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David Wasserman

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The Moral Cost of Compensatory Damage Claims in Reproductive Negligence Cases

DAVID WASSERMAN*

INTRODUCTION

In this original and important work, Dov Fox makes a compelling case for rethinking and reformulating the way that negligent conduct by reproductive health professionals is understood, and in the way the harms resulting from that misconduct are rectified.[1] He seeks a unified account of this negligence and harm that recognizes the "gravamen of the offense" as the wrongful interference with reproductive planning while also recognizing three distinct categories of adverse outcomes: deprived, imposed, and confounded procreation. Fox argues that the injuries in each category differ from each other sufficiently to justify the recognition of three distinct torts.[2]

To unsympathetic courts, it has seemed like wrongful-birth plaintiffs are trying to have their cake and eat it too, enjoying the benefits of the tort—an intimate parental relationship with a beloved, if initially unwanted, child—while seeking damages for conduct that was necessary for that benefit. The plaintiffs confront what has been called the "paradox" of wrongful birth: they seek compensation for wrongful acts whose foreseen

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* © 2021 David Wasserman. Visiting Research Scholar, Department of Philosophy, University of Maryland, College Park, MD.

1. DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW (2019) [hereinafter FOX, BIRTH RIGHTS AND WRONGS].

2. *Id.* at 99–139.

outcome they would not now wish to undo.[3] Fox seeks to avoid this conundrum by shifting the focus from the result—the allegedly "wrongful birth" of a child the parents love and cherish—to the negligent interference with their prior planning. He is, however, understandably reluctant to ignore the consequences of that interference in assessing damages, and he insists that plaintiffs be able to recover compensation for the specific harms they sought to avoid, compensation that would vary with the magnitude of the harm that they or their family incurred.[4]

But there is a moral cost to allowing compensation for reproductive negligence. In seeking compensatory damages, the plaintiffs are not only demanding redress for the affront to their autonomy, however wisely it may have been exercised; they are treating the consequences they sought to avoid by that exercise as harms for which they deserve to be compensated. But many of those consequences are inseparable from the child they now love and cherish, in the sense that they could not have had that child without those consequences. There is thus a tension between the demand for compensation and the attitude of unconditional love and acceptance the plaintiffs aspire to maintain towards their child. I will argue that that tension can be mitigated, but cannot be fully resolved so long as reproductive negligence is regarded as a compensable wrong.

First, however, I will suggest that this tension could be avoided or significantly reduced by allowing only punitive and reliance damages for confounded and imposed reproduction. I will argue that the demand for compensatory damages in those cases, however reasonable in other respects, requires parents to affirm their earlier decision to avoid the birth of the type of child, or number of children, they now have. While this does not explicitly treat the birth of those children as "wrongful," it gives rise to the kind of tension Fox sought to avoid in developing the alternative tort of reproductive negligence.

After arguing for this claim in more detail, I will place the demand for compensatory damages in the context of a family of cases that pit the acknowledgement of present benefits against the condemnation of the wrongs responsible for them. I will then examine several attempts in the philosophical literature to address a challenge akin to that raised by the

3. *Id.* at 40–47, 90–91. I regard these as harder cases than those in which the plaintiff parents *do* wish the injury undone, as in the negligent failure to prenatally prevent or diagnose a condition like Tay Sachs, that arguably results in a life not worth living. There is not even an apparent paradox here, since although the parents love the child, they regret its birth and wish for the child's sake that it had never been born. The basis for damages here is straightforward, or at least far less "paradoxical" than in the more common cases where the parents emphatically do not regret the birth of this disabled or unrelated child and emphatically do not wish that they had not brought it into existence.

4. FOX, BIRTH RIGHTS AND WRONGS, *supra* note 2, at 128–39.

demand for compensation in confounded procreation cases: to reconcile the affirmation of a prior judgment that a certain type of child should not be born, or would be too burdensome to bear, with the unalloyed joy and lack of regret many parents claim to feel at the birth of such a child. I will argue that to the extent these attempts are successful at avoiding or blunting offense to that child, they fail to justify compensation for the unavoidable costs of the child's existence.

My conclusion is not that the law should bar compensatory damages for reproductive negligence, or even that parents should not seek such damages, only that the moral cost of their doing so may be greater than Fox acknowledges. I will suggest that the best way to avoid this moral cost is for the state to reduce the need for legal claims that incur it, by absorbing many of the expenses of raising children, especially disabled children, now borne by their parents—giving victims of reproductive negligence less incentive, and need, to seek compensation.

