liz Tilberis, a popular magazine editor, died after numerous attempts to become pregnant. She described her fertility treatments as “ovary blasting” and attributed her ovarian cancer to the reproductive treatments she underwent to become pregnant.<sup>80</sup> Author Madelyn Cain recounts Tilberis’s painful journey to become pregnant and the allegation that ART treatments were the cause of Tilberis’s death.<sup>81</sup> Cain’s book illuminates female attitudes about pregnancy and the overwhelming desire or pressure to parent even at great expense to women’s health, as well as personal and family finances.<sup>82</sup>

Dr. Alice Whittemore, a professor at Stanford University, focuses much of her research on the possible link between cancers and reproductive technologies. She was among the first doctors to acknowledge that ovaries may be stressed by undergoing cycles to release exponentially more eggs than are naturally produced in a one-month ovulation cycle.<sup>83</sup> In one study examining ovarian cancer risks in white women, Whittemore discovered that fertility treatments increased the risk of ovarian cancer three-fold.<sup>84</sup> The study

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<sup>79</sup> Coney, *supra* note 78, at 976.

<sup>80</sup> See, e.g., MADELYN CAIN, *THE CHILDLESS REVOLUTION: WHAT IT MEANS TO BE CHILDLESS TODAY* 69–70 (2002) (noting that Tilberis underwent nine fertility cycles in her thirties and was convinced that her later cancer diagnosis was linked to the fertility treatments). Tilberis’s oncologist was far less adamant about a connection between ART and cancer, noting that at the time of Tilberis’s cancer, a strong scientific connection between hormone treatments and ART generally had not been associated with cancer. *Id.* Tilberis’s autobiography chronicles her struggle to become pregnant and subsequent journey with ovarian cancer. LIZ TILBERIS, *NO TIME TO DIE* (1998).

<sup>81</sup> CAIN, *supra* note 80, at 69–70.

<sup>82</sup> *Id.*

<sup>83</sup> R.E. Bristow & B.Y. Karlan, *Ovulation Induction, Infertility, and Ovarian Cancer Risk*, 66 *FERTILITY & STERILITY* 499 (1996); J.J. Nieto et al., *Ovarian Cancer and Infertility: A Genetic Link?*, 354 *LANCET* 649 (1999); Harvey A. Risch et al., *Parity, Contraception, Infertility, and the Risk of Epithelial Ovarian Cancer*, 140 *AM. J. EPIDEMIOLOGY* 585 (1994); Carmen Rodriguez et al., *Infertility and Risk of Fatal Ovarian Cancer in a Prospective Cohort of US Women*, 9 *CANCER CAUSES & CONTROL* 645 (1998); Mary Anne Rossing et al., *Ovarian Tumors in a Cohort of Infertile Women*, 331 *NEW ENG. J. MED.* 771 (1994); Alice S. Whittemore et al., *Characteristics Relating to Ovarian Cancer Risk: Collaborative Analysis of 12 U.S. Case-Control Studies*, 136 *AM. J. EPIDEMIOLOGY* 1184, 1188 (1992).

<sup>84</sup> Whittemore et al., *supra* note 83, at 1188.

also found that women who used fertility drugs but never achieved pregnancy were twenty-seven times more likely to develop ovarian cancer.<sup>85</sup>

Concern about increased risk of cancer among women undergoing aggressive hormone therapies seems reasonable considering the biological context: typically, a woman will produce one egg per month, but with hyperstimulation that number can increase to between eighteen and twenty. The health risks associated with such aggressive hormone treatments are not yet fully understood. Anecdotal evidence suggests that drugs like Pergonal may stress the ovaries, causing damage.<sup>86</sup> A study conducted by researchers at the University of California's Irvine Medical Center cautions that there is a possible link between fertility treatments and cancer in patients undergoing ART, and that cancer risks may extend to fetuses.<sup>87</sup>

## 2. *The Process*

Assisted reproductive technology processes vary.<sup>88</sup> With the advancement of fertility services, the menu of options available to patients has increased. For women, most ART services are invasive and non-therapeutic, meaning that these are not life-saving techniques. To the contrary, ART procedures are elective, often painful, and require strict adherence to specified drug protocols.<sup>89</sup>

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<sup>85</sup> *Id.*; see also Tom Reynolds, *Fertility Drugs May Raise Ovarian Cancer Risk*, 85 J. NAT'L CANCER INST. 84, 84-86 (1993) ("Because the never-pregnant group was small, the calculated odds ratio of 27 is very uncertain, as reflected in a 95% confidence interval of 2.3 to 315.6.").

<sup>86</sup> See Polly Summar, *The Cost of Infertility*, ALBUQUERQUE J., Oct. 3, 2004, at 10 (reporting that stimulating ovarian egg production with drugs like Clomid or Pergonal could stress and damage the ovaries, but also observing that having not been pregnant is already a risk factor for ovarian cancer).

<sup>87</sup> See Krishnansu Tewari et al., *Fertility Drugs and Malignant Germ-Cell Tumour of Ovary in Pregnancy*, 351 LANCET 957, 958 (1998) ("Since fertility drugs recruit follicles containing oocytes derived from germ cells, the germ cell may also be susceptible to any possible carcinogenic influence of fertility drugs.").

<sup>88</sup> AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES: A GUIDE FOR PATIENTS 18 (2008), available at [http://www.asrm.org/uploadedFiles/ASRM\\_Content/Resources/Patient\\_Resources/Fact\\_Sheets\\_and\\_Info\\_Booklets/ART.pdf](http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf) [hereinafter ASRM GUIDE].

<sup>89</sup> Women with "healthy" reproductive systems typically produce one ovum per menstrual cycle, while women with compromised systems might use reproductive technologies to hyperstimulate their ovaries to produce multiple ova. The more ova produced, the better the odds of creating an embryo for implantation. To hyperstimulate the ovaries, patients are prescribed a veritable cocktail of reproductive medications. *Id.* at 5, tbl.1. The drugs are administered during ovulation and include: clomiphene citrate, human menopausal gonadotropins (hMG), follicle stimulating hormone (FSH), recombinant FSH and leutinizing hormone (LH), and human chorionic gonadotropin (hCG). *Id.* With the exception of clomiphene citrate, which is taken orally, these drugs are injected daily and are more potent than their oral counterparts. *Id.* A woman also may need to take gonadotropin releasing hormone (GnRH) agonists or GnRH antagonists to prevent premature

For those seeking to enhance the production of eggs to create new embryos, they will commence an ART “cycle.”<sup>90</sup> A cycle begins with hormone therapy to stimulate the ovaries for the maximum production of eggs, with the intent to have the eggs transferred.<sup>91</sup> The second step involves retrieval of the biological material (eggs).<sup>92</sup> General anesthesia is introduced at this step as egg retrieval involves abdominal surgery to remove eggs from a woman’s ovaries.<sup>93</sup> While the outcomes associated with general anesthesia are generally very good, risks are nonetheless associated with the treatment, including death and paralysis.

The fertilization process is the next step, and the goal is to maximize the number of embryos created through the clinical combination of sperm and eggs. Cost effectiveness is associated with maximizing embryo production.<sup>94</sup> Because ART success rates are low, in order to achieve a pregnancy that will result in a live birth, patients will use more than one or two embryos.<sup>95</sup> Embryos can also be cryopreserved<sup>96</sup> for use later, guaranteeing the same genetic makeup for future offspring.<sup>97</sup> The final step is the implantation of embryos<sup>98</sup> directly into the cervix or the fallopian tubes.<sup>99</sup> Most cycles will not result in a live birth.<sup>100</sup>

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ovulation. *Id.* at 6; *see also* Adam Balen, *Pathogenesis of Polycystic Ovary Syndrome—The Enigma Unravels?*, 354 LANCET 966, 997 (1999) (“Ovulation has traditionally been induced with clomiphene citrate and then gonadotropin, or with laparoscopic ovarian surgery in those who are clomiphene resistant.”).

<sup>90</sup> ART procedures are collectively known as “cycles.” 2007 ART SUCCESS RATES, *supra* note 17, at 4.

<sup>91</sup> *Id.* at 19.

<sup>92</sup> *Id.*

<sup>93</sup> ASRM GUIDE, *supra* note 88, at 13.

<sup>94</sup> *Id.* at 9.

<sup>95</sup> Mulrine, *supra* note 13.

<sup>96</sup> Cryopreservation is a sophisticated medical technology used by ART consumers to preserve sperm, ova, and embryos for delayed implantation. The technique involves “freezing” reproductive biologics. *Cryo-Preserving Embryos and Sperm*, ONT. NETWORK OF EXPERTS IN FERTILITY, <http://www.onefertility.com/services/cryo-preserving> (last visited May 23, 2010).

<sup>97</sup> ASRM GUIDE, *supra* note 88, at 9. For a cohort of ART patients, cryopreservation is less advantageous because it is more difficult to establish a pregnancy with “thawed” embryos. *Cryo-Preserving Embryos*, *supra* note 96. The most significant advantage of using cryopreservation technology is that it affords a measure of choice for timing the implantation of embryos. *Id.*; *see also* *Family Beginnings: Egg Freezing: Risks and Benefits*, <http://www.ivf-indiana.com/education/egg-freezing-risks-benefits.html> (last visited May 23, 2010).

<sup>98</sup> ASRM GUIDE, *supra* note 88, at 7–10.

<sup>99</sup> 2007 ART SUCCESS RATES, *supra* note 17, at 3, 19, 41.

<sup>100</sup> *Id.* at 13 (“The 142,435 ART cycles performed at these [430] reporting clinics in 2007 resulted in 43,412 live births (deliveries of one or more living infants) and 57,569 infants.”).

### C. Class, Race, and Religion

With poor odds and serious medical risks,<sup>101</sup> the probability of birthing a healthy baby through assisted reproduction is relatively low. Nadya Suleman's desperate attempt to become pregnant resulted in pre-term octuplets with low birthweights and high risks of sustained medical disabilities.<sup>102</sup> That case captured international attention, particularly because Suleman already had six children.<sup>103</sup> Arguably, her story might have gone unnoticed were it not for the perfect storm: an international economic crisis with public repercussions in the family sphere, including working parents losing homes and multiple murder-suicides involving fathers killing their families, and a sense that these tragedies were caused by the economic disaster.<sup>104</sup> Suleman's bold statement of single-motherhood, despite her near-poverty status (living with her parents and receiving government assistance) and the disabilities of three prior children, inspired outrage among Americans struggling to stay in their homes and feed their families.<sup>105</sup>

By contrast, the Gosselins, a married couple with sextuplets and twins received a much different public reception. Their reality television show was one of the highest rated on the TLC Network in 2009.<sup>106</sup> The Gosselin children, however, have health problems similar to Suleman's children; several of the Gosselin children use respirators for significant periods of the day, and others demonstrate varying levels of disability.<sup>107</sup> Both stories reveal a

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<sup>101</sup> See, e.g., Liv Bente Romundstad et al., *Increased Risk of Placenta Previa in Pregnancies Following IVF/ICSI; A Comparison of ART and Non-ART Pregnancies in the Same Mother*, 21 HUM. REPROD. 2353, 2353 (2006) ("There was a six-fold higher risk of placenta previa in singleton pregnancies conceived by assisted fertilization compared with naturally conceived pregnancies.").

<sup>102</sup> Marrecca Fiore, *All Home at Last: The Challenge Is Just Beginning for the Suleman Octuplets*, FOXNEWS.COM (Apr. 15, 2009), <http://www.foxnews.com/story/0,2933,516436,00.html>.

<sup>103</sup> Mike Celizic, *Octuplet Mom Defends Her 'Unconventional' Choices*, MSNBC.COM (Feb. 6, 2009), <http://today.msnbc.msn.com/id/29038814/>.

<sup>104</sup> Adam Foxman & Teresa Rochester, *T.O. Father Involved in Murder-Suicide Had Lost Job Recently*, VCSTAR.COM (Sept. 17, 2009), <http://www.vcstar.com/news/2009/sep/17/thousand-oaks-deaths-were-murder-suicide-police/>; *Man Kills Wife and Five Kids After Being Fired*, CNN.COM (Jan. 27, 2009), <http://www.cnn.com/2009/CRIME/01/27/family.dead/index.html>; Mary Richard, *Father Admits to Killing Son over Child Support*, NOWPUBLIC.COM (Jan. 3, 2009), <http://www.nowpublic.com/world/father-admits-killing-son-over-child-support>.

<sup>105</sup> *Id.* Mongelli & Olshan, *supra* note 5.

<sup>106</sup> Lynette Rice, *'Jon & Kate Plus 8' Season Finale Scores Series-Best Ratings*, EW.COM (Mar. 25, 2009), <http://hollywoodinsider.ew.com/2009/03/25/jon-and-kate-pl-3>.

