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Intentional Procreation

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Dov Fox's book *Birth Rights and Wrongs*[1] makes the case for the development, through judicial decision-making, of various torts that would respond to the disruption of intentional conception, contraception, gestation and childbirth, where those intentions are thwarted because of the negligence of professionals employed to assist or guide consumers of their services in reaching their reproductive goals. When that occurs, Fox argues, profound personal interests have been wrongly infringed, and that infringement should be compensated, according to well established tort-based principles of negligence, causation, and injury.[2] Yet, typically, as things now stand, they are not.[3] Thus consider: a woman or a couple chooses to conceive, but cannot do so without the assistance of a third party. They enlist a professional (or commercial entity) to assist them toward that end. That professional malpractices—eggs are negligently lost, destroyed, or implanted in the wrong client, sperm is mislabeled or similarly lost or destroyed—and, as a result, the person or couple fails to conceive. She or they are thereby injured by virtue of the deprivation of the chance they would otherwise have had to conceive a child.[4] Her interest in fulfilling her intention to conceive a child has been compromised. Or perhaps a woman, a man, or a couple chooses not to conceive. They enlist a professional to assist in that choice, and that

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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 99–175.
3. *Id.* at 25–54.
4. *Id.* at 99–113.

professional malpractices—a tubal ligation or a vasectomy or an abortion is botched—and consequently the woman conceives, or a pregnancy continues. Whether or not she continues the pregnancy, she is injured: her intention to thwart either conception or gestation was itself thwarted, resulting in what Fox calls a violation of her interest in avoiding "imposed reproduction."[5] Or, finally, I choose to conceive a healthy baby, or a baby with some particular constellation of attributes. I enlist a professional, but my plan is thwarted because of his or her or its negligence. I wanted a baby conceived with sperm donated by a healthy donor; the sperm bank negligently failed to discover—or worse, intentionally failed to disclose—indicators of severe schizophrenia, and as a consequence I now have a child with a profound mental illness.[6] A more troubling scenario: I wanted a baby that looks like me, or shares my racial or ethnic identification. A medical professional or a commercial outlet, through negligence, thwarts that intent, and I bear a child that does not meet the criteria I have specified.[7] In all of these cases, I have been injured, because my interest in not having my reproductive intentions "confounded" has been thwarted.

Fox calls these three separate types of wrongs *reproduction deprived*, *reproduction imposed*, and *reproduction confounded*.[8] The interests, he argues, which are thereby harmed, when these wrongs occur—interests in intentional conception, contraception, gestation, and childbirth—are basic. Our intentions to conceive, to contracept, or to conceive a child who possesses specified traits, are all central to our most deeply held life plans. They are founded in our most fundamental yearnings, and for many of us—obviously not all—their fulfillment constitutes a significant source of life's meaning, pleasure, and value.[9] Our general interest in what we might call—bringing these three interests together—*intentional procreation* is, therefore, at least as fundamental as our interests in privacy, or bodily integrity, or reputation, or freedom from fear, all of which are in some way protected against invasion by tort law.[10] These interests should be so protected, as well. For various reasons, however—including the common law's longstanding disfavoring of emotional or nontangible harms; courts' and judges' political and ethical worries about eugenics and race-driven consumer choices; and judges' and advocates' inability to grasp the profundity or simply the logic of probabilistic harms (the reduction of a chance of

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5. *Id.* at 113–27.
6. *Id.* at 127–41.
7. *Id.* at 6–7, 151–60.
8. *Id.* at 99–164.
9. Alex Stein, *Foreword* to FOX, BIRTH RIGHTS AND WRONGS, *supra* note 1, at vii–viii, 14–16.
10. *Id.* at 14–24.

reproductive success), all of which are addressed in the various chapters of the book[11]—what Fox calls *reproductive wrongs* have not been compensable. Fox argues that none of these reasons are persuasive. Therefore, tort law should evolve in a direction that aims to protect these interests against their negligent invasion by others.