THE ROAD NOT TAKEN

A tort that concerned itself strictly with vindicating the plaintiff's violated autonomy would not require either the plaintiff to claim, or the court to assess, actual damages. The plaintiff would not be endorsing or affirming the specific choice that was thwarted by the defendant's negligence but her authority to have made that choice, whether or not she now regards it as a wise one. Her posture would be similar that that of an individual who objects to paternalistic interference with a choice she had autonomously made—whether or not she would make that choice now. It was her choice to make, even if she made it badly, and the paternalistic intervention violated her autonomy, even if it resulted in a better outcome.

At an extreme, such a tort would not distinguish among Fox's three kinds of reproductive harm, treating imposition, denial, and confounding as serious autonomy violations. A less extreme form of neutrality would make a categorical distinction between reproduction denied and imposed, on the one hand, and reproduction confounded, on the other. It could be argued that, at least in the case of plaintiffs who were not yet parents, the decision to become or avoid becoming a parent was an "existential" one, whose neglectful disregard constituted a greater autonomy violation than the confounding of the plans made by plaintiffs who sought and succeeded in becoming parents.

Further distinctions could be made, but they would have to be based on the (expressed or reasonably assumed) importance to the plaintiffs of the

plan, not the harm that resulted from the negligent failure to implement it. Despite the obviously close association between the two, they may diverge, and if they do, what matters is only the importance to the plaintiff of the thwarted plan. Thus, parents who made it clear that they would rather have no child than a slightly disabled one would suffer a greater autonomy violation from the defendant's negligence than would plaintiffs who made it clear that, while they had a strong desire for a nondisabled child, that they would rather have a severely disabled one than no child at all.

As this last contrast suggests, however, it might be problematic for courts to gauge the magnitude of the autonomy violation in terms of the subjective importance of the plaintiffs' plans. Prospective parents may attach great importance to what most of us would regard as frivolous or toxic preferences—for example, for or against certain body types or physical features. It might seem perverse to courts to award greater punitive damages for the disruption of centrally important but morally questionable reproductive plans than less important but less objectionable plans. On the other hand, the courts should not be in the business of passing moral judgment on private reproductive plans. For these reasons, I think it would be best to scale punitive damages within broad categories of reproductive negligence only by the extent to which the defendant's conduct departed from the prevailing standard of care.

THE ROAD FOX TAKES, AND WHERE IT LEADS

Fox, however, does not go this way. He wants plaintiffs to be able to seek compensation for the specific harms caused by the negligent confounding of their reproductive plans. He favors compensation based on "the magnitude and probability of frustrated interests in offspring particulars."[5] He understands these as interests in preventing concrete harms. So, in the case of health conditions that the parents had sought to prevent, "courts should start with the foreseeable range of implications for offspring lifespan, impairment, medical care, and treatment options. . . . the reproductive injury will tend to be less serious for conditions whose symptoms are milder, treatable, and uncertain to manifest."[6] Because these injuries are tangible—financial costs, impaired functions, reduced lifespan, pain, discomfort, or disruption, for example—they cannot be offset by the intangible benefits of coming to love and cherish an initially unwanted type of child.[7]

5. FOX, BIRTH RIGHTS AND WRONGS, *supra* note 2, at 139.
6. *Id.* at 129–30.
7. *Id.* at 133.

This may be a desirable practical outcome, but It lets in much of what Fox tried to exclude in formulating the tort of reproductive negligence. The parents are not suing only for the violation of their autonomy; they are seeking, to use the legal phrase, "to be made whole;" to be compensated to the extent possible for not getting what their agreement with the provider entitled them to. In making this expectation the baseline for recovery, they are affirming their interest in "offspring particulars" that the defendant's negligence denied them and treating the failure to get those particulars as a harm. This is a problematic affirmation to the extent the harm is inseparable from the child they love and cherish.

The problem in seeking compensatory damages—at least the one I am concerned with—is not that it risks hurting the child's feelings or eroding its trust and self-esteem. Nor is it that it reflects or predicts insufficient parental affection for or commitment to the child. Children may be too young to appreciate their parents' legal claims, or if older and secure in parental love, may not care. Parents often fall in love with children of a type they tried to avoid, lose any initial regrets they may have had about getting that kind of child, and raise the child as lovingly and affectionately as parents who were more welcoming prenatally.