<sup>107</sup> Jessica Carlson, *The Gosselin Sextuplets*, EXAMINER.COM (June 4, 2009, 4:09 PM), <http://www.examiner.com/x-12100-Jon-and-Kate-Plus-8-Examiner-y2009m6d4-The-Gosselin-Sextuplets>.

reproductive roulette and demonstrate how high stakes and medical risks dot the ART landscape.

To speak of ART and its high failure rates is to introduce a discomfiting element into reproduction discourse. High rates of failure, infant mortality, and multiple births; low rates of live birth; and incidences of congenital abnormalities, hearing impairment, cerebral palsy, and other health risks<sup>108</sup> paint a portrait of ART services that stands in stark contrast to the conventional perception of the technology. Simply put, the health consequences to a mother and her fetuses are far more severe than portrayed in ART advertisements or reality television shows featuring families that have used ART.

Prior to the debacle caused by Nadya Suleman and her media representative in spring 2009, few pundits critiqued the serious health risks associated with ART. Instead, the media was quite complicit in sketching a perception of ART that failed to account for its steep financial costs and health risks. Consider the McCaugheys. In 1997, Kenny and Bobbi McCaughey became the parents of septuplets who were born two months premature. Instantly, they were media darlings.<sup>109</sup> Successful ART cycles rely in part on chance but in part on deliberate medical interventions and treatments. Yet, ironically, couples often use explicitly religious language to describe the ART process and its outcomes, claiming the process or result was a “miracle” or was “in God’s hands.”<sup>110</sup>

### *1. Religious Justifications*

Disentangling science and medicine from religion in the sphere of ART is not so easy. The consumers of ART often carry religion with them, and perhaps they should as it provides a level of security and hope. Religion is invoked even when multiple babies are born using dozens of doctors and the most sophisticated neonatal technologies.<sup>111</sup>

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<sup>108</sup> See BenEzra, *supra* note 35; Bruinsma et al., *supra* note 35; Ozkan Ozturk & Allan Templeton, *In Vitro Fertilisation and Risk of Multiple Pregnancy*, 359 LANCET 414, 414 (2002) (finding a correlation between IVF therapies and increased risk of multiple pregnancies); Strömberg et al., *supra* note 35.

<sup>109</sup> A LexisNexis Terms & Connectors search conducted on March 11, 2010, by this author was interrupted because it showed over 3,000 hits for “McCaughey and septuplets” in its “News, All” database.

<sup>110</sup> See Sonya Charles & Tricha Shivas, *Mothers in the Media: Blamed and Celebrated—An Examination of Drug Abuse and Multiple Births*, 28 PEDIATRIC NURSING 142, 144 (2002) (“Even the few editorial articles that were critical of the McCaughey’s choices framed the McCaughey’s decision as a family determined to beat the odds and who trusted in God to provide assistance in that goal.”).

<sup>111</sup> See, e.g., Robert T. Francoeur, *We Can—We Must: Reflections on the Technological Imperative*, 33 THEOLOGICAL STUD. 428 (1972).

Assisted reproductive technology occupies a unique space within the reproductive realm. Unlike the political landmines that spring from abortion or stem cell debates, religious couples seem to find far less conflict with this technology than other medical reproductive procedures and technologies. While couples in high-publicity multiple births may often invoke the image or assistance of God,<sup>112</sup> they tend to de-emphasize the strict regimens of hormone therapies, the purchasing of sperm or ova, the use of medical specialists prior to and after birth, and the high cost associated with the procedures. In fact, the high cost of ART may play a role in couples pressuring doctors to implant multiple embryos per cycle in an attempt to maximize the odds of becoming pregnant.

Invoking religious sentiment in this reproductive sphere may have benefited the advancement of the technology in unanticipated ways. The use of religious sentiment and praise of God strategically limits political and religious backlash. By containing the potential backlash and presenting ART as a ministry between God and medicine, ART consumers have preserved their independence and autonomy, essentially deflecting legislative interest in their clinical bedrooms.

Indeed, before the birth of Nadya Suleman's octuplets, it was expected that a multiple gestation resulting in live births would bring an outpouring of positive media attention, solicitations from local and national politicians, and numerous donations.<sup>113</sup> Such had been the case with the Morrisons, Maches, McCaugheys, and other similarly situated families in recent years.<sup>114</sup> An examination of what made Suleman's case different raises questions about class, race, and status in American reproductive politics.

## 2. *Race: A Filtered View of ART*

Race continues to matter even in a society described as "post racial." One could examine the public celebrity of the McCaugheys as an example of racial politics in reproduction. Such an assessment raises provocative questions,

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<sup>112</sup> For example, one week after Ivette Zapata-Smalls announced to the world that God had blessed her with septuplets, she suffered the loss of all seven through a miscarriage resulting from an infection. Her husband was later quoted as saying, "She feels like she murdered her kids. She feels like she let the world down." Andrew Jacobs, *An Infection Kills a New Jersey Woman's Unborn Septuplets*, N.Y. TIMES, Feb. 2, 2000, at B2.

<sup>113</sup> Nikitta A. Foston, *The Harris Sextuplets: One Year Later*, EBONY, Oct. 2003, at 164.

<sup>114</sup> See, e.g., *id.* ("[T]he reaction to the Harris sextuplets stands in stark contrast to the highly publicized [w]hite Iowa [McCaughy] septuplets.").

which are not the subject of this Article but are treated elsewhere.<sup>115</sup> Might the legacy of ART have offered a different path had the early users been African American? The McCaughey children received extensive and positive media attention, and they continue to enjoy a rich outpouring of support and attention through annual interviews on television news programs and cover placements on women's magazines. The media was not so kind nor so welcoming following the births of black octuplets to twenty-seven-year-old Nkem Chukwu, a Nigerian-born American citizen.<sup>116</sup> Instead of open embrace, media headlines following the births of Chukwu's octuplets urged restraint.<sup>117</sup>

As for Kenny and Bobbi McCaughey, they hit the lecture circuit and were featured on the covers of popular magazines and in thousands of newspaper articles.<sup>118</sup> The couple released a CD, and Bobbi became a minor celebrity, traveling the speaking circuit and delivering lectures about faith and fertility.<sup>119</sup>

The McCaugheys basked in a glow that Americans were willing to shine on them. A twelve-seat Chevrolet van, a lifetime supply of diapers, a new home, new appliances, mutual funds for the children, and free college tuition made their otherwise difficult journey seem easy and worth replicating.<sup>120</sup>

The carefully crafted image of ART families was defiled by Suleman.<sup>121</sup> She was neither married, white, nor middle class.<sup>122</sup> And while her octuplet pregnancy resulted in only one child more than the McCaugheys, the birth of her children took on the atmosphere of circus and bizarre pageantry, while the McCaughey's birth of seven had an air of austerity and almost religious reverence. Perhaps for that reason, few journalists bothered to report about birth defects associated with the McCaughey septuplets. In a recent search, only forty-one hits on LexisNexis were found for "McCaughey septuplets and birth defects." This is particularly revealing because more than 3,000 articles were found for the terms "McCaugheys and septuplets," using the same

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<sup>115</sup> See, e.g., Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1736 (2008).

<sup>116</sup> Rick Lyman, *Mother of the Octuplets Goes Home to Recover*, N.Y. TIMES, Dec. 31, 1998, at A10, available at <http://www.nytimes.com/1998/12/31/us/mother-of-the-octuplets-goes-home-to-recover.html>.

<sup>117</sup> Azell Murphy Cavaan, *A Multitude of Concerns—Restraint Urged in Treatment for Fertility*, BOS. HERALD, Jan. 10, 1999, at 19; *Octuplets: Too Much of a Good Thing?* (CNN television broadcast Dec. 23, 1998).

<sup>118</sup> Charles & Shivas, *supra* note 110, at 143.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 143.

<sup>121</sup> *Id.* at 142 (commenting that images of the prototypical white, middle-class, stay-at-home mother are still commonplace in films and advertising).

<sup>122</sup> Hedley, *supra* note 5.

database.<sup>123</sup> This could indicate that less than 2% of media reports about the McCaughey births discussed anything about the health conditions of the children. But in reality the McCaughey children have suffered health traumas similar to those suffered by Suleman's children. Two of the McCaughey children suffer from cerebral palsy, and at least one is hampered by mobility issues.<sup>124</sup> So, what should constitute success in the realm of ART? At the very least, the terminology of success in these spheres necessitates greater nuance and a commitment to honest interrogation.

Not all ART families have been received with warm embrace. Indeed, at times it appears that race is a factor in determining who gets the "baby bail-out" of government-subsidized cars, homes, and invitations to the White House. Recent births of black multiples expose the awkward distinctions.<sup>125</sup> Sara Eckels concludes that race influences public perceptions about reproduction.<sup>126</sup> A strong socio-legal literature and legal cases support her analysis<sup>127</sup> as does a recent article in *Ebony*, the popular African-American magazine:

[T]he reaction to the Harris sextuplets stands in stark contrast to the highly publicized [w]hite Iowa septuplets. In addition to a phone call from former President Bill Clinton and an invitation to the White House, the McCaughey family received an offer by Iowa's governor to build a new home, the donation of a new 12-seat Chevrolet van, cover stories in *Time* and *Newsweek* magazines, and free advertising in major newspapers for their family assistance fund.<sup>128</sup>

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<sup>123</sup> LexisNexis searches were conducted by this author on March 7, 2009.

<sup>124</sup> Amanda Pierre, *Surgery Set for McCaughey Child: 'More Normal' Walking Is the Goal Set for Nathan, the Sixth of the Iowa Septuplets*, DES MOINES REG., Nov. 8, 2004, at 1B.

<sup>125</sup> Foston, *supra* note 113, at 164. Even when aid is provided for black families, they are not the "poster children" for ART. *Tiny Graduates*, JET, July 15, 2002, at 32. A LexisNexis Terms & Connectors search conducted by this author on March 11, 2010, of "Thompson and Sextuplets" returned only 297 results in its "News, All database." A similar search of "McCaugheys and Septulets" stops at "more than 3,000" results. Of the first five hits in the Thompson search, none actually mentioned the Thompson sextuplets, and all but one mentioned the Gosselin sextuplets. A similar search for "Thompson w/s Sextuplets" retrieved only 173 hits, with the first hit referring to the Morrison sextuplets.

<sup>126</sup> See Foston, *supra* note 113, at 168. Freelance writer Sara Eckel observed that domestic birthing might be captured by a hierarchy of compassion, with black babies being at the bottom of that system. *Id.*

<sup>127</sup> See, e.g., DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1998); ANN MARIE SMITH, *WELFARE REFORM AND SEXUAL REGULATION* (2007); Dorothy Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 J.L. & POL'Y 63 (1999); see also *In re Primus*, 436 U.S. 412 (1978).

<sup>128</sup> Foston, *supra* note 113, at 168. It is worth noting, however, that the Thompson sextuplets received a \$25,000 gift from Jack and Jill of America, Inc., an African-American organization, on their first birthday, and

### 3. *Class and the Suleman Debate*

Nadya Suleman's case raises other issues. In late January 2009, the media thrust Suleman into the spotlight after she gave birth to octuplets. With the aid of forty-six doctors, countless nurses, and other specialists, the octuplets were retrieved from her womb via cesarean delivery.<sup>129</sup> Suleman accomplished this feat after having six embryos implanted in her uterus—two split, causing eight fetuses to develop.<sup>130</sup> It was not entirely unusual to have so many embryos implanted, as women attempt to increase the odds of becoming pregnant.<sup>131</sup> Neither federal nor state laws limit the number of embryos that may be implanted, although private organizations have established advisory guidelines.<sup>132</sup>

At first, Suleman declined interviews, instead choosing to issue a statement asking for privacy.<sup>133</sup> Early news, gathered by reporters trying to piece together Suleman's life, offered very few details.<sup>134</sup> Reporters from major news networks staked out her house, finding her neighborhood through anonymous sources.

But what Suleman may have thought was private became quite public when reporters discovered that the mother of octuplets was unmarried and, therefore, quite unlike Bobbi McCaughey, Brianna Morrison, Vicky Lamb, and Jenny Masche. And although she is the mother of other children from previous ART treatments—not unlike other couples who went back for more and got more than what they bargained for—her story raised a red flag. Why? Suleman can hardly be described as the only parent in the United States with a large family. Only a month before Suleman's delivery, Jim and Michelle Duggar announced on their website and to reporters the birth of their eighteenth child.<sup>135</sup> And

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the family was given a six-bedroom home, donated by the Freddie Mac Foundation. *Tiny Graduates*, *supra* note 125.

<sup>129</sup> Hedley, *supra* note 5.

<sup>130</sup> Ayers, *supra* note 2.

<sup>131</sup> ASRM GUIDE, *supra* note 126, at 9.

<sup>132</sup> *Id.*

<sup>133</sup> Jessica Garrison et al., *Mother of Octuplets Already Has Six Children: Doctors Asked If She Wanted to Selectively Abort, but She Refused*, L.A. TIMES, Jan. 30, 2009, at A1.