A few others have argued likewise.[12] What makes Fox's book distinctive even among these outliers, however, is his argument that the courts should do so *not* by simply changing the relevant law so as to overcome the standard litany of obstacles to recovery for these injuries: the longstanding pre-existing presumptions against recovery for emotional, economic, nonquantifiable or probabilistic harm, for example. Rather, Fox argues, what courts should do in these cases is fashion three novel causes of action, each of which protects one or another of the fundamental interests identified above: our interest in fulfilling our intentions to reproduce, not reproduce, or to reproduce in a particular way.[13] In each of the cases in which our intentions with respect to one of those goals is negligently frustrated, a wrong has been done the injured party, and if causation and injury are present, then recovery should follow. Therefore, we need a new cluster of torts, or causes of action, to reach these harms done to our reproductive intentions. By analogizing to Warren and Brandeis's impactful article from the 1890s[14] arguing for the existence of interests in privacy, and then for the construction of a handful of causes of action that might protect those interests against private infringement, Fox likewise argues here that these three interests in fulfilling our reproductive intentions exist, and that when they are negligently harmed the wronged party should have access to distinct torts designed to protect them.[15]

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11. *Id.* at 25–54.

12. Fox observes that this is a sizable gap in the literature, and my research bears it out. He notes the exceptions, mostly authored by students: Ingrid H. Heide, *Negligence in the Creation of Healthy Babies: Negligent Infliction of Emotional Distress in Cases of Alternative Reproductive Technology Malpractice Without Physical Injury*, 9 J. MED. & LAW 55 (2005); Joshua Kleinfeld, *Comment, Tort Law and in Vitro Fertilization: The Need for Legal Recognition of "Procreative Injury,* 115 YALE L.J. 237 (2005); and Fred Norton, *Note, Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages,* 74 N.Y.U. L. REV. 793 (1999).

13. *Id.* at 173. The argument is spread over the three chapters that argue for new torts for "procreation deprived," "procreation imposed," and "procreation confounded." *Id.* at 99–139.

14. Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

15. FOX, BIRTH RIGHTS AND WRONGS, *supra* note 1, at 57–60.

That's the overall argument. It seems to me that whether or not the book reaches the level of impact of Warren and Brandeis's brief for privacy—and it might—the book is a success on several measures. It could well be a milestone, or at least a marker, in the doctrinal development of common law torts for injuries caused by the negligence of actors in the growing world of techno-reproduction. One can easily imagine that this book will be viewed and used as authoritative by judges and their clerks faced with claims that point toward reproductive torts, and thus one can see a role for this book in the common law judicial development of the body of law governing these distinctive harms. Second, and whether or not it reshapes the law, the book nevertheless puts forward an argument for the existence of a heretofore unnamed class of interests in reproductive autonomy: interests that in turn imply rights to avoid the wrongful compromise by private parties of reproductive intentions. The articulation of those possible rights and interests is a significant contribution, regardless of whether or not judges take up the invitation in the immediate future to mold a body of tort law that might protect them.

I have two qualms about the overall project that I'll summarize here, then explore in the first two sections below, and then I'll conclude with a suggestion for future development. First, I worry that Fox's assertion of the existence of a fundamental right to intentional procreation suffers from something like what Roberto Unger and other critical legal scholars used to call the "truncating" effect of liberal legal scholarship.[16] The critical idea was that doctrinal scholarship—in part because it is so overwhelmingly geared toward making moderate or incremental reform—tends to take the social world, as well as the bulk of existing law, as given. I will argue in the first section below that Fox's treatment of these reproductive rights and wrongs suffers from something like this truncating effect. Although Fox takes tort law to task for failing to recognize procreational torts, he never addresses critically the social facts, conditions, or narratives that prompt our sufferance and understanding of those harms: specifically, the practice of intentional procreation itself. That practice could use more critical examination, but the overriding need to refashion the law in such a way as to compensate for the harms sustained while engaging in it might have blinded Fox to that need. It's a shame: it's if nothing else a lost opportunity. Second, I worry that Fox's reform proposal also carries what critics used

16. *See* Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 561–82 (1983). For a similar critique of traditional doctrinal scholarship, *see* PAUL KAHN, THE CULTURAL STUDY OF LAW (1999) and Pierre Schlag, *Normative and Nowhere to Go*, 43 STANFORD L. REV. 167 (1990). For a review and response to the "truncation thesis' in critical legal studies, *see generally* ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE 139–47 (1993).

to call "legitimation costs"[17]: if we reform tort law so as to compensate for these reproductive harms in the way in which he argues, we might thereby legitimate the sufferance of uncompensated harms sustained by a far larger class of similarly situated people. In the conclusion, I'll backtrack a bit, and suggest that neither of these objections is fatal to Fox's project, but that they may imply that the wrongs that concern Fox might be better addressed through a reform of tort law that is more conventional than that which he has suggested, and perhaps less likely to run truncating and legitimating risks.