The problem is simply that such parents act on attitudes and beliefs that are inconsistent or in tension with the acceptance and love they now have for their child. In the rest of this paper, I will not attempt to address claims that such inconsistency or tension is hurtful or harmful to the child; I will assume for the sake of argument that it is neither. Rather, I will consider and reject accounts that attempt to deny this inconsistency or tension. In doing so, I will sometimes sketch a hypothetical dialogue between parent and child. My aim is to assess the adequacy the parent's attempt to reconcile their pursuit of compensatory damages with their unqualified acceptance and love, not to suggest or predict whether the words I put in their mouths would actually hurt or damage the children who heard them.

There would be no need for reconciliation in a case where the parents had not sought to avoid a particular kind of child, but merely to prepare for the birth of such a child. An increasing number of prospective parents state that they would seek prenatal testing, not to decide whether to continue the pregnancy, but merely to make medical or financial preparations. For example, if the fetus turned out to have Down syndrome, they would make arrangements to give birth in a tertiary care hospital because of the greater odds that it would need neonatal cardiac surgery. Or they might set aside

more money for more costly childcare and tutoring in a state with poor "special education." Such parents might incur substantial reliance costs if the negligent diagnosis prevented them from making such preparations. It would be hard to see any offense to their child in treating the harms of unpreparedness as a recoverable injury.

In many or most cases of confounded procreation, however, there might not be substantial reliance costs—and even if there were, recovering for them would provide only a small fraction of the damages that would typically be sought for negligent confounding. The eventual development of fetal medicine for genetically based disability may dramatically increase the costs of relying on a negligently mistaken diagnosis, because the child may suffer significant harms from the failure to obtain effective prenatal interventions. But at present, even the fullest preparation could not significantly mitigate the kinds of injury for which Fox would allow confounded plaintiffs to seek compensation.

The tension in this posture can be highlighted by comparing it to the parents' posture in demanding compensation for the same, or similar, harms resulting from *gestational* negligence by a doctor who gave the mother a drug he should have known was teratogenic. In that case, the parents' demand would seem fully compatible with their avowed love and lack of regret: their love for their child is not strained by treating as a compensable injury a health condition that *this child* would have avoided had the doctor exercised due care. In contrast, the confounded parents can't claim that, absent the doctor's negligence, *this child* would not have had the injuries for which they seek compensation: this child would never have been born. Due care could not have resulted in their having this child without its health condition; that was a practical impossibility.[8]

Now, one response is that in the case of confounded procreation, even if the child could not have come into existence without its disability, the plaintiffs can cherish the child but regret its disability. As loving parents, they would seek to correct the disability if they could—except in the case of certain disabilities so integral to the child's identity that correction would amount to repudiation or even replacement. But given the practical impossibility of having had this child without its disability, the defendant's

8. I am alluding here to the familiar non-identity problem. For a clear introduction, *see*, Melinda A. Roberts, *The Nonidentity Problem*, STAN. ENCYC. PHIL. (Edward N. Zalta ed., 2020), https://plato.stanford.edu/archives/win2020/entries/nonidentity-problem/ [https://perma.cc/LWT6-BCPW]. A parallel claim can be made where the confounding results in the absence of genetic ties with the child. Even in cases of switched embryos, where *this child* —the one the parents now love and cherish—could have existed without the doctor's negligence, it would have been born to, and raised by, different parents. It is only marginally less disturbing to treat the child's birth into the parent's family as a harm than to treat its very existence as a harm.

negligence cannot be said to have caused that disability or any harm resulting from it, except in causing or allowing this child, or a child with this disability, to be born. The reproductive plan thwarted by negligence sought to prevent the existence of any child with the condition this child has, as the only feasible way to avoid the condition that this child has. In seeking compensation for the condition, the plaintiffs are seeking to come as close as possible to the fulfillment of a plan that would have precluded the birth of this child.