<sup>134</sup> *Id.*

<sup>135</sup> THE DUGGAR FAMILY, <http://www.duggarfamily.com> (last visited June 16, 2010); *see also* Laura T. Coffey, *Not Home Yet: 19th Duggar Baby Still in Hospital*, MSNBC.COM, May 7, 2010, <http://today.msnbc.msn.com/id/36991633>.

Jeannette and John Murphy of Atlanta<sup>136</sup> and Greg and Holly Richardson of Utah<sup>137</sup> have nearly fifty children between them. The Duggars, Murphys, and Richardsons all raise the question: *when will one more be enough?* But they are married couples, unlike single-parent Suleman, and with the exception of the Duggars, who never adopted, the Murphys and Richardsons have blended families.

To focus exclusively on Suleman's poor choices is to ignore thousands of other parents who make similar choices each year. Those families endure similar hardships, which are acutely felt when there is limited social support to help address the physical traumas of newborns and the emotional stresses on young parents. Deena Ryan, a young mother of quadruplets (born when she was twenty-four years old) has publicly lamented her choice to use ART. She told one reporter that she "wouldn't wish this on [her] worst enemy."<sup>138</sup> Ms. Ryan's vigilance to care for her children can be followed online through support networks. To peek into her life in this way is to get a glimpse into the struggles of a family trying desperately to cope with the high-stakes side of ART, where the disabilities overwhelm the parents and children. In a post about medical care for her children, she writes:

Hi, I am new to this group. I am a mother of quadruplets, two of whom have [cerebral palsy]. The kids are now 5.5 yrs. old. We have been to Ability Camp in Canada 4 times, and just can't logistically do the trip anymore. My daughter, Katherine, is a spastic quad and has done the most treatments (132) and we have only seen improvement in her oral motor control. Colin, spastic hemiplegia, has done 69 treatments and has been seizure-free since the last. We are looking into buying a [hyperbolic oxygen] chamber and I was told by a friend to look to this group for information and advice. I have sent for more information on the "inflatable" chambers from oxyhealth.com and wondered if any of you have experience with these or with similar ones. What are the pros and cons of these "portable" chambers? Are

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<sup>136</sup> *The Murphys: Big Family with a Big Heart*, CBSATLANTA.COM, Oct. 31, 2008, <http://www.cbsatlanta.com/news/17857862/detail.html> (noting that as of October 31, 2008, the Murphys had four biological children and twenty-two adopted children who were living and six deceased adopted children).

<sup>137</sup> *How to Manage a Family of 22*, ABCNEWS.COM, Oct. 28, 2005, <http://abcnews.go.com/GMA/AmericanFamily/story?id=1258529> (noting that as of Oct. 28, 2005, the Richardsons had four biological children and sixteen adopted children).

<sup>138</sup> *See HealthWeek*, *supra* note 8 (interviewing Deena Ryan, mother of twenty-month-old quadruplets).

they as effective as the standard kind? Any info would be greatly appreciated. Deena Ryan, Revere, MA.<sup>139</sup>

The medical struggles of Ms. Ryan's children provide a sobering image of ART "success." Ryan's babies were born premature and severely underweight, problems that are commonly associated with multiple births. Multiple birth pregnancies can cause severe emotional and medical trauma. Low birth weight is frequently cited in medical literature as associated with secondary medical problems such as hearing impairment (including deafness), blindness, and cerebral palsy.<sup>140</sup> Yet there is one difference between the Suleman and Ryan ART experiences: Deena Ryan was a first-time ART user, and she lamented that she was unaware and unprepared for what awaited her. Nadya Suleman, on the other hand, knew from five prior high-tech pregnancies (resulting in six children) exactly what the risks were and ignored them. Was that negligence, irresponsibility, or simply a private matter?

#### D. *The Gender Story*

My prior scholarship on assisted reproduction urged caution in this scientific field as the motivations for high-yield pregnancies may in fact be derived from "soft discrimination," meaning women make reproductive decisions not based on "real," *unburdened* choice but instead as a strategic decision to avoid career discrimination and double standards.<sup>141</sup> In other words, many women delay motherhood to avoid potential discrimination in

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<sup>139</sup> Deena Ohrt Ryan, posting to PARENT STORIES ABOUT HBO TREATMENTS (Oct. 29, 2002, 19:18:45), <http://www.netnet.net/mums/hbostories.htm> (discussing hyperbaric oxygen treatments).

<sup>140</sup> Maureen H. Hack et al., *School-Age Outcomes in Children with Birth Weights Under 750 g*, 331 NEW ENG. J. MED. 753 (1994); Howard W. Kilbride et al., *Preschool Outcome of Less than 801-Gram Preterm Infants Compared with Full-Term Siblings*, 113 PEDIATRICS 742, 742, 745 (2004).

<sup>141</sup> See, e.g., Michele Goodwin, *Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood*, 9 J. GENDER RACE & JUST. 1 (2005) (arguing that ART fails to resolve pregnancy and motherhood discrimination). As I have noted in my scholarship elsewhere:

For these young women, they understand or are advised by older women to delay pregnancy to increase their chances of "fair" opportunity at law firms, businesses, or university posts. This article describes this type of discrimination as "soft" because it exists without an actual act committed against a woman, the perception of discrimination is subjective, and therefore might be difficult to prove in traditional modes of adjudication. Yet, studies confirm that young women increasingly delay pregnancies, often against their preference, in order to avoid employment discrimination or the "pink collar" glass ceiling.

*Id.* at 2. Cf. Judith Warner, *Mommy Madness: What Happened When the Girls Who Had It All Became Mothers? A New Book Explores Why This Generation Feels So Insane*, NEWSWEEK, Feb. 21, 2005, at 42, 45–46 (noting that women are faced with an impossible "choice" between pursuing professional aspirations and child rearing).

elite employment. Both options, early career and delayed child bearing *or* early maternity and postponed career, are burdened choices.<sup>142</sup> For thousands of women, assisted reproduction helps them avoid employment pitfalls and potentially uncomfortable confrontations in the workforce, including asking for time off, a reduction in hours, or part-time employment in order to accommodate pregnancy and child-rearing. A study uncovering patterns of discrimination in the defense bar highlighted the difficulties for young women lawyers who—much like their male colleagues—would like to work and raise a family simultaneously but fear harassment and losing their jobs.<sup>143</sup>

The fact that young women of high school and early college age are their reproductive prime<sup>144</sup> is difficult to reconcile with social movements, educational opportunities, and contemporary social and political values for a few reasons. First, this biological truth fails to match our evolving egalitarian views of young women, their potential, and the importance of nurturing opportunities outside of the home-life sphere. Now, nearly forty years after *Roe v. Wade*,<sup>145</sup> and decades after the passage of Title IX<sup>146</sup> and Title VII,<sup>147</sup> the value of women's intellect, their contributions to society, and the rigor of their mental capacities is no longer in doubt. Second, while young women may be at their reproductive prime during their late teenage years, that does not automatically translate into a readiness for parenting. Birthing and parenting are quite different. The physical stamina needed to endure the equivalent of a challenging academic year is quite distinct from a life-long commitment to support, nurture, and help develop an external life.

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<sup>142</sup> According to Helayne Spivak, a leader in the advertising business:

There are so many things that organizations can do to retain their women employees—and so few organizations that choose to do those things. I've seen the resentment that a high-ranking woman causes when she takes maternity leave. I've seen the skepticism that emerges when she says that she'll be back. How can it be that so few companies, on Madison Avenue or elsewhere, offer on-site day care? More than a decade ago, Hill, Holliday in Boston created one of the finest day-care centers around. Yet very few agencies have followed that model.

Helayne Spivak, *Next Stop—The 21st Century*, FAST COMPANY, Sept. 1999, at 108. Spivak provides an female insider's perspective into the corporate advertising world and finds that women "are expected to sacrifice who they are as human beings" and "berate themselves" for trying to work around the insurmountable, politically charged choices of motherhood and/or career. *See id.* ("[E]ven those of us who create ads don't seem to know how to address women these days.")

<sup>143</sup> *Id.* at 14–17.

<sup>144</sup> Summar, *supra* note 86; *see also* Anne-Marie Nybo Andersen et al., *Maternal Age and Fetal Loss: Population Based Register Linkage Study*, 320 BRIT. MED. J. 1708, 1711 (2000).

<sup>145</sup> 410 U.S. 113 (1973).

<sup>146</sup> 20 U.S.C. § 1681 (2006).

<sup>147</sup> 42 U.S.C. § 2000e-2 (2006).

Third, as opportunities unfold for young women, so do our social expectations. Fifty years ago the fact that a young girl's ambitions were to marry and build a family immediately after high school might have been embraced as charming, and perhaps genteel. Today, such ambitions would cause alarm in guidance counselors and amongst the parents of many young women.

### III. PUBLIC AND PRIVATE LAW GAPS: WHY ART LAW DESERVES GREATER SCRUTINY

In Professor Naomi Cahn's new book *Test Tube Families*, she provides a thoughtful analysis of why the fertility market needs legal regulation.<sup>148</sup> According to Cahn, producing families is a paradox because it represents "for some, the most intimate of intimate acts and, for others, a multibillion-dollar business that simultaneously creates our closest relationships."<sup>149</sup> Is it the money or the outcomes that drive our concern? Does it matter? Indeed, we should be concerned about both, but for different reasons.

From a libertarian perspective, the answer to whether the state has anything meaningful or legitimate to contribute to a discussion about ART, maternal autonomy, and fetal harms is not clear at first glance. There are, what Richard Epstein might refer to as "fuzzy limits."<sup>150</sup> On one hand, we wish to preserve individual autonomy and avoid unnecessary state interference in the intimate spheres of individuals' lives. Yet, when vile externalities arise, including forcing children to cope with irreversible disabilities that result from the odious manipulation of reproductive specialists or the narcissistic choices of their parents, there must be a mechanism for addressing them. Part III addresses these fuzzy limits, specifically unpacking the weaknesses of current federal legislation and the gaps in private law that result from common law approaches to intra-familial immunity doctrine.

#### A. *Success: Terminology Failures*

Congressional involvement with ART has been narrow and limited. Nearly twenty years ago, Congress enacted the Fertility Clinic Success Rate and

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<sup>148</sup> CAHN, *supra* note 28.

<sup>149</sup> *Id.* at 1.

<sup>150</sup> See Epstein, *supra* note 49 (contrasting an individual's right to name oneself or one's child with the soft externality that immoral or scandalous names place on others).

Certification Act (FCSRCA).<sup>151</sup> The bill was limited in scope and ambition, requiring only that the CDC collect data on the “success” of reproductive technologies in the United States.<sup>152</sup> But success seems difficult to pin down, as the law does not require even short-term follow-up; it requires only reporting on pregnancies achieved through ART. At the time it was enacted the FCSRCA represented progressive legislative action, and the legislative history indicates that members of Congress acknowledged the risks, benefits, and some of the nuances of reproductive technology.<sup>153</sup> Yet deficiencies in the legislation are apparent. Specifically, Congress failed to give substantive meaning to the term “success,” a standard adopted as a benchmark in the reproductive industry.<sup>154</sup> In essence, the term signifies only that a pregnancy was accomplished.

The gravity of this semantic problem becomes clear when one considers how a mother such as Deena Ryan might evaluate “success” versus how a clinic might represent its performance using the same term. Success will be understood differently according to the stakeholders involved. When Congress used the term to measure outcomes, the technology was nascent, and achieving a pregnancy, if not a birth, was considered a medical advancement. For doctors, even the “failed” ART procedures were learning and research opportunities. For patients, success may connote something entirely different. For them, success might be outcome-sensitive and relate to the physical and mental health of their newborns. For some women, their decision to utilize ART procedures may be directly influenced by *artful* data and reports.<sup>155</sup>

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<sup>151</sup> Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102-493, 106 Stat. 3146 (codified as amended in scattered sections of 42 U.S.C. (2006)).

<sup>152</sup> See, e.g., 42 U.S.C. § 263a-1 (2006). Excepting the FCSRCA, Congress has been virtually silent on assisted reproductive technology. Nicole Hebert, *Creating a Life to Save a Life: An Issue Inadequately Addressed by the Current Legal Framework Under Which Minors Are Permitted to Donate Tissues and Organs*, 17 S. CAL. INTERDISC. L.J. 337, 344 (2008) (“The U.S. is a virtually regulatory-free environment when it comes to reproductive technologies . . .” (quoting Donna M. Gitter, *Am I My Brother’s Keeper? The Use of Preimplantation Genetic Diagnosis to Create a Donor of Transplantable Stem Cells for an Older Sibling Suffering from a Genetic Disorder*, 13 GEO. MASON L. REV. 975, 984 (2006))).