A. INTENTIONALITY IN PROCREATION AND SOCIAL CRITIQUE

Let me begin with the possibility that Fox's doctrinal focus shortchanges —or "truncates," to use the old critical term—the possibility for critique of the social context that gives rise to the need for precisely the doctrinal change he proposes. Again, Fox's book addresses a perversion of an increasingly commonplace social practice: he is focused on acts of negligence that thwart the fulfillment of the intentions of parents or would-be parents seeking technologically assisted conception, contraception, gestation, and reproduction. For the most part, Fox shows, these acts of negligence are not viewed as compensable. They should be: tort law's basic principles of duties of care, causation, and injury all point toward liability. Therefore, tort law should self-correct. We need tort recoveries for the various ways in which our reproductive intentions are negligently thwarted by the omissions or commissions of the professionals or vendors we employ to help us fulfill our reproductive intentions. Fox's conclusion may be well taken; I think it is. There does, however, seem to be something pretty sizeable missing from Fox's otherwise thorough legal analysis of this phenomenon, which does indeed call to mind those old critical complaints about how doctrinal scholarship of this kind brings in its wake the "truncation of critique." The elephant in the room that is left unexamined by Fox's focus on the legal doctrine around techno-reproduction and his proposed reform of it, is the very social reality that seemingly demands legal recourse – the practice of intentional procreation itself. The book suggests a reform that would address some of the harms attendant to this

17. *See, e.g.*, Mark Kelman, *Choice and Utility*, 1979 WISC. L. REV. 769 (1979); Robert Gordon, *Unfreezing Legal Reality: Critical Approaches to Law,* 15 FLA. ST. U. L. REV. 195 (1987).

practice, but leaves the practice within which those harms recur, basically unaddressed.

To be clear: the "practice" that I'm claiming is unaddressed in this book, and which I think is crying out (and overdue) for critique, is not simply the practice of technologically assisted reproduction, although it is of course in part that. I mean, rather, the more pervasive and less obvious "practice" of intending various reproductive outcomes. The "practice," in other words, that I think is directly implicated by Fox's critique of law, but which is not itself critically examined, is the entirety of the "practice" of first *intending* one reproductive or contraceptive result over another, then planning for that result, and then living in accord with that intended result. The injury, Fox takes pains to emphasize, when these intentions are thwarted because of a professional's malpractice, is not the injury of not having a child, or of having a child, or of having a mentally ill or physically disabled child.[18] No one in these actions or potential actions is claiming (or contesting) that the state of being childless is itself an injury, or that the costs of having a child outweigh the delight of having one, or that being borne disabled is worse than not being borne at all. These parents or would-be parents who sue for these injuries are not declaring to the world that they do not love their children, or that their children are the source of their anguish, or that a childless adulthood is an injury for which compensation is due. Rather, Fox argues, they are suing for the thwarting of their reproductive intentions or, put differently, for the distinctive harm done to their intentions regarding procreation. These plaintiffs had all intended to have no children, or a child, or a different child, or a well child, and that intention has been thwarted at least in part and maybe entirely by someone's negligence, and therein lies the injury.

So, it is the practice of *intentional procreation*—the practice of forming and acting on intents to live one's reproductive life in a certain way—and

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18. The focus on intentionality and planning is sustained throughout the book. For just a few examples, *see, e.g.*, FOX, BIRTH RIGHTS AND WRONGS, *supra* note 1, at 14–15 ("vital human goods (of equality, autonomy and wellbeing) give distinct reasons to care that individuals be able to choose whether, when and how to reproduce"); *id*. at 15 ("making these decisions helps a person live well"); *id.* at 16 ("developments in medicine and technology separate sex from conception; biology from brute luck; and genetics from gestation or childrearing. Birth control, surrogacy, sperm banking, egg freezing, and embryo selection don't just enhance control over whether when and how to reproduce. They reveal distinct interests in choosing pregnancy . . . parenthood . . . and particulars"); *id.* at 18–19 (describing the "interest in choosing whether or not to have children" as "crucial to understanding and expressing oneself"); *id.* at 61–62 (emphasizing the interruption of intentionality and planning in various torts as crucial to injury); *id.* at 165 (contrasting role of choice with role of fate in reproduction). The argument that plaintiffs in even wrongful birth and wrongful life actions are not claiming that the life itself is more injurious than "never having been born at all" is made explicitly at 43–47.