Without entering a metaphysical briar patch, I want to acknowledge that the extent to which the pursuit of damages constitutes an affirmation of the thwarted plan varies with separability of the harm alleged from the now-beloved child. Imagine a couple promised $100,000 by a parent if and only if their first child is male; they detest the sexism (and may even hope for a girl) but need the cash. Because of their doctor's negligence, they end up with a female child, with whom they immediately fall in love. In suing the doctor for the $100,000, they are not only seeking to vindicate their autonomy but to recover what they lost by the negligent disruption of their enrichment plan. They want every dime they would have received if the doctor had exercised due care and prevented the existence of a girl like their beloved daughter.

And yet, in this case, their acceptance and welcome of their actual child seems less qualified than in cases of a genetically based disability. They desired a different type of child only because of its highly contingent association with the money. It would have only required the benefactor's change of heart to disassociate the child's sex from the cash. This is not to say that their daughter, on learning of the lawsuit years later, would have no reason to be disturbed, but she would have more reason to be disturbed by her parents' mercenary attitude, or their complicity, than by their attitude toward female children. As I will argue below, parents who tried to avoid having a child with a disability only because they could not at that time afford adequate care arguably would face less tension in seeking compensatory damages than would parents with a less contingent aversion to having a disabled child.

AN AWKWARD POSTURE

As I have suggested, the parents' demand for compensation in many confounded procreation cases would be in tension with their unqualified welcome and unconditional acceptance of the child for whose unavoidable burdens and expenses they seek compensation. To highlight that tension,

I'll contrast the parental postures in three other types of confounding cases that, while similar in some respects to those I've just characterized, are easier to reconcile with unqualified love, welcome, and acceptance:

Tight budget: Imagine parents who had been at a life stage when they could barely afford to raise one healthy child. They would be open to having a child with a costly disability, or triplets, once they had established themselves financially, moved out of their studio apartment, et cetera. But they want the OB/GYN to ensure that this first time, they will not have a child with a costly, genetically diagnosable disability, or multiple children. Assume that they have accurately assessed the additional costs of both and have done careful financial as well as reproductive planning. Such parents could explain a reproductive negligence lawsuit to their children in the following terms: "We just weren't ready for a child like you/more than one child, though we would have welcomed children like you/triplets all later on. But we're thrilled to have you now that you're here, and the only reason we're suing is to get the money we need to raise you."

The case of unwanted multiples is really one of procreation imposed, not confounded, and an especially favorable one for avoiding offense. The parents' posture in such a case does not seem demeaning to any of their children, in part because none of the three can be identified as one of the unwanted ones. There's no fact of the matter about which children were unwanted; the parents wanted any one of them and no more. In contrast, parents who did not want *any* child have assumed a slightly more awkward posture toward the child imposed on them by the provider's negligence: while they were not seeking to avoid a specific type of child, any child was unwelcome at that time. The awkwardness is still greater in the case of a medically expensive child. In this case, the parents were seeking to avoid the very type of child they ended up having. But even here, there is less offense than in a typical case of confounded procreation: the expensive child can be seen more like a guest who wasn't unwelcome but who arrived early, before the hosts were ready to receive guests. The offense might be greater if the parents' willingness to have such a child was strictly hypothetical, however sincere—for example, parents mired in chronic poverty who would happily bear such a child if, against all odds, they ever became wealthy.

Holland Instead of Italy: This travel analogy is often used by advocates for Down syndrome and other intellectual and developmental disabilities (IDDs) to illustrate how the experience of raising a child with a disability can be different without being worse: prospective parents may initially be disappointed at arriving in the wrong country, but they will find Holland

quite enchanting and have little regret about their unexpected visit.[9] We can imagine parents who sought a particular kind of child and were initially disappointed to end up with another. The easiest case would be one where, despite a strong preference for a particular trait, they recognized that it could be equally rewarding to have a child without it. This might well be the case for parents who want their first child to be a boy, or a girl, but have the reverse preference for their second child. Of course, such parents would be unlikely to abort a fetus of the "wrong" sex, go through the trouble and expense of sperm sorting or IVF to select the preferred sex, or to sue the doctor if her negligence resulted in their getting a child of the "wrong" sex.

Parents might feel more aggrieved if they had sought a particular trait, like height or musicality, that could (I will assume) be selected for in advance. They would be disappointed in ending up with a child of average height or musical ability, even if they quickly discovered that they could have just as rewarding a parenting experience with that child as one with the desired trait. If they did not repudiate their initial preferences, however, they would be affirming their preference for a child with "better" characteristics than the one they got.