<sup>153</sup> See, e.g., 138 CONG. REC. 8210 (1992) (extension of remarks by Rep. Ron Wyden); 137 CONG. REC. 2604 (1991) (extension of remarks by Rep. Ron Wyden); 137 CONG. REC. 35,950 (1991) (extension of remarks by Rep. Ron Wyden).

<sup>154</sup> 42 U.S.C. § 263a-1(b) (2006).

<sup>155</sup> See *HealthWeek*, *supra* note 8 (discussing Deena Ryan’s decision to utilize ART procedures).

*B. Can the CDC Do Much When Congress Does So Little?*

While the CDC functions as the primary federal liaison for data collection regarding ART services and success rates,<sup>156</sup> it does not disaggregate or adjust the data to account for mistakes or birth defects.<sup>157</sup> Instead, it defines success as the achievement of a pregnancy and live birth.<sup>158</sup> For most women, such a bar is too low. This gap creates information inefficiencies and poses several problems. Perhaps the most important information asymmetry is that between women seeking ART services and the data reviewed about a clinic's success rates. Women who seek to be well-informed may select a clinic based on CDC data believing that "success" means birthing healthy, vibrant babies, which means more than simply becoming pregnant.<sup>159</sup> Second, long-term health outcomes for babies born through procedures at particular clinics are unknown because the CDC does not require post-natal follow-up reports.<sup>160</sup> This information shortfall creates an empirical vacuum. Third, to achieve greater "success" rates, clinics unnecessarily implant more than the recommended number of embryos.<sup>161</sup> Nadya Suleman's pregnancy with octuplets was the result of this type of conduct.<sup>162</sup> Fourth, Congress's hands-off approach to reproductive technologies gives clinics a pass on data submission that could prove highly relevant to the CDC, women's health organizations, childrens' health care advocates, and prospective ART patients.<sup>163</sup> Finally, there are no disincentives such as fines and criminal penalties to reign in outliers.<sup>164</sup> In other words, there is no punishment for "bad actors." As a result, determining who benefits from the technology according to class and race analysis is virtually impossible as the CDC does not inquire about ethnicity, income, or employment, leaving researchers to guess who benefits from the technology and who is harmed.<sup>165</sup>

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<sup>156</sup> See 2007 ART SUCCESS RATES, *supra* note 17, at 1 (noting that the FCSRCA has required the CDC to publish pregnancy success rates for ART since 1992).

<sup>157</sup> *Id.* at 23 ("Infant deaths and birth defects are not included as adverse outcomes because the available information for these outcomes is incomplete.").

<sup>158</sup> *Id.* at 6. Published in December 2009, the data represents the most recent information available. *Id.* at 23. For a list of other factors relevant to success, see *id.* at 21.

<sup>159</sup> *Id.* at 6 (explaining how success rates are determined).

<sup>160</sup> *Id.* at 4–6 (explaining the reporting procedure).

<sup>161</sup> *Cf. id.* at 82.

<sup>162</sup> Elizabeth Cohen, *Six Embryos?! How to Avoid a Fertility Fiasco*, CNNHEALTH.COM (Feb. 19, 2009), <http://www.cnn.com/2009/HEALTH/02/19/ep.fertility.clinic.numbers/index.html>.

<sup>163</sup> 2007 ART SUCCESS RATES, *supra* note 17, at 4–9.

<sup>164</sup> *Id.* at 574–77 (listing known non-reporting as well as closed clinics).

<sup>165</sup> See *id.* at 9 (noting that the CDC does not collect information regarding race, income, or education of egg donors).

### C. *Private Law Gaps: Intra-familial Immunity Doctrine*

A brief study of the development of tort law, particularly as applied to families and children, gives some indication of why scholars traditionally overlook private-law regulatory solutions in reproductive matters. Historically, tort law precluded intra-familial lawsuits, as well as litigation brought on behalf of a child for damages suffered *in utero*. Immunity doctrine evolved as a social policy response to protect negligent actors from liability for the harms caused by their conduct.

Immunities basically serve as affirmative defenses; the doctrine does not suggest that no harm was committed but rather that for important social reasons it would be inappropriate or deleterious to society to impose liability for acts that occur within the scope and function of a particular office or duty. The doctrine evolved to protect government, state employees, educational institutions, charities, parents, and children from liability. Over time, there has been considerable pushback against immunities, most notably in cases involving government, police misconduct, and injuries caused by charities.

In the context of negligence committed within a family, immunity doctrine traditionally relieved the party causing injury from liability for his conduct. In spousal matters, husbands and wives were legally considered to be a “whole” or one, and thus a suit could not successfully be initiated against oneself.<sup>166</sup> In matters involving parents and children, tort law proscribed parents suing their children and children suing their parents. These matters are briefly explained below.

#### 1. *Spouses*

Intra-spousal immunity must be understood in its historical context, as the doctrine evolved from coverture laws of the 1800s, which denied independent legal status to married women.<sup>167</sup> In *Barber v. Barber*, the Supreme Court warned that “we must not allow ourselves to be misled[;] . . . a suit cannot be maintained at law by a *feme covert*, and that, notwithstanding a divorce *a mensa et thoro*, a wife cannot sue or be sued in a court of law.”<sup>168</sup> A husband’s

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<sup>166</sup> *Thompson v. Thompson*, 218 U.S. 611, 614, 617 (1910) (denying recovery to a plaintiff who sued under a statute permitting married women to engage in contracts, holding that the statute was not intended to allow married women to sue their husbands).

<sup>167</sup> See *Barber v. Barber*, 62 U.S. (21 How.) 582, 589–90 (1858) (noting previous decisions in England and the United States that held a woman could not sue at law without doing so jointly with her husband).

<sup>168</sup> *Id.* at 588–89.

“control” over his wife provided her “protection” and only in narrow instances, including the husband becoming an “alien enemy,” being banished from the country, or being sent into exile as a felon, would courts allow married women to access the courts on their own.<sup>169</sup>

As a matter of common law, women spoke through their husbands.<sup>170</sup> Thus, common law tort doctrine repudiated intra-spousal claims because they contravened social and cultural norms that situated women as subordinate and lacking legal standing in many respects. Statutes enacted in the twentieth century to provide women status to contract, own property, and otherwise access the legal process drew a clear and decisive line, distinguishing access to the court for those types of claims against litigation initiated by women to sue their husbands.<sup>171</sup> The Supreme Court warned that if Congress had intended to grant women permission to sue their husbands, it would have articulated its intent with “irresistible clearness.”<sup>172</sup>

Indeed, the U.S. Supreme Court urged that in cases of battery and assault, it would turn centuries of precedent on its head to allow wives to sue their husbands in cases of domestic violence.<sup>173</sup> The Court reminded women that other avenues of redress existed, including criminal law.<sup>174</sup> In an elegant treatment of this issue, Professor Margaret Turano describes the nineteenth century common law doctrine of coverture as utterly castrating, “suspend[ing] a wife’s being, terminat[ing] her legal existence, and completely incorporat[ing] her into her husband.”<sup>175</sup>

Modern judicial application of spousal immunity builds from a somewhat different socio-legal approach. The two theories providing contemporary

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<sup>169</sup> *Id.* at 589 (“Except in such cases, a *feme covert* cannot sue at law, unless it be jointly with her husband, for she is deemed to be under the protection of her husband, and a suit respecting her rights must be with the assent and co-operation of her husband.”).

<sup>170</sup> *Thompson*, 218 U.S. at 614–15.

<sup>171</sup> CAL. CIV. PROC. CODE § 370 (1872) (current version at CAL. CIV. PROC. CODE § 370 (West 2004)); Act of July 10, 1846, ch. 327, 1846 N.H. Laws 307 (current version at N.H. REV. STAT. ANN. § 460:2 (LexisNexis 2007)) (in relation to married women); Act of May 27, 1937, ch. 669, § 1, 1937 N.Y. Laws 1520 (amending N.Y. DOM. REL. § 57 (McKinney 1916)), *repealed by* General Obligations Law, ch. 576 § 3-313, 1963 N.Y. Laws 909 (enacted current version at N.Y. GEN. OBLIG. § 3-313 (McKinney 2001)).

<sup>172</sup> *Thompson*, 218 U.S. at 618.

<sup>173</sup> *Id.* at 617–18.

<sup>174</sup> *Id.* at 619.

<sup>175</sup> See Margaret Valentine Turano, *Jane Austen, Charlotte Brontë, and the Marital Property Law*, 21 HARV. WOMEN’S L.J. 179, 179 (1998) (“Coverture utterly transformed a woman’s status upon marriage and trampled her like a Juggernaut; it stripped away her personal freedom and most of her rights to her property, her children, and her body.”).

justification for spousal immunity seek to promote marital harmony and discourage fraud.<sup>176</sup> First, the doctrine purports that conjugal harmony is disrupted by intra-familial litigation—and destabilized marriages could lead to a lack of sexual bliss, unhappiness, divorce, and disjuncture in the immediate family. Implicit in such reasoning is a social interest in promoting and protecting the sanctity of marriage. Second, courts attempt to ward off fraud and frivolous litigation. To the extent that a husband (or wife) could benefit from litigation even when losing to the other, particularly when insurers are involved, the court has an interest in preventing such collusion as well as deterring frivolous lawsuits. Similar rationales hold true in intra-familial litigation involving children.

## 2. *Children*

Common law tort doctrine proscribed litigation involving children against their parents and parents against their children. Again, such policies were rooted in social policy aimed at protecting family cohesion. Permitting claims brought by children against their parents would turn social order on its head. Viewed in social contexts similar to spousal immunity, children were essentially the property of their parents; to permit children to litigate against their parents would disturb a normative view of the parent-child relationship and undermine social order.

In *Villaret v. Villaret*, the Court of Appeals for the District of Columbia articulated its reason for dismissing a negligence action brought by a child against his mother:

[T]here has grown up in this country a mass of authority holding that such a suit is against public policy and cannot be maintained. Criticism of the rule has been voiced, . . . however, and it continues to be the almost unanimous judicial opinion that an unemancipated child may not maintain an action against a parent for a personal tort.<sup>177</sup>

The court of appeals's conclusion that it would be unnatural and inconsistent with the roles assigned parents and children to allow such litigation reaffirmed an entrenched position within the law that had little to do with the possibility

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<sup>176</sup> See, e.g., *Raisen v. Raisen*, 379 So. 2d 352, 354 (Fla. 1979) (retaining the doctrine of interspousal tort immunity on the ground that "interspousal tort actions disturb domestic tranquility; cause marital discord and divorce; cause fictitious, collusive, and fraudulent claims; cause a rise in liability insurance; and promote trivial actions").

<sup>177</sup> *Villaret v. Villaret*, 169 F.2d 677, 677-78 (D.C. Cir. 1948) (citations omitted).

of collusion and fraud, but instead signaled other interests and values, including preserving social order within families.<sup>178</sup> In turn, greater social control and obedience within families would be reflected in the broader society.

In a line of cases dating back to *Hewellette v. George* in 1891, courts maintained that litigation brought by children against their parents disrupts familial harmony.<sup>179</sup> According to the Mississippi Supreme Court in *Hewellette*, “so long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained.”<sup>180</sup> According to the court, “peace of society . . . and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.”<sup>181</sup> In later cases, courts expanded parental immunity to include intentional torts as well as negligence.

In *Roller v. Roller*, a seminal decision on parental immunity, the Washington Supreme Court held that a minor could not maintain a civil cause of action against her father for rape.<sup>182</sup> Proof of the criminal act was not at issue in the case, as the father had already been convicted of rape by the time his fifteen-year-old daughter brought the tort action against him.<sup>183</sup> Instead, the court reaffirmed the common law rule prohibiting a minor from suing a parent for damages resulting from torts, reasoning that its holding was consistent with public policy.<sup>184</sup> In reaching its conclusion, the court relied on the father’s argument, which emphasized the importance of maintaining domestic harmony.<sup>185</sup> According to the court, society’s interest in preserving domestic harmony was manifested in the “earliest organization of civilized

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<sup>178</sup> *Id.* at 678–79.

<sup>179</sup> 9 So. 885, 887 (Miss. 1891), *abrogated by* *Glaskox ex rel. Denton v. Glaskox*, 614 So. 2d 906 (Miss. 1992) (holding that the doctrine of parental immunity does not apply in automobile accident cases where a minor is injured as result of his or her parent’s negligent operation of a motor vehicle); *see also* *Roller v. Roller*, 79 P. 788, 789 (Wash. 1905) (arguing that the public policy of family unity justifies parental immunity), *distinguished in part by* *Borst v. Borst*, 251 P.2d 149 (Wash. 1952) (holding that a minor child could sue his parent for a tort resulting in personal injuries where the father was operating his business vehicle for business purposes and ran over his child, who was playing in the street).

<sup>180</sup> *Hewellette*, 9 So. at 887.