not the practice of reproducing, or contracepting, or raising children per se – that is the social practice which is distinctively injured by these reproductive professionals, and then neglected by tort law's myriad failures. The question, then, which I think Fox neglects—or which is truncated, to borrow Unger's word—is what is the nature, origin, and consequences of *this* practice, or this way of being, that is injured, when these negligent acts occur?[19] What does it mean to even have procreative intentions, and what does it mean to so highly value them, and for them to be so palpably *present,* and so precious, as to be what's injured, when those intentions are thwarted?

I don't think the answers to these questions are at all obvious. I suspect the societal shift toward widespread engagement with the practice of intentional procreation—assuming for a moment that we have made that shift—marks a profound transformation of our intimate and familial lives, and I wish Fox's book had explored it more deeply. Contraception and conception are, of course, sometimes profoundly intentional states of being: gay men, lesbians, trans men, trans women, and others who self-identify in gender nonconforming ways, as well as a vast number of straight cis men and women who are either not in sexual partnerships or not fertile, and who wish to parent, will indeed often or typically form extremely precise, focused, reproductive intentions and then act on them, and they often act on them by accessing the very commercial and professional entities that are the target of Fox's critique. In a dramatic late-twentieth century transformation, it is now true that for many people—a now-sizeable percentage of parents—the entire experience of reproduction has everything to do with these intentional acts, and has virtually nothing to do with sex or sexuality at all.

Nevertheless, there still remain plenty of people for whom conceiving, gestating, and parenting are not particularly intentional acts. Look at some examples of what I'll call "nonintentional procreation." First a good deal of the procreating and then the parenting that happens in the world is forced, or at least coerced. "Intentions" are nowhere in sight. Women and girls are still forced to marry, forced to have intercourse, forced to finish the pregnancies that ensue, and then forced to bear and raise the children

19. Fox's brief discussion of the cultural and technological *causes* of the rise of choice, and the demise of chance—followed by backlash against choice—in reproduction, is found at FOX, BIRTH RIGHTS AND WRONGS, *supra* note 1, at 33–35 (crediting the birth control movement, and primarily the invention of oral contraceptives, for the move to choice, and then the family-values movement for the backlash.).

that result.[20] But there are other circumstances as well in which procreating and parenting is a far cry from intentional, even in formally liberal and nonpatriarchal societies. Many of us who are parents fell into it, so to speak, rather than stepped into it. We weren't seeking to *avoid it*, but we weren't seeking it out either. Rather, we conceived recklessly, perhaps misjudging the odds of a less than reliable method of birth control, or the odds of failing to use any at all.[21] Or we didn't think about it one way or the other. Then, perhaps because of a moral opposition to abortion, or perhaps because we weren't able to afford or obtain one, or perhaps because once pregnant we warmed to the idea, or perhaps because we moved from a state of ambivalence to one of acceptance or even affirmance, we continued the pregnancy, and eventually gestated and bore a child. The conception was not fully "intentional," but it was not necessarily a tragedy either; a woman or a man in any of these scenarios may in fact have found her true calling. (Think of the movie *Waitress,* but without the million-dollar tip from the cranky old rich customer with the heart of gold). A woman or man in this scenario might feel that, far from intending anything, she more or less lucked into the parental role. A third scenario is not so lucky: a parent might feel that the parenting, albeit not the conception and gestation, was something she or he got "stuck with." Maybe she conceived and bore a child assuming the burden would be equally borne by her partner, her family, or her community, and instead she found herself parenting very much on her own. She sure didn't intend *that*. "Forced into," "fell into," "lucked into" or "got stuck with" are all somewhere short of "intended to" conceive or parent. For many people, in other words, there simply wasn't any intention—any moment in which an intention is formed—that preceded conception, gestation, birth, or childrearing. And so, there just weren't any intentions that could have been thwarted or injured by anyone's malpractice. Many of us conceive, gestate and parent, but only a subset engages in the intentional procreation suggested by the logic of Fox's account of the injuries sustained when those intentions are thwarted.