The analogy would be even less apt for parents who tried to avoid having a child with Down syndrome, since they would clearly be selecting against, rather than for, a specific kind of child. This may indeed be a typical attitude for prospective parents, whether or not they actually pursue testing. The familiar refrain, "as long as it has ten fingers and ten toes," makes clear that the parents would be content with a range of children—that they are only seeking to avoid one lacking the standard complement of digits, or similar "birth defects."

Repudiation: Some parents might come to reject their initial opposition to a child of a specific type after getting one. Such parents might be able to seek redress for the provider's negligence without offense to their child. "We were mistaken in seeking to prevent the birth of a child [like the one we now have], but even though we were mistaken, the provider had a duty to respect our decision and exercise due care in implementing it. It breached that duty and disrupted our reproductive planning. It should be sanctioned for its negligence, though we now unambivalently welcome the outcome." As I claimed above, however, I don't think that they could demand anything

9. *See*, *e.g.*, JENNIFER GRAF GRONEBERG, ROAD MAP TO HOLLAND: HOW I FOUND MY WAY THROUGH MY SON'S FIRST TWO YEARS WITH DOWN SYNDROME (2008).

more than punitive damages and reliance costs. It would seem inconsistent to seek compensation for costs that they now believe they should have been willing to incur.

In contrast to the parents in **Repudiation**, the parents on whom I will focus do not think they were mistaken in seeking to have a different type of child. In contrast to the parents in **Holland Instead of Italy**, they were not seeking to have a specific kind of child they didn't get, but seeking to avoid having the specific kind of child they got. And in contrast to the parents in **Tight Budget**, they were unwilling not only to have such a child at the present time, but at any time. Yet, like the parents in those cases, these parents love and cherish the child they now have and do not wish that they had a different child instead. Something has changed dramatically in their evaluative landscape, but it is not something that compels them to repudiate the reproductive plans they made, and which the provider's negligence disrupted. I want to situate these parents within a philosophical debate about the coherence or consistency of prospective and retrospective judgments, a debate that is not limited to reproduction.

RECONCILIATION ATTEMPTS

A variety of actions or decisions appear wrongful to the individual, not only in prospect but in retrospect, yet bring about outcomes the individual welcomes. Because of your race, you are denied a seat on a plane that goes on to crash; a lifeguard wrongfully lets a large number of children drown in order to effect a much easier rescue of one drowning child, who turns out to be yours; the injuries inflicted by a drunk driver end your career as a mediocre runner and enable you to instead become a great artist; you carelessly disregard your doctor's instructions to delay pregnancy for several months until you recover from rubella, and, as a result, have a severely disabled child that you dearly love; because of the Final Solution, your Jewish grandparents, from opposite ends of the continent, meet in a displaced-persons camp.

These cases vary in whether the same individual or entity is the wrongdoer and the beneficiary; in whether the wrongdoer intends or expects to confer the benefits, and in whether the benefit is the individuals' existence or survival. What they share is an apparent tension between condemning the wrongdoing and accepting a benefit for which it seems to have been necessary. In some of these cases, that benefit is unforeseen by the beneficiary and unintended by the wrongdoer, which makes it easier to accept the benefit while blaming the wrongdoer. Neither the victim nor perpetrator of discrimination expected the plane to crash, and that prospect was not the reason the victim was barred from the flight. The victim hardly treats his

survival as less welcome in condemning his racist exclusion.[10] I would say something similar in the Final Solution case, although others see the tension as far less tractable.[11] Things are trickier in the lifeguard case. Had the parent known that the one child who would be saved by the easier rescue would be his own, he might have had reasons of partiality to urge the lifeguard to do just what she did; lacking that knowledge, his partiality entitles him to welcome the "suboptimal" outcome. Although it would be awkward for him to condemn the lifeguard's action retrospectively, his relief at the outcome places no pressure on him to oppose her condemnation by third parties who are unconstrained by his partiality to the rescued child.