<sup>181</sup> *Id.*

<sup>182</sup> *Roller*, 79 P. at 789.

<sup>183</sup> *Id.* at 788.

<sup>184</sup> *Id.* at 789.

<sup>185</sup> *Id.* at 788.

government . . . [and] inspired by the universally recognized fact that the maintenance of harmonious and proper family relations is conducive to good citizenship, and therefore works to the welfare of the state.”<sup>186</sup>

The *Roller* court’s decision was grounded in substantive and procedural rule making. As a procedural matter, the court predicted that to allow the daughter’s case to move forward would unleash a flood of cases, thereby creating a slippery slope and too much confusion for courts to deal with.<sup>187</sup> The court overlooked the fact that justice could be achieved in some measure by allowing such cases to move forward. A flood of litigation might have indicated the weakness in the presumption that familial harmony is maintained by the silencing of abused women and children.

As a substantive matter, the court emphasized the importance of maintaining a uniform approach to intra-familial torts.<sup>188</sup> As the common law rule prohibited children from suing their parents, the court did not find it necessary or appropriate to interrupt the line of precedent; for the court, uniform principles have meaning.<sup>189</sup> The court acknowledged that rape is a heinous crime, but the justices juxtaposed that harm against “any other tort,” suggesting that any generic tort compared to a rape “would be different only in degree.”<sup>190</sup> According to the court, to allow one child to recover might rob other siblings of food and shelter.<sup>191</sup> But the court was more speculative, suggesting that it would be absurd to allow a child to recover in tort against a parent, for in the child’s death, “the parent would become heir to the very property which had been wrested by the law from him.”<sup>192</sup>

Based on the signaling in *Hewellette* and *Roller*, subsequent courts applied the immunity rule prophylactically under the guise of promoting social welfare. As reflected by Justice Rossman’s concurrence in *Cowgill v. Boock*, courts viewed immunity not as “a reward, but as a means of enabling the parents to discharge the duties which society exacts.”<sup>193</sup> Yet the limitations in

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 789.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Cowgill v. Boock*, 218 P.2d 445, 455 (Or. 1950) (Rossman, J., concurring), *repudiated by Winn v. Gilroy*, 681 P.2d 776 (Or. 1984) (refining the broad doctrine of parental tort immunity and holding that the proper inquiry in determining whether a parent is immune from tort liability to his or her child concerns the

such an approach seem quite obvious; greater household discipline or social discipline is not achieved by denying children access to courts for harms caused by their parents and guardians. The precedent established by *Hewelette* remains a vital part of intra-familial tort law. Due to decades of an entrenched judicial position on family immunity matters, progress has been slow at hand for children seeking to recover against their parents. Only in recent years has family immunity doctrine come into some disrepute.<sup>194</sup>

#### IV. A PRIVATE LAW APPROACH TO REPRODUCTIVE REGULATION

High failure rates and substantive medical risks associated with ART are well documented in this Article and elsewhere. Despite compelling evidence that the industry self-regulates quite poorly (doctors are not reprimanded or censured for implanting embryos in women over sixty years old or for implanting too many embryos in women in their thirties), Congress has not imposed limits. In most instances involving consumer demand and industry supply, it might not be a bad thing for government to allow private parties to freely contract. However, the realm of assisted reproduction is different than buying a car or house. Babies are not widgets, and the externalities extend beyond parental dissatisfaction with outcomes.

Part IV, then, considers whether tort law provides a permissible vehicle for redressing harms arising from negligent or reckless use of ART. At first glance, the intra-familial immunity doctrine may indicate the futility of such an inquiry. However, the limited but consistent erosion of that doctrine offers some insights into how children might use tort law to address familial conflicts in the future. Moreover, as suggested in this Article, ART exposes why parental immunity fails to address contemporary socio-legal problems, and thus deserves elimination. Indeed, lifelong injuries resulting from the use of ART justify this inquiry. The delicate nature of such an investigation cannot be overlooked. This Article does not take up the question of natural selection and tort liability as that is beyond the scope of this inquiry.

Part IV considers whether tort law can provide a regulatory framework to address harms caused by the use of ART. Section A unpacks the function of tort law, demonstrating that the values tort law seeks to uphold map

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tortious or privileged nature of the parent's act that causes injury to child, not special parental immunity from the child's action for a personal tort, as distinct from other kinds of claims).

<sup>194</sup> Szollosy v. Hyatt Corp., 396 F. Supp. 2d 147, 155, 156 (D. Conn. 2005) (declaring that "a national examination of parental immunity finds that doctrine edging toward disrepute").

appropriately onto reproductive conflicts. Section B addresses why the parental immunity doctrine is an inappropriate cover for prospective parents who use ART negligently and recklessly. Section C proposes new tort frameworks for ART cases.

#### A. *The Function of Tort Law*

Tort law, a possible venue for regulation, is generally underexplored in the domain of reproductive technologies. A robust common law history exempting parents from liability for the harms they cause children partially explains this gap. However, intra-familial immunity is an insufficient response to contemporary challenges, risks, and injuries suffered through reproductive biotechnologies. Tort law shifts the cost of accidents back to the parties that cause them, sparing “innocent” and comparatively innocent individuals from bearing the financial burdens of recovery and restitution. In this way, tort law operates as a form of social insurance; someone must pay for the costs of accidents, and this doctrine shifts the costs of recovery to the *tortfeasor* from the state. Without an organized system of compensation, plaintiffs would either internalize the financial costs of accidents or the costs would shift to society either through public welfare systems or private insurance.

In the context of assisted reproduction, the costs associated with delivering multiple newborns and their neonatal care are often exorbitant. In Suleman’s case, forty-six doctors assisted in the delivery of her octuplets.<sup>195</sup> Similarly, dozens of physicians assisted in the delivery of the McCaughey septuplets.<sup>196</sup> Increasingly, neonatal wards outspend other medical departments in hospitals.

In states where insurance companies are exempted from mandated coverage of costs associated with reproductive technology, hospitals absorb those costs. Inevitably, in both instances—hospital absorption or insurance companies paying out—the general public picks up the costs. Tort law reallocates costs associated with accidents and injuries, thereby reducing the burden on society and bringing recovery back to the locus of causation. Currently, in the case of ART, medical costs and other externalities are borne by the public, without a social agreement or commitment (from society) to

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<sup>195</sup> See Jessica Garrison et al., *Public Fury Overtakes Awe After Birth of Octuplets: As the Economy Sours, Many Express Concern over a Variety of Costs*, L.A. TIMES, Feb. 7, 2009, at B1.

<sup>196</sup> See Pam Belluck, *Iowan Makes U.S. History, Giving Birth to 7 Live Babies*, N.Y. TIMES, Nov. 20, 1997, at A1.

support the costs associated with reproductive experimentation. There is no affirmative right to reproduce.

Tort law fulfills other purposes beyond compensating aggrieved parties. Unlike the criminal law—which uses the hard stick of punishment to deter irresponsible or harmful behavior by incarceration, public reprimand (and embarrassment), and fines—tort law seeks to deter harmful conduct by imposing only financial sanctions. One system operates publicly—the criminal law—while the other achieves the goal of deterrence through private law means. The rationale behind civil law (tort law) deterrence is that the financial burden imposed on tortfeasors will be sufficient to incentivize reasonable behavior. Similar to criminal law, however, tort law seeks to avoid violent self-help and thus facilitates a peaceful resolution process. In this way, honor is restored in the courts rather than through fisticuffs.

A fourth function of tort law is to define or establish community standards for socially appropriate behavior. In reality, juries do not so much establish what appropriate behavior is as tell us what falls outside the social consensus regarding how individuals and institutions should behave. Finally, tort law punishes wrongdoing.

Some might argue that tort law deemphasizes moral incentives to act responsibly because bad actors pay up only when they are caught and a plaintiff sues. Unlike the criminal law, tort law does not seek to champion the victim's cause as a matter of social redress. For example, in criminal law, a matter can be adjudicated without the injured party's participation, as in cases of rape or child molestation, because those harms are deemed acts against society.

Tort law does not make such broad claims. It does not attempt to make individuals and institutions "better" or more sensitive. Plaintiffs are not to be made better off than they were prior to the injury. Nor is it the goal of tort law to inspire sympathy or empathy in those whose conduct causes injury. Rather, tort law uses a system of financial incentives and disincentives to shape individual, professional, and social behaviors. From an economic point of view, tort law imposes transaction costs on those whose conduct causes injuries. Sometimes those transaction costs, particularly in the sphere of punitive damages, may be sufficient to catalyze a change in industry behavior and guard against future conduct that could lead to similar harms. This is most notable in product liability and strict liability cases.

Currently, the most significant gap in tort law's evolution happens to be in the domain of biotechnologies. Courts handle biotech cases with extreme caution, often relying on persuasive arguments of defense counsel or sending signals that the legislature should respond more robustly. At such times, the legal process can seem stalled and unable to right itself. Assisted reproductive technology is no exception. However, the difficulty in bringing a legal challenge to evolving sciences and those who promote them often centers on the substance of evidence and whether plaintiffs can offer a prima facie case that the user or creator of biotechnology actually caused the harm (or that the harm was derived from the biotechnology). These issues are particularly complicated when biotechnology is used by families to reproduce children since causation becomes more difficult to prove, and the legal process becomes mired in immunity doctrine.

### *B. Immunity and Sufficiency*

Immunity doctrine provided a robust if not controversial shield to guard parents from liability for harms caused to their children, even in cases of rape.<sup>197</sup> In some states, recent cases invoking the doctrine provide a welcomed and more nuanced approach, which provide relief for child victims of negligence resulting from a family's business activities or sexual misconduct.<sup>198</sup> However, a review of the legal history of family immunity doctrine reveals a complicated past. According to the North Carolina Supreme Court, parental immunity is "unmistakably and indelibly carved upon the tablets of Mount Sinai."<sup>199</sup> Unlike spousal immunity, which developed from English common law, parental immunity emerged from as a uniquely American tradition. In part, successful application of the doctrine reaffirms the notion that families operate as micro-governments, and thus are to be shielded from extra-legal interference by other states.<sup>200</sup> Today, however, many of the rationales for such a rigid doctrine no longer satisfy evolved notions of fairness and justice. Contrary to the court in *Mesite v. Kirchstein*, children and their

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<sup>197</sup> See *Roller*, 79 P. at 788–89.

<sup>198</sup> See, e.g., *Cates v. Cates*, 588 N.E.2d 330 (Ill. App. Ct. 1992).

<sup>199</sup> *Small v. Morrison*, 118 S.E. 12, 16 (N.C. 1923).

<sup>200</sup> See *Squeglia v. Squeglia*, 661 A.2d 1007, 1013 (Conn. 1995) (barring a suit brought by a four-year-old who was bitten by his father's dog and noting that the "maintenance of the home environment typifies the day-to-day exercise of parental discretion that the state would rather not disrupt"); *Shoemaker v. Fogel*, 826 S.W.2d 933, 936 (Tex. 1992) ("In the absence of culpability beyond ordinary negligence, [parental] choices are not subject to review in court.").

parents do not share the same identity.<sup>201</sup> The criminal law bears that out quite clearly, as parents are not prosecuted for the crimes committed by their children. A non-rebuttable parental immunity doctrine no longer reflects the social values and public policy of our times as briefly discussed below.

### 1. *Family Discipline Theory*

On inspection, the family discipline argument no longer holds sway. It is difficult to justify denying injured children access to courts based on the notion that parental authority will be compromised. In the past, courts responded favorably to defense arguments that litigation brought by children against their parents would negatively impact family discipline.<sup>202</sup> Courts were persuaded by the family discipline doctrine because it was presumed that an orderly society required a certain level of order and discipline in the household. The problem with that line of thinking is that it has no application to cases where children are injured as a result of an undisciplined parental activity. Parental responsibility is not corrected by denying children a right of action when parents act negligently or with intentional malice. Indeed, in those cases where children are injured because of irresponsible parental conduct, including child abuse, exploitation, and incest, the parent has breached a duty to his child and to the public at large. Here, the purpose of the family discipline doctrine has never been served by protecting tortfeasors from civil sanction.<sup>203</sup>

There is another reason for denying immunity based on family discipline theory: As a social policy matter, we might wish to encourage uniformity within the law. Children are not prohibited from suing their parents in contract and property.<sup>204</sup> Denying children access to courts because of personal injuries caused by parents, but permitting litigation in cases involving contracts and property, disserves the goals and function of tort law and creates problematic public policy.

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<sup>201</sup> *Mesite v. Kirchenstein*, 145 A. 753, 756 (Conn. 1929). *But see Szollosy v. Hyatt Corp.*, 396 F. Supp. 2d 147, 155, 156 (D. Conn. 2005) (“[A] national examination of parental immunity finds that doctrine edging toward disrepute. . . . The scope of the doctrine since has been limited by both the courts and the legislature. The Connecticut General Assembly statutorily has abrogated immunity with respect to a parent’s negligent operation of motor vehicles, aircraft, or vessels, and the Connecticut Supreme Court has judicially abrogated it in two instances: when the alleged negligence stems from a parent’s business activities conducted outside the home, or when a parent is sued for sexual abuse, sexual exploitation, or sexual assault.”).