Intentional procreation does, however, seem increasingly entrenched, not as a practice, but as an *ideal*—seemingly for everyone, and most emphatically for everyone in those cultures that have commodified the

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20. *See* Sneha Barot, *Governmental Coercion in Reproductive Decision-Making: Seeing it Both Ways*, 15 GUTTMACHER POL'Y REV 7 (2012), https://www.guttmacher.org/sites/default/files/article_files/gpr150407.pdf [https://perma.cc/L6TQ-2EXK].

21. Thus, the clear findings that increased and responsible use of contraception is the surest way to bring down both the abortion rate and the rate of unwanted births. *See* Joerg Dreweke, *New Clarity for the US Abortion Debate: A Steep Drop in Unintended Pregnancy Rates is Driving the Abortion Decline*, 19 GUTTMACHER POL'Y REV. 16 (2016), https://www.guttmacher.org/sites/default/files/article_files/gpr1901916.pdf [https://perma.cc/N7EP-FGZU].

services that facilitate it. We are all now encouraged to partake in intentional procreation, and to steer clear of the other, more accidental kind. It is that shift that I want to highlight, and which I think Fox might have usefully explored. The shift in our shared positive morality toward the encouragement and endorsement of intentional procreation, and away from accidental or unintentional procreation, has quite vividly changed not only our norms around conception, but also our norms around the parenting that follows. It seems to me a piece of our now-conventional morality around reproduction is that—whatever might have been the case in the past—in the world we live in now, with available and reliable birth control, before we find ourselves with a baby at the bosom or a child in the house, we should first have *intended* to have had that baby. Planned Parenthood, of course, advocates family planning with admirable zeal, and has done so now for almost a century.[22] But the phenomenon certainly extends well beyond anything that can be credibly attributed to their influence. Whatever the morality or politics of legal abortion, the *desirability* of having only planned as opposed to unplanned children; of having "control" over their births, spacing and sequencing; of having children only at a point in mature adult life where parenting of young children fits into a rational life plan; of having children only if and when one can afford to raise them; of having a moderate or small rather than large number of children; and of having a thought-through plan for covering the costs of their future young adulthood experiences, including their college tuitions; *and* of doing all of this intending and planning before the first child is even in utero have all become deeply familiar bromides, so familiar perhaps as to seem natural and necessary. It has become a core, central tenet of our positive and liberal morality. This is how to have children *responsibly.* We teach our children the wisdom of "safe sex," which means, of course, contracepted sex, if they want to ward off unwanted pregnancy, but also means so much more: it counsels familiarity with and use of birth control technology as the first step of a complex process of intentional and responsible—because planned—parenting. The point of intentional procreating, and of the moral rules we've built around it, in other words, is not only to prevent unwanted pregnancies, and the abortions or unwanted births to which those pregnancies lead. It also means planned parenting. It means only having children that

22. Fox correctly notes that the U.S. Centers for Disease Control and Prevention ranks family planning "among the "ten great public health achievements" in the twentieth century." FOX, BIRTH RIGHTS AND WRONGS, *supra* note 1, at 15, 181 n.28.

are fully intended. It means, affirmatively, to have children when you intend to, and, by implication if not explicitly, to only intend to do so when you can do so responsibly, which means, basically, when you can afford it. This is the kind of parenting we should engage in, whether or not we do.