The most vexing cases for my purposes are those where you (the individual) expect, or should expect, that you will not regret the outcome of the wrongful conduct, because of the way it will change your values or perspective, yet you still believe, after these changes in your values or perspective, that the conduct that led to those changes was wrongful. Moreover, you do not believe prospectively that you will be mistaken or deluded in changing your values. In the context of reproductive negligence, these are cases where: i) the plaintiffs sought to avoid giving birth to a child, or a type of child, even though they expected that they would love, cherish, and have no regrets about having a child, or a child of that type; ii) the defendant's negligence causes them to have a child, or such a child; and iii) as they expected, they now love the child they have and do not wish they had no child, or a different child, instead; yet iv) they do not think they were mistaken in trying to prevent the existence of a child, or that type of child, and in seeking compensation for the negligence which thwarted their attempt.[12]

10. *See* James Woodward, *The Non-Identity Problem*, 96 ETHICS 804, 810–11 (1986).

11. Saul Smilansky, Morally, *Should We Prefer Never to Have Existed?*, 91 AUSTRALASIAN J. PHIL. 655, 655–66 (2013).

12. If having an unwanted type of child can be said to be a transformative experience, or a transformative experience fundamentally different from having a wanted child, it seems more personally than epistemically transformative (Laurie Paul's distinction, LAURIE ANN PAUL, TRANSFORMATIVE EXPERIENCE (2014)) in the cases I've described. Prospectively, the woman or couple expect that they will love and cherish the child and lack regret about its birth. They expect that the experience, which they seek to avoid, will be personally transformative, in changing their values and attachments. While the actual experience of having the child may itself have been epistemically inaccessible, the judgments arising from that experience were not; the prospective parents were correct (and justified) in predicting how they would judge the outcome.

I think we can gain insight into these cases by considering the attempts made by philosophers to defend the coherence of parents' attitudes towards their own past actions in cases where those actions, not those of a provider, results in their having a child with a serious disability. In these "parental negligence" cases, the providers advise reproductive delay or selection to prevent disability. It is the parents, acting Against Medical Advice, who bring about the birth of a disabled child. No one violates their reproductive autonomy; it is freely, if poorly, exercised.[13] But these cases raise much the same question as cases of reproductive negligence: whether the parents' lack of regret for the expected consequences of past conduct—whether their own or a third party's—constrains the attitude they can hold or the response they can make to that past conduct.

Several heroic efforts have been made to deny such constraints: to deny that it is inconsistent for parents to insist that they were correct in seeking to prevent the existence of a type of child they do not regret having and knew they would not regret having. I will suggest that the stronger the grounds the parents have for affirming their present attitudes toward the child, the weaker their grounds for affirming the judgments they defied in bringing it into existence.

Here, then, are three notable attempts to defend the compatibility of present parental attitudes toward their child and their past judgments, in a way that permits the parents to affirm those judgments without impugning their love for that child or their unalloyed joy at having him.

For David Velleman, consistency between prospective and retrospective judgments in such cases is preserved because of a fundamental difference in the reference of those judgments:

> [T]here are no persons whose existence as such ought to have been prevented. Whatever persons there are, are worthy of being treasured. It's the persons that *aren't* whose existence ought to be prevented, and they are nobody in particular, or at least nobody we can point to. Of persons we can point to, the most we can say in that insofar as others might be like them, they—those faceless others—should not be brought into existence. And as soon as there is anyone whose existence might be disparaged by this conclusion, the conclusion falls to the ground and the person should rather be welcomed into the world".[14]

13. I believe that prospective parents can have a variety of good reasons for declining to delay or select to avoid having a child with a disability. But in this literature, the refusal to delay or select is assumed to be wrongful. The issue of consistency obviously will not arise for parents happy to have a child with a disability that they refused to select against, for reasons they continue to endorse.

14. J. David Velleman, *Not Alive Yet, in* DISABILITY IN PRACTICE: ATTITUDES, POLICIES, AND RELATIONSHIPS 91, 94–95 (Adam Cureton & Thomas E. Hill eds., 2018).

This strikes me as little more than a sleight-of-hand. A child, however loved and valued once he can be "pointed to" (in Kripke's terms, "rigidly designated"), could reasonably be offended to discover that his parents believed, and still believe, that they should have prevented the existence of others "like him." If he were to ask, "how do I differ from those "faceless others" whose existence you still think should be prevented?" the Kripkean answer is hardly reassuring: "Because we can now rigidly designate you, and encounter you in a way that makes it possible to love you, rather than just refer to you by a definite description." The child's parents clearly devalue those "faceless others" like him, a devaluation he avoids only because he is accessible to them as a particular person and "they" are not. This difference in reference, or, per Velleman, in "mode of presentation," hardly offers the child a satisfactory explanation of how their past actions were compatible with their present attitudes.