<sup>202</sup> *See, e.g., Small*, 118 S.E. at 15 (public policy “discourage[s] causes of action that tend to destroy parental authority”).

<sup>203</sup> *See, e.g., Henderson v. Woolley*, 644 A.2d 1303, 1303 (Conn. 1994) (holding that parental immunity does not bar a child from asserting a cause of action for sexual abuse).

<sup>204</sup> *See 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS* § 8.11 (2d ed. 1986).

## 2. Family Tranquility Theory

A second argument used to deny child plaintiffs' claims is that family tranquility may be disturbed.<sup>205</sup> This doctrine was expanded beyond general negligence actions (i.e., parental injuries to children) to include harms caused by parents carrying out business activities that injured their children. Courts refused to allow such cases to move forward under the theory that by allowing recovery, the state would be interfering in the tranquility of the defendant's home. In *Dzenutis v. Dzenutis*, a case involving severe burns and injuries sustained by a boy resulting from his father's negligence, the Connecticut Supreme Court acknowledged, "[t]he prospect of greeting an adolescent judgment creditor at the dinner table each day would likely strain the familial relationship even for the most saintly of parents."<sup>206</sup> In *Dzenutis*, to reach a conclusion supportive of the plaintiff's claim, the Connecticut Supreme Court reasoned that the presence of liability insurance reduced concerns about tranquility. Carving out a narrow exception both aids child litigants and leaves them in limbo. Creating an open door for victims where there is insurance helps only a narrow class of plaintiffs, leaving others suffering from equally egregious harms without similar protection. Indeed, as late as 1997, the Court of Appeals of Maryland barred a personal injury lawsuit against a mother who severely injured her daughter when she negligently drove the car into the rear of another vehicle. The court based its ruling on preserving family tranquility.<sup>207</sup>

However, children have never been legally barred from suing their parents in property and contract disputes. To distinguish a personal injury claim from a breach of contract claim on the ground of family *disharmony* seems specious at best. Why would a tort claim cause family disharmony but a property or contract claim would not? The distinction in this context is frivolous.

Nevertheless, one cannot dismiss the family tranquility argument outright, as litigation can be disruptive. Litigation is not always amicable; by definition, it is an adversarial process, and although a child may win in court, she could lose parental affection at home. These concerns are real and should not be

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<sup>205</sup> See *Mesite*, 145 A. at 755; *Small*, 118 S.E. at 15; *Matarese v. Matarese*, 131 A. 198 (R.I. 1925).

<sup>206</sup> *Dzenutis v. Dzenutis*, 512 A.2d 130, 134 (Conn. 1986).

<sup>207</sup> See *Renko v. McLean*, 697 A.2d 468, 471-72 (Md. 1997), *superseded by statute*, MD. CODE ANN., Courts and Judicial Proceedings § 5-806 (West 2010), *as recognized in* *Allstate Ins. Co. v. Kim*, 829 A.2d 611, 615 (Md. 2003).

ignored, even by those who agree that tort law has a function and purpose in reproductive matters.

As a matter of law, it would be unjust to deny rightful recovery to an injured child based on the possibility of discomfort at home. For contemporary purposes, such arguments ignore twenty-first-century family dynamics, including the fact that the child litigant may not live in the “family home.” The existence or absence of prior tranquility in the family home can be a substantial factor in the injury caused to the child. In no other area of tort litigation would the *ex post* factors of litigation be used to deny rightful claims made by plaintiffs. For example, Title VII sexual harassment claims by women would be substantially undermined if a defendant was permitted to argue that a plaintiff’s return to work could be considered as a factor in determining the hostile nature of the work environment. .

Additionally, the family home has changed since the *Hewellette*, *Villaret*, and *Roller* decisions. Increasingly, children move between parents and reside in diverse living arrangements. With the rise in divorce, children may spend only part of the year, month, or week with a particular parent. This is not to dismiss the importance of family tranquility regardless of the specific parenting arrangement, but it does offer a context vastly different than that of a century ago. Finally, for contemporary analysis, family tranquility claims are insufficient to overcome the goals of tort law: to create social order, restore injured parties, hold negligent actors responsible for their conduct, and deter negligent and reckless conduct.

A tranquil home without love, respect, and tolerance is an oppressive space. As the court in *Dunlap v. Dunlap* articulated, “[t]he communal family life is held together and its continuity assured by something finer than legal command.”<sup>208</sup> If litigation widens the fissures in the familial relationship, it is quite likely that such fractures existed before the litigation.

### 3. *Fraud and Collusion Theory*

A third argument put forth to shield defendants from claims initiated by their children arises in the context of fraud and collusion.<sup>209</sup> The theory here is

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<sup>208</sup> 150 A. 905, 915 (N.H. 1930).

<sup>209</sup> See, e.g., *Luster v. Luster*, 13 N.E.2d 438, 439 (Mass. 1938) (suggesting that permitting tort claims brought by children against their parents could lead to fraud and collusion, but deciding the case on other grounds), *overruled by* *Sorensen v. Sorensen*, 339 N.E.2d 907, 909 (Mass. 1975) (abrogating—to the extent of the parent’s automobile liability insurance coverage—the doctrine of parental immunity in a tort action for

that parents are unjustly enriched by such litigation, and the litigation serves primarily to exploit an insurance policy. Analogous arguments proscribed women from suing their spouses on the basis that husbands would share in the wealth or “payout” a woman received as a result of her injury.

The fraud and collusion line of argumentation is not a sound basis for denying recovery to children. Nor would this line of argumentation work in other spheres where indemnification exists. For example, workers are not denied worker’s compensation for proven injuries on the theory that the employer and employee might be in collusion. Equally, injured passengers are not denied compensation to assist in their recovery simply because they know the driver. While it is true that the family unit is generally characterized by a stronger bond than the employer–employee relationship, plaintiffs should not be denied recovery simply on the basis of familial affection. Contemporary enforcement of such a rule would create perverse incentives, including incentivizing the withdrawal of familial affection to disprove that fraud and collusion could be operable.

#### 4. *Family Exchequer Theory*

As a public welfare matter, courts have expressed an interest in the health and economic functionality of the family household. In *Roller*, for example, the court reasoned that family property should not be appropriated to one child, but rather intimated that all children should have an equal share in their family’s wealth.<sup>210</sup> The holding in *Roller* was disturbing—not simply for this line of argumentation, but also because the case involved a heinous rape—and the court denied recovery based on the family exchequer argument.<sup>211</sup>

Even today, the state lacks authority to dictate how an estate’s wealth should be distributed absent probate (and even then a will is the controlling document). To be sure, negligent conduct by a parent would not foreclose recovery to a non-child plaintiff based on the notion that the defendant is

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negligence “(a) arising from an automobile accident and (b) brought by an unemancipated minor child against a parent”); *see also*, *New Hampshire Ins. Co. v. Fahey*, 430 N.E.2d 1193, 1194 (Mass. 1982) (citing *Sorensen* and noting that “[w]ith the doubtful logic of intrafamily immunity in motor vehicle personal injury actions already noted by this court, we decline to create a new common law principle of intrafamily immunity in motor vehicle tort actions arising from negligent damage to a motor vehicle”).

<sup>210</sup> *Roller v. Roller*, 79 P. 788, 789 (Wash. 1905), *overruled in part by* *Borst v. Borst*, 251 P.2d 149 (Wash. 1952).

<sup>211</sup> *Id.* at 788–89.

married or has children. We might imagine how this logic would apply in the real-life context of car accidents, wrongful death claims, and battery.

If applied generally, the family exchequer theory could bar recovery to all plaintiffs on the ground that defendants are responsible for the care of persons other than themselves. The very purpose of tort law would be turned inside-out if such arguments were given traction in contemporary contexts. The meaningful question is whether there is any substantive difference between a defendant paying out to a “stranger” versus her daughter. For the estate, it would seem healthier to keep wealth within the family. Although it could be argued that one child might be more enriched than her siblings, that child in fact suffered a harm the others did not.

##### 5. *Scope and the Line-of-Duty Theory*

The scope-and-line-of-duty theory extends beyond parental immunity doctrine, providing a shield for government employees, including police officers, firefighters, and others. Its application to intra-familial litigation bars lawsuits by children against their parents for injuries arising from the discharge of parental duties. This theory presupposes that the tort committed was within the scope of parental duty. If this is correct, the theory is overbroad. All torts committed by a parent would be within the dynamic of their control or duty as their parental responsibilities cease only when their children reach the age of majority.

A more nuanced approach is needed. For example, causing an accidental injury while buckling a child into a car seat or while saving a child by jumping out of a second-story window of a house engulfed in flames<sup>212</sup> are measurably different from using corporal punishment or extreme force in response to a child’s poor school performance.<sup>213</sup> The broad application of scope-and-line-of-duty theory is problematic as a social policy prescription. Assessing scope and line of duty is rightfully complicated as parents are expected to construct social and behavioral boundaries for their children. Yet, broad application of this defense might proscribe recovery in cases where parental behavior is socially repugnant, including severe spankings. In such cases, the type of

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<sup>212</sup> See *Ascutto v. Farricielli*, 711 A.2d 708, 717 (Conn. 1998) (“[T]he doctrine of parental immunity, which protects family harmony by preventing discord between parents and children, is consistent with the policy of encouraging divorced parents to assume responsibility for their children.”).

<sup>213</sup> See, e.g., Abraham Aboraya, *Father Charged with Child Cruelty*, SEMINOLECHRONICLE.COM, May 21, 2008, [http://www.seminolechronicle.com/vnews/display.v/ART/2008/05/21/4833576d09c41?in\\_archive=1](http://www.seminolechronicle.com/vnews/display.v/ART/2008/05/21/4833576d09c41?in_archive=1) (reporting about a father severely beating his eight-year-old son because he received poor grades).

parental conduct at issue might be rationalized by a parent as falling within the scope of parenting obligations to discipline her children.

#### 6. *Adult Status*

Much of child immunity doctrine derives from the notion that most parent-child torts occur during childhood and therefore will be litigated by minors. These presumptions deserve a second look as they can be over- and under-inclusive. The overly broad treatment of parental immunity could leave an adult child without recourse for harms suffered as an adult. Equally, immunity doctrine could deny access to courts for personal injuries sustained by a seventeen year old, while permitting judicial access for an older sibling similarly harmed. Childhood becomes an arbitrary line in intra-familial tort disputes. This approach to tort injuries would be void in all other contexts; as a public policy matter, society should disfavor ageist formulations of who deserves access to courts. Denying access to courts based on the age of litigants deserves serious scrutiny and should be avoided in nearly all instances.

#### C. *The Application of Tort Law to Assisted Reproductive Cases*

This Article recognizes the value of ART and does not suggest that all uses of ART are irresponsible, should be barred, or would fall under the general principle articulated here. Rather, this Article urges the recognition of harms to children born from reckless and negligent use of ART. This distinction is important. As discussed above, the parental immunity doctrine, which may prevent such claims, draws an arbitrary distinction between injuries to property and injuries to persons. Allowing children to recover against parents for injuries to property but not for personal injury lacks intellectual and legal merit.

Nor should scholars be pacified by the claim that applying a new tort regime to reproductive cases might establish a troubling precedent for reproductive freedom. The right to parent is not an uncontested principle. Nowhere is such a right articulated in the Constitution or made explicit by legislative action. The fragmented law implying a right to reproduce is a complicated patchwork derived largely from a negative constitutional principle, namely that the state cannot interfere with an individual's capability to parent. In *Skinner v. Oklahoma*, the Supreme Court examined compulsory sterilization laws as applied to prisoners who committed petty thefts as

opposed to embezzlement.<sup>214</sup> Writing for the majority, Justice Douglas emphasized the duplicitous nature of a law that would impose sterilization on one class of thieves (petty criminals) and not others (namely embezzlers).<sup>215</sup> Justice Douglas referred to this type of discrimination as fatal.<sup>216</sup> But the case says little about the importance or value of reproduction or the right to reproduce.

The issue most important to address is one of fairness with contemporary biotechnologies. Who should pay for the mistakes increasingly incurred by the use of the technology? The disabilities resulting from reckless use of ART range from life-threatening conditions to an impaired quality of life. The costs incurred in treating and living with severe disabilities is calculable and, absent recovery from a parent, may be borne entirely by the child (into adulthood) or the state. As a public policy matter, we must consider what intentionally- or negligently-caused disabilities to children mean in real life. Much in the same way that the law recognizes personal injury causes of action arising from the use of technology, such as cars, trains, and planes, so too should the law recognize personal injury actions in biotechnology and in ART in particular.

The inherent challenge in framing a new tort regime for ART cases is that they do not fall within enumerated doctrines. The harms suffered by children in these domains are independent reproductive harms distinguishable from derivative medical injury cases. Yet, as independent harms, the tort claims that result may seem too speculative to some courts. Part C explores three tort theories for recovery.

### *1. The Thornwell Approach*

Timing and framing are significant factors in tort claims involving children injured *in utero*. It may be that the difficulty in finding an appropriate perch for reproductive claims initiated by children discourages scholars from the pedantic unpacking and unsorting of tort frameworks to determine a best fit or shape a new regime. One possible approach for adjudicating reproductive

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<sup>214</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 536–43 (1942).

<sup>215</sup> *Id.* at 538–39.

<sup>216</sup> *Id.* at 543. According to Justice Douglas, “When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.” *Id.* at 541.

technology cases might be found in the framework suggested by *Thornwell v. United States*.<sup>217</sup>

At first blush, *Thornwell* differs substantially from reproductive cases. The case did not address wrongs to children, nor reproductive claims. However, the *Thornwell* case substantively addressed an important timing issue in litigation against an immune entity—the federal government.<sup>218</sup> Thus, some relevant parallels animate both lines of cases. In *Thornwell*, a serviceman accused of stealing classified documents was given lysergic acid diethylamide (LSD) to coerce a confession from him.<sup>219</sup> *Thornwell* was unaware that he had been administered the drug until sixteen years later.<sup>220</sup>

*Thornwell* sued the U.S. government for all the injuries he sustained resulting from the treatment and for the government's failure to inform him of his exposure to LSD.<sup>221</sup> *Thornwell* complained that he suffered long-term effects from the LSD, including severe psychiatric disorders that impacted his ability to achieve and maintain gainful employment.<sup>222</sup> The district court barred his recovery on all claims related to the original administration of the drug based on intra-military immunity.<sup>223</sup> However, the court found that *Thornwell* could recover against the government for the negligence that occurred after *Thornwell* left the service, which included severe mental anguish and disability.<sup>224</sup> The court seemed particularly swayed by the nature of experimentation in the tortious medical treatment given to *Thornwell*.<sup>225</sup>

In denying the defendants' motion to dismiss, the court referred to the government's treatment as a "brutal and shameless" form of human experimentation that left *Thornwell* with a "shattered" life.<sup>226</sup> On examination, assisted reproduction remains a form of human experimentation, with very limited oversight from federal and state governments. With its high incidences of still births, miscarriages, and multiple births, it is quite likely that if ART

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<sup>217</sup> 471 F. Supp. 344 (D.D.C. 1979).

<sup>218</sup> *Id.* at 345.

<sup>219</sup> *Id.* at 346.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 346–47.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 337.

<sup>224</sup> *Id.* at 352–53, 355.

<sup>225</sup> *Id.* at 355 ("The injury which [*Thornwell*] suffered was not mere 'emotional distress,' but rather a prolonged psychiatric disorder accompanied by severe physical pain.").

<sup>226</sup> *Id.* at 346.

were subject to the rigors of federal standards for human trials, it would not gain approval.

For my purposes here, it is important to point out the footing gained through the *Thornwell* framework. The court emphasized that “life” after the military did not “free Mr. Thornwell from the wrongs inflicted by his alleged tortfeasors.”<sup>227</sup> Similarly, in reproductive technology cases, “life” after birth does not free children from the consequences of their parents’ pre-birth choices and conduct that caused their lifelong injuries. By analogy, to hold that parents may deprive children of their constitutional rights “merely because the deprivation originated” when the child was *in utero*, “would be tantamount to declaring all [children] second class citizens.”<sup>228</sup>

The *Thornwell* court placed considerable emphasis on the non-consensual nature of the government’s conduct.<sup>229</sup> In situations involving harm to children from reproductive technology, children are saddled with a physical status resulting from a line of experimentation to which they lacked the capacity to consent. And had they been given the option, they likely would have chosen not to participate in medical experiments that presented high risks of hearing impairment, sight problems, cerebral palsy, and a host of other risks. To the extent that parents consent to risky experiments on their children, parents must make informed, responsible choices. These issues are particularly thorny in reproductive contexts in part because reproduction is intimate and private—even in clinical settings.

On comparison, intimacy does not bar other causes of action in tort that are deeply personal and private; the very intimate becomes public when non-consensual harms occur. The more obvious cases might include marital rape, physical discipline of children that tips into abuse, and domestic violence.<sup>230</sup>

Are children entitled to particular reproductive outcomes, including freedom from disabilities? Certainly parents do not owe children a promise of perfection. But the key question here is the distinction between natural reproduction and clinical or assisted reproduction, which are distinctly

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<sup>227</sup> *Id.*

<sup>228</sup> *See id.* at 353.

<sup>229</sup> *Id.* at 346 (discussing the “surreptitious, nonconsensual administration of LSD” to persons questioned by the Army).

<sup>230</sup> *See, e.g., Szollosy v. Hyatt Corp.*, 396 F. Supp. 2d 147, 156 (D. Conn. 2005) (observing that the Connecticut General Assembly statutorily abrogated immunity when a parent is sued for sexual abuse, sexual exploitation, or sexual assault).

different. The germane issues are whether parents owe a duty of care to their children, and whether that duty is breached by the purposeful use of medications that are very likely to result in gestational and future harms to their children.<sup>231</sup> To further contain this question and the possibility of liability, the treatments under discussion here relate specifically to the purposeful, technological creation of children and not treatments to save the parent's life—such as chemotherapy or other medical therapies that might harm the developing fetus as a side-effect of life-saving treatment of the mother.

*Thornwell* is analytically compelling for another reason. It addresses important issues related to the timing of the alleged harm. In reproductive matters, an unkind body of case law suggests that reproductive disability claims are far too speculative—courts and litigating parties become mired in details that in some instances truly are quite tenuous.<sup>232</sup> *Thornwell's* analysis of military life folding into an entirely independent state of civilian life offers a lens through which to consider a sticky point in reproduction disability cases. Namely, in *Thornwell*, the court refused to bar claims that manifested in the “second” life, but occurred in the “first.”<sup>233</sup> In reproductive contexts, embryo and fetal life can be the subject of significant political debate that ignores the actual question of a living individual in the “second” life—who lives with and must endure—the disabilities related to actions caused in a different life status.

Under the *Thornwell* framework, children would not be foreclosed from bringing claims for harms caused in a different state of life but that manifest in a second, more permanent status of life. Instead, the relevant inquiry would address identifying the tort actors in the first-life status, the conduct that results in disability, and the disability for which the plaintiff seeks to recover.

## 2. *Continuation of Harm Theory*

Another legal frame through which plaintiffs might access the courts is the continuation of harm theory. Under this theory, plaintiffs could claim that the original injury occurred *in utero*, but the effects of the harm continued after birth. Courts have acknowledged the validity of negligence actions arising

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<sup>231</sup> Here, I put aside the issue of right to life and the abortion debate, which impose a different set of political questions that are not the subject of this Article.

<sup>232</sup> At other times, it appears that the difficult task of toiling through the unmanicured fields of reproduction law becomes the subject of political capture.

<sup>233</sup> *Thornwell*, 471 F. Supp. at 350, 352–53.

from previous wrongs that manifest in a separate cause of action.<sup>234</sup> In *Schwartz v. United States*, the plaintiff had been treated with a radioactive contrast dye by the U.S. military.<sup>235</sup> The plaintiff did not seek recovery based on the negligent administration of the dye,<sup>236</sup> but instead alleged that the government's negligence was a separate tort that occurred post-operatively.<sup>237</sup> The court was swayed by the logic that the government breached a duty to Schwartz by not properly treating him after he became a civilian.<sup>238</sup>

In reproductive contexts, one would assume that parents will provide the support necessary for their children's recovery, but nothing in the law obligates parents to care for the unique needs of their children after they reach the age of majority, even if specific harms continue into adulthood. Depending on the level of disability, children may need economic support into adulthood to provide basic necessities in their lives, including medical care and housing.

Under the continuation theory, plaintiffs would be required to demonstrate the continuation of the harms caused earlier in life. If, for example, the plaintiff's underlying condition, such as the need to use a respirator, ceases to exist or other injurious health conditions improve over time, a plaintiff's claim would necessarily weaken.

### 3. *Derivative Tort Theory*

Derivative tort theory provides an interesting foundation on which to build reproductive technology claims. Under a derivative theory, child plaintiffs would claim to suffer from a third party's negligent action against their parents. A typical derivative claim might involve the misdiagnosis of a parent during pregnancy<sup>239</sup> or a botched sterilization that results in conception and subsequent birth of a child. At times the purpose of a vasectomy or tubal ligation is to prevent conception specifically because one parent (or both) carries a harmful genetic marker that the parents *intend* to avoid passing on.

Reproduction cases that fall within a derivative theory generally involve wrongful life (initiated by the child) or wrongful birth (initiated by the parent). In a Seventh Circuit case, discussed *infra*, the court awarded damages to the

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<sup>234</sup> See *Schwartz v. United States*, 230 F. Supp. 536, 540–42 (E.D. Pa. 1964).

<sup>235</sup> *Id.* at 537–38.

<sup>236</sup> *Id.* at 539.

<sup>237</sup> *Id.* at 540.

<sup>238</sup> *Id.* at 540–42.

<sup>239</sup> See, e.g., *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981).

parents of a child born with blindness and hearing loss as a result of the failure of military doctors to inform the pregnant mother she had rubella.<sup>240</sup> The court reasoned that there is very little difference between medical malpractice actions and wrongful birth claims.<sup>241</sup> Because wrongful birth causes of action do not require a significant departure from existing tort law, courts are less inclined to become mired in political and moral questions that are intertwined with the tort at issue.<sup>242</sup>

Derivative claims provide a permissible avenue for litigation, especially when there has been overreaching, coercion, and a breach of fiduciary responsibility to the plaintiff. Such conditions can be said to exist when doctors, hungry to profit from the vulnerable status of infertile women and couples, engage in certain risky practices and negligent conduct. Assisted reproductive technology is complicated by the pecuniary interests of medical professionals, including the endocrinologists involved in the procedures.<sup>243</sup> At Integra Med's website, for example, women are encouraged to "[a]pply for a loan online now!"<sup>244</sup> Through Integra Med's financing program with Springstone Patient Financing, clients can extend payments up to seven years.<sup>245</sup> Doctors interviewed at one clinic (now a franchise) exclaim with pride that their company once had "a handful of employees in 1984" and now boasts four hundred employees at facilities in California, Texas, Minnesota, Virginia, and even at one facility in China.<sup>246</sup> Revenue generated by ART services surpasses three billion dollars annually.<sup>247</sup>

When physician financial interests compete against patients' best interests, ethical and legal conflicts should be anticipated. Even if clinics view their interests as running parallel to women's social and personal interests to procreate, the potential for overreaching intensifies. Money-back guarantees do not work in this industry; entrepreneurial clinics and their management profit from each ART attempt despite whether pregnancy is achieved, as would

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<sup>240</sup> *Id.* at 473.

<sup>241</sup> *Id.* at 476.

<sup>242</sup> *See id.*

<sup>243</sup> *See Fertility Centers in Illinois Addresses Dangerous Trend Surfacing Within Chicago Fertility Community*, BUSINESS WIRE, May 18, 2004, at 1 (urging that more extensive types of therapies for complex fertility cases be referred to highly trained reproductive endocrinologists).

<sup>244</sup> *See Infertility and IVF Financing*, INTEGRAMED FERTILITY NETWORK, <http://www.integrated.com/inmdweb/content/cons/financing.jsp> (last visited May 30, 2010).

<sup>245</sup> *Id.*

<sup>246</sup> *See, e.g.*, Edmonds, *supra* note 18, at 174 (discussing the Genetics and IVF Institute).

<sup>247</sup> *See CAHN, supra* note 28, at 1.

be the case in a lottery whether or not the ticket holder wins.<sup>248</sup> In most cases, the ticket holder loses, but the state lottery profits. Here, too, clinics profit.