Kieran Setiya emphasizes a metaphysically more robust difference: this child exists, while those other do not. In a case where the parents have a disabled child, but could have had a different, nondisabled child if they waited, Setiya argues:

> In general, what you should want or do is fixed by the balance of reasons. Since what you should prefer beforehand differs from what you should prefer now, there must have been a shift in the reasons for or against. There must be a new reason to prefer not having waited, one you did not have before the decision was made; or one of the reasons you had back then must no longer apply.[15]

Setiya finds the reason in the simple fact that the child exists. He maintains that the child's existence gives not only his parents but all other coexisting people reason to prefer his existence—a reason they did not have at the time the prospective parents did their reproductive planning.

> To know that someone presently exists is to know that she coexists with you. Such coexistence makes a moral demand. Part of being on good terms with your coexistents is to affirm their lives and so to prefer that they exist.[16]

This affirmation, however, does not seem to offer the child a more satisfactory response than Velleman's. To his question: "How do I differ from those you still believe should not be brought into existence?" the Anselmian answer, "You exist," is hardly convincing given the parents' continued belief that the balance of reasons "back then" favored waiting

15. Kieran Setiya. *The Ethics of Existence*, 28 PHIL. PERSP. 291, 295 (2014).
16. *Id.* at 299.

until they could have a different, nondisabled child. At the risk of treating existence as a predicate, the child could object that he warrants unqualified love and acceptance only because of his privileged ontological status; because he belongs to the "in-group" of coexistents. He is left with the unsettling thought that his parents' reason to welcome him, a (type of) child that the balance of reasons opposed, is the bare fact that he exists, a fact that obtains only because of the provider's negligence.

I should note that this tension seems greater in the case of confounded than imposed procreation, since in the latter, the parents are not seeking to avoid *a type of child*. There seems to be something far less personal in cases where the parents did not want *any* child, even if they did not want one for principled reasons that they continue to affirm. Consider a child who learns that his parents tried not to have any children because of their conviction, which they continue to hold, that people should stop procreating because of overpopulation. While the child may feel some slight guilt or shame in adding to that overpopulation, his parents' welcome is the inverse or complement of the welcome given by confounded parents: there is nothing about him they would have tried, or would try, to prevent *except* his existence, and that, being given, can no longer be regretted.

The final reconciliation attempt I will discuss comes from David Sussman. While Setiya claims that the child's very existence provides a balance-tipping reason, unavailable in prospect, for preferring that the child exists, Sussman contends that its existence so fundamentally alters the parent's outlook that the importance of its life is "something that can't be called into question. . . . You [the child] have become part of the outlook from which I can recognize something as good or bad in the first place, not one of the things that might be so regarded itself."[17] In the case of parents who had a disabled child against their better judgment, there is no simple yes or no answer to the question of whether they would do it again. "As they are now, their relationship to their child is an essential aspect of how they understand themselves and of what options they can recognize as real options for them. Although they can say it was wrong to *have* this child, they deny that it was wrong to *have had* him" (my emphasis).[18]

Sussman's account may come closer than the others to giving the parents a satisfying explanation of how they can unambivalently affirm a child's existence while not repudiating their prospective judgment that it would be wrong to have a child like him. They can no longer even question whether the child's life is good or bad, because its life is an essential part

17. David Sussman, *Respect, Regret, and Reproductive Choice*, *in* DISABILITY IN PRACTICE: ATTITUDES, POLICIES, AND RELATIONSHIPS 105, 112–13 (Adam Cureton & Thomas E. Hill eds., 2018).

18. *Id.*

of their evaluative framework, not something that can be evaluated. Yet if they can still say that it was wrong to *have* this child, they can surely say that the provider was wrong to have negligently caused them to have it. That still leaves the question, though, of how they can seek compensation from that provider for "damages" that they can no longer regard as harms. It is unclear that they can claim any harm from that negligence when they cannot evaluate its outcome as good or bad. Since the outcome of the negligence is part of the outlook from which they regard things as good or bad, it is, as Sussman would have it, beyond evaluation, and therefore, arguably, beyond compensation.

But perhaps this very distance from their former selves would enable Sussman's parents to adopt an objective attitude toward their plan. That attitude would enable them to act on behalf of their past selves, as trustees for a plan they cannot endorse but are dutybound to vindicate. Their past selves would be like close relatives, whose thwarted decisions they had an obligation to enforce—an obligation imposed by their relationship. In this role, they can seek damages without offense to their child; they would act like lawyers zealously advocating for a client whose views they do not share. But if they analogy works, it may only work for punitive damages. It's mysterious how their former selves could be compensated for damages they don't have to bear but which are borne by their continuers /trustees, who would thereby receive compensation for "damages" they do not regard as harms.

Sussman's account may, then, offer the child a somewhat more satisfying explanation than Setiya's or Velleman's of how the parents can unambivalently welcome its existence while continuing to believe that it should have been prevented. But if it does, it also, as I suggested, casts doubt on their demand for compensation. This is true as well of Setiya's account, which requires affirmation of the child's existence not only by its parents but by all coexistents, including, presumably, the judges who hear lawsuits. That affirmation would not be undermined by giving the negligent provider a judicial slap on the wrist for disrupting the parents' reproductive plan, but it would be hard to square with compensation for the expected and endorsed consequences of that disruption. Velleman's approach, the least satisfactory for the child, not surprisingly appears the most congenial to damage recovery. In claiming the parents are "doomed to love"[19] a severely disabled child they sought to avoid, Velleman can be seen as treating the negligent act

19. David J. Velleman, *Persons in Prospect*, 36 PHIL. & PUB. AFF. 221, 272 (2008).

as responsible not only for the various burdens of raising the child, but for the parent's unconditional willingness to bear those burdens. To make this claim, however, the parents would have to adopt an observer's "objective attitude" toward their own *present* values and attachments.

CONCLUSION

I've been focusing very narrowly on the consistency of the set of attitudes that the plaintiffs in many confounded procreation cases appear committed to holding. I have questioned the compatibility of demanding compensation for the damages that parents incurred because the provider negligently caused the birth of their present child—a birth they do not regret and a child they love and cherish. I think there is little prospect for coming up with a "theory of the case" that would justify compensatory damages for the parents in a way that is fully consistent with their unqualified acceptance and love for the child. For this reason, I find it problematic for parents to seek compensation for the disruption of their reproductive plans.

I do not think, however, that this inconsistency will often provide an all-things-considered reason for eschewing compensatory damages. Parents rarely seek those damages to enrich themselves; in most cases, they are merely trying to ensure that they will have the financial resources to take care of a type of child they never intended to raise—resources they require because of the provider's negligence. Adopting a morally awkward posture may be a small price for securing the resources needed to adequately support a severely disabled child. It would be presumptuous to insist that such parents forego needed resources rather than press claims that are inconsistent with unqualified acceptance and love. Indeed, the tort regime Fox proposes may be fully justified in a decidedly non-ideal world where the support for raising disabled children is woefully inadequate.

Although I think that parents should in many cases pursue compensatory damages for reproductive negligence, I also think the state should reduce their incentive to do so—not by making it hard for them to make those claims, but by making it much easier for them than it now is to raise a child with the kind of condition they sought to avoid, substantially reducing the costs for which they would be entitled to seek compensation. There would hardly be much moral hazard in more generous state funding for the additional expenses of raising additional children or a child with a significant disability. The fertility rates in countries with the most extensive social welfare systems, like Denmark, Sweden, and the Benelux nations, have been

declining for decades,[20] and in those countries, with both far better state funding for the education and support of people with Down syndrome than in the U.S., and far greater access to abortion, the termination rate for diagnosed cases of Down is—for better or worse—consistently over 90%.[21] Adopting such extensive social welfare provisions, for which I believe there is compelling independent justification, would also have the desirable effect of sparing many victims of reproductive negligence the need to adopt a legal posture that was, on its face, inconsistent with the unqualified acceptance and love for their children that they regarded as a parental ideal—if not always a reality.

20. OECD, FERTILITY RATES (INDICATOR) (2021), https://data.oecd.org/pop/fertility-rates.htm [https://perma.cc/3PZJ-72Z6].

21. Suellen Hopfer et al., *Termination Rates After Prenatal Diagnosis of Down Syndrome, Spina Bifida, Anencephaly, and Turner and Klinefelter Syndromes: A Systematic Literature Review*, 19 PRENATAL DIAGNOSIS 808, 808–12 (1999).