*a. Pregnancy Misdiagnosis*

In *Robak*, the parents filed a medical malpractice action against the government for its failure to inform the mother she had contracted rubella syndrome while pregnant and to provide proper information and guidance about the potential consequences to the fetus.<sup>249</sup> The plaintiffs' claim was brought under a wrongful birth theory.<sup>250</sup> In a finding for the plaintiffs, both the federal district and appellate court found that the defendant's negligence in failing to inform the mother that she had rubella was the proximate cause of the child's injuries.<sup>251</sup> The damages included the cost of raising a "normal" child.<sup>252</sup>

One clear parallel between *Robak* and contemporary reproductive technology cases is the importance of information sharing. In *Robak*, the defendant's culpability did not extend from a failure to perform an abortion or even to advise the mother that she should seek abortion counseling or services elsewhere.<sup>253</sup> Rather, the Seventh Circuit was rightfully persuaded on two issues. First, the government doctors had a duty to provide information to the mother as to her condition.<sup>254</sup> Second, the plaintiff had a right to expect information from her doctor, and from that information she could have decided whether to continue the pregnancy.<sup>255</sup>

Similarly, plaintiffs using ART services deserve clear information that is not polluted by the pecuniary interests of reproductive specialists who stand to profit whether the plaintiff's pregnancy is achieved or not despite the conditions of the pregnancy or the quality of life of the child(ren). This over-enrichment has gone virtually unchallenged in reproductive contexts. Although lawyers are prohibited from in-person solicitation of business, specifically due to concerns about overreaching, conflicting interests, financial

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<sup>248</sup> See Thomas H. Murphy, *Money Back Guaranties for IVF: An Ethical Critique*, 25 J.L. MED. & ETHICS 292 (1997).

<sup>249</sup> *Roback v. United States*, 658 F.2d 471, 473 (7th Cir. 1981).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 473, 476–77.

<sup>252</sup> *Id.* at 479.

<sup>253</sup> *Id.* at 477.

<sup>254</sup> *Id.* at 476–77.

<sup>255</sup> *Id.*

gains, and undue persuasion with vulnerable clients, these issues are virtually unexplored in the medical context, but they provide a perfect juxtaposition.<sup>256</sup>

In *Becker v. Schwartz*, the New York Court of Appeals allowed parents to bring wrongful birth claims following negligent consultation by an obstetrician.<sup>257</sup> The thirty-seven-year-old plaintiff, Dolores Schwartz, consulted her obstetrician and remained under his care from the tenth week of pregnancy.<sup>258</sup> Schwartz claimed that the doctor never advised her about amniocentesis or the possibility of birthing a baby afflicted with Down syndrome given the higher risk for women over thirty-five.<sup>259</sup> In permitting the mother's recovery, including expenses for the life-long care of her afflicted child, the court emphasized that courts were no longer shackled by conceptual difficulties in this domain.<sup>260</sup>

### b. Negligent Sterilizations

Botched sterilizations are another sphere in which parents and children may bring tort claims within the wrongful birth and wrongful life contexts.<sup>261</sup> The general claim in these cases is that conception and birth of a child are proof of the medical negligence in the sterilization procedure.<sup>262</sup> Parents in such cases seek recovery and restitution for the costs associated with the pregnancy and delivery.<sup>263</sup> Most relevant for purposes of this Article is the inquiry regarding child-rearing expenses. Courts are generally reluctant to award those types of damages, characterizing them as too speculative. In *McKernan v. Aasheim*, the court fleshed out its concern about the lack of science it perceived in awarding damages for child rearing, asserting:

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<sup>256</sup> See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449–50 (1978) (upholding the constitutionality of a rule prohibiting an attorney from soliciting a client in a hospital).

<sup>257</sup> 386 N.E.2d 807, 808 (N.Y. 1978).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 808–09.

<sup>260</sup> *Id.* at 813–14. Similarly, in *Garrison v. Medical Ctr. of Del., Inc.*, 581 A.2d 288, 292 (Del. 1989), the court held that plaintiffs could recover for “extraordinary” life expenses they were likely to incur in raising their disabled son. In that case, the medical professionals did not disclose relevant amniocentesis information in a timely manner, thereby foreclosing the mother’s opportunity to obtain a legal abortion. *Id.* at 289.

<sup>261</sup> See, e.g., *Fulton-DeKalb Hosp. Auth. v. Graves*, 314 S.E.2d 653 (Ga. 1984); *Cockrum v. Baumgartner*, 447 N.E.2d 385 (Ill. 1983), *cert. denied*, 464 U.S. 846 (1983); *Garrison v. Foy*, 486 N.E.2d 5 (Ind. Ct. App. 1985); *Nanke v. Napier*, 346 N.W.2d 520 (Iowa 1984).

<sup>262</sup> *Emerson v. Magendantz*, 689 A.2d 409 (R.I. 1997) (recognizing the tort of negligent performance of a sterilization where a pregnancy results, but adopting the limited recovery rule, which excludes specific damages such as emotional distress for the birth of a healthy child).

<sup>263</sup> *Id.*

We believe that it is impossible to establish with reasonable certainty whether the birth of a particular, healthy, normal child damaged its parents. Perhaps the costs of rearing and educating the child could be determined through use of actuarial tables or similar economic information. But whether these costs are outweighed by the emotional benefits which will be conferred by that child cannot be calculated. The child may turn out to be loving, obedient and attentive, or hostile, unruly, and callous.<sup>264</sup>

Such judicial claims, however, ignore the parallels in other aspects of tort law that award special damages to children who suffer irreparable harm.<sup>265</sup>

The United States Department of Agriculture (USDA) annually collects and reports data on the costs of raising children to the age of majority.<sup>266</sup> According to USDA, average “annual child-rearing expenses” for middle-income families “ranged between \$11,650 and \$13,530.”<sup>267</sup> Other published studies report costs associated with raising children with disabilities as higher than that of raising children without disabling conditions.<sup>268</sup>

Annual data collected by the Maternal Child and Health Bureau of the U.S. Department of Health and Human Services reports that families with children

<sup>264</sup> McKernan v. Aasheim, 687 P.2d 850, 855 (Wash. 1984) (en banc) (“[I]t is impossible to tell, at an early stage in the child’s life, whether its parents have sustained a net loss or gain.”).

<sup>265</sup> See Anderson v. Sears, Roebuck & Co., 377 F. Supp. 136 (1974) (opining that a jury verdict of two million dollars for compensatory damages was not excessive where a four-year-old girl had been burned over 40% of her entire body and would need care related to her injuries throughout childhood).

<sup>266</sup> MARK LINO, U.S. DEP’T OF AGRIC., CTR. FOR NUTRITION POL’Y & PROMOTION, EXPENDITURES ON CHILDREN BY FAMILIES, 2009: MISCELLANEOUS PUBLICATION NO. 1528–2009 (2010). Since 1960, the USDA has collected data on annual child-rearing expenses. *Id.* at iii.

<sup>267</sup> *Id.* at 10.

<sup>268</sup> See Paul W. Newacheck et al., *Health Services Use and Health Care Expenditures for Children with Disabilities*, 114 PEDIATRICS 79 (2004). According to the study:

[The Medical Expenditure Panel Survey (MEPS)] is designed to produce national estimates of the health care use, expenditures, and insurance coverage of the US civilian, noninstitutionalized population. It is composed of 4 component surveys: the Household Component, the Medical Provider Component, the Insurance Component, and the Nursing Home Component. MEPS uses an overlapping panel design in which data are collected through a preliminary contact followed by a series of 6 rounds of interviews over a 2.5-year period.

*Id.* at 80; see also Donna Anderson, et al., *The Personal Costs of Caring for a Child with a Disability: Review of the Literature*, PUB. HEALTH REP., Jan–Feb. 2007, at 3 (reviewing data and findings presented in seventeen articles published since 1989 on the personal cost of caring for a disabled child); Paul W. Newacheck & Sue E. Kim, *A National Profile of Health Care Utilization and Expenditures for Children with Special Health Care Needs*, 159 ARCHIVES PEDIATRIC & ADOLESCENT MED. 10, 12 (2005) (“Total health care expenditures averaged \$2099 for [children with special health care needs], more than 3 times the average of \$628 for children without special health care needs . . .”).

suffering disabilities can incur significant financial costs, resulting in severe economic burdens for families without health care coverage.<sup>269</sup> Another study, “demonstrate[d] that the 7.3% of US children with disabilities used many more services than their counterparts without disabilities in 1999–2000.”<sup>270</sup> There, researchers attributed the added expenses to hospital stays: 464 versus 55 days per 1000; non-physician professional visits: 3.0 versus 0.6; and occupational home visit days: 3.8 versus 0.04.<sup>271</sup> When framed as direct expenditures, the differences are highlighted. For example, expenditures for hospital stays were \$2,669 versus \$676.<sup>272</sup>

The negligent sterilization cases typically fall under the conceptual umbrella of “wrongful conception.” Claims of wrongful conception have received mixed treatment from courts.<sup>273</sup> The conceptual underpinnings of such causes of action are quite strong, however, especially as they specifically relate to an underlying cause of negligence. Interestingly, in the early cases dismissing plaintiffs’ claims for wrongful conception, the thrust of the courts’ denial of damages was moral in nature—that parents should welcome unanticipated children or that the birth defects suffered were entirely unforeseeable by the physicians who botched the sterilizations. To be sure, a pregnancy should be unforeseeable after a vasectomy or tubal ligation. But, complications should necessarily be anticipated by a negligently performed surgical sterilization that is intended to make conception impossible.

*Bowman v. Davis* provides a compelling example of a wrongful conception case.<sup>274</sup> Veda Bowman, who suffered from obesity, diabetes, and a history of difficult pregnancies and miscarriage underwent a bilateral partial salpingectomy (tubal ligation) immediately after the birth of her fourth child.<sup>275</sup> Barely three months later, Bowman conceived twins, and she later delivered

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<sup>269</sup> See U.S. DEP’T OF HEALTH & HUMAN SERVS., HEALTH RES. & SERVS. ADMIN., THE NATIONAL SURVEY OF CHILDREN WITH SPECIAL HEALTH CARE NEEDS: CHARTBOOK 2005–2006 (2007), available at <http://mchb.hrsa.gov/cshcn05/NF/7impact/financial.htm> (“Nearly 42 percent of uninsured [children with special health care needs] live in families that reported a financial problem, compared to 20 percent of those with only public coverage and 15 percent of those with only private insurance.”).

<sup>270</sup> Newacheck, *supra* note 268, at 79.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> For example, in *LaPoint v. Shirley*, 409 F. Supp. 118, 119–22 (W.D. Tex. 1976), the court denied relief for the rearing of a child born with severe disabilities resulting from a botched sterilization procedure. The court found the proximate cause link far too tenuous to allow recovery of child-rearing expenses. *Id.* at 121.

<sup>274</sup> *Bowman v. Davis*, 356 N.E.2d 496 (Ohio 1976).

<sup>275</sup> *Id.* at 497.

them prematurely.<sup>276</sup> In allowing the recovery of damages to cover the care and upbringing of one of her twin daughters, who suffered kidney and hip malformation and mental retardation, the court recognized Bowman's rightful claim to expenses stemming from the foreseeable consequences of the operation.<sup>277</sup> Granting lifelong support for the Bowman twin was an acknowledgement that love alone cannot feed, clothe, educate, and provide special services for children born with disabilities.

## CONCLUSION

Law in the twenty-first century demands a different approach to biotechnological cases, especially in the spheres of reproductive technology. The parental immunity doctrine is the most significant barrier to children seeking recovery against their parents in tort law. That the responsibilities associated with raising children are vast, and often enormous stamina is required to maintain a healthy family and well-functioning household, does not justify barring children's claims. Instead, it indicates the need for a nuanced approach to immunity doctrine, which will illuminate factors appropriate for judicial consideration that account for the challenges of raising children and providing housing, clothing, and food.

By deferring to the antiquated principles that parental immunity doctrine upholds, courts stand in the way of providing judicial access to a discrete, vulnerable class—children—based on outmoded social conceptions. In many instances those conceptions conflict directly with evolved norms of justice, fairness, and human rights, creating significant barriers and gaps in the law. Among the gaps created are the inconsistent applications across legal doctrines. In property, for example, courts have not hesitated to protect the interests of children.<sup>278</sup> According to one court, “it would be anomalous for us to give greater protection to property rights than to personal rights” of children.<sup>279</sup>

In tort law, courts attempt to mitigate these concerns by pointing to the criminal law as a remedy for children injured by parental misconduct. Expecting the criminal law to be the only avenue for children to redress wrongs against parents is as vacuous as suggesting the same for car accident

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<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 499.

<sup>278</sup> See HARPER ET AL., *supra* note 204.

<sup>279</sup> Gibson v. Gibson, 479 P.2d 648, 651 n.7 (Cal. 1971).

victims. Incarcerating a parent will hardly treat a child's disability or provide the economic resources necessary to provide a meaningful quality of life.

In an era when the federal government and states refuse to regulate assisted reproduction, there must be room within the law to promote social justice for children injured by the reckless conduct of physicians and parents. Tort law can serve a much needed social policy function by placing a check on the conduct of physicians and potential parents. Tort law discourages reckless behavior *ex ante* and helps to restore victims *ex post*.

So, what might a new approach to tort law provide to children born through reproductive technology? Eliminating barriers to tort law might provide the only reasonable disincentives to respond to the negligent or reckless use of reproductive technologies. Moreover, it may provide the only recovery possible for children born into a life of sustained disabilities caused by the negligent use of reproductive medicines and techniques.