But even if many of us have procreational intentions, and even if our common positive morality has followed suit, does it follow that we have a fundamental interest in having those intentions protected? It seems to me that even just the basic coherence of Fox's argument that these intentions should be protected against negligence depends quite heavily not only upon the fact that we *have* made this shift in our common or positive morality around parenting, but that the shift is also laudable—that we not only do but should now think of intentional procreation as good, or at least as far better than the other kind. We don't, after all, have a deep fundamental interest in *all* of our intentions, even important ones. If we intend to sail around the world, and we hire a sailing instructor who proves to be negligent, so our intent to sail is thereby frustrated, we may have various contract- or tort-based claims against the instructor, but thwarting our intention to sail will not be one of them. Likewise, if we intend to cure cancer, and hire an SAT tutor as a first step toward a first-rate science education that will set us on this life course—even if the SAT tutor negligently malpractices, thwarting our intention to cure cancer will not be recognized as a separate cause of action. Why are intentions to procreate, or not, or to procreate in a certain way different from intentions to sail the world or cure cancer? I am not sure, but I think it must be that they are not only intentions that matter hugely—so might intentions to sail or cure cancer—but that they are intentions we *should* form, and then should have, as a precondition to procreating or contracepting, such that once we have them, they should not be negligently thwarted. Intentional procreation is or should be a fundamental interest, then, because of the centrality and importance of intentional *procreation*—unlike, say, intents to sail or cure cancer—in our lives.

Significantly, it is not only the "procreation" side of the "intentional procreation" formula that is necessary for this to become a fundamental interest; it is also the intentionality side. Thus, parenting alone is not the interest at stake, nor is conceiving or contracepting. Not *all* parents of mentally ill children have a right to assistance with the extraordinary costs of raising those children; likewise, nor do all women with an unwanted pregnancy have a right to compensation for the unwanted pregnancy. It is the thwarting of the intention to conceive or contracept that gives rise to the cause of action—the parent with the mentally ill child has been *wronged* (if at all) because of the negligent behavior that caused a rift between his intentions and his reality, the woman who finds herself pregnant because of someone's negligence has a cause of action because

of her thwarted intent to contracept, not just anyone with an unwanted pregnancy. The premise of Fox's argument, in other words, is that intentional procreation is a fundamental interest that should be protected through tort against negligent invasion—not "fundamental intentions" across the board, and not "procreation" across the board. The interest protected is the interest in procreating or not in accordance with one's formed intents. That is the interest that Fox claims many of us now have—just as we now have interests in privacy—and which should be protected against negligent harms.

The point is not only, then, that many of us do in fact have these intentions; it is, further, that all of us should. It is because these are good intentions to hold and to stick by that their infringement constitutes, or should constitute, a tortious harm. Thus, at least part of what Fox seems to mean by the claim that we all have a deep and distinctive fundamental interest in intentional procreation—even if we don't have a fundamental interest in our intentions across the board, and even if we don't have a fundamental interest in procreation across the board—is not only that many of us do in fact engage in this practice of intentionally procreating or intentionally not procreating, but also that we should do so, and it is because we should do so that it might form the basis of a tort action when those intentions are thwarted.

Once put this way, it might be a little clearer what's missing from the overall argument, and how the "truncation" of doctrinal scholarship might be what obscured it. In brief, it seems to me that the two claims implicit in Fox's argument—that this is the kind of procreating we *should* do, and that this kind of procreating is in turn an activity that should be protected by law against negligence—are two sizeable assumptions, both of which need to be both articulated and defended. I think that they may be right, and I would be predisposed to agree with them. But neither of them is much articulated, much less defended in Fox's book, which instead moves very quickly to a third claim: that intentional procreating should be protected through tort law against private invasion by negligent third parties. That third claim is what is vigorously defended in the book. But the first two assumptions are also problematic, and it is those two assumptions that receive only truncated analysis. They need, and deserve, much more.

Let me just sketch out, here and in the next section, a couple of reasons to be skeptical. First, and most basic: is intentional procreation, as a practice, one that we ought to value, and value so highly as to protect these intentions against negligence? Is it as good as our conventional morality

now holds it to be? Again, of course, accidental or unintentional procreation is neither an option nor a danger for many people: gay, trans, unpartnered, or infertile cis men and cis women who wish for either an adopted or genetically connected baby do not have the option of "leaving it to chance." Nevertheless, many couples and individuals not in those subgroups might well choose to not choose, and many others may not give it any thought at all. The non-choosers among us might conceive or not; we might parent or not. Intentionality might not be a part of it. Choosing not to choose or never confronting the choice is clearly a mind-set and way of life that is very different from forming an intention to conceive and then doing all in one's power to make it happen. One consequence of our relatively newfound embrace of the value of intentional procreation is that this mindset around unintentional reproduction described above—an actual preference for the accidental kind, or an unthinking inclination toward it—has come to seem profoundly reckless.

Might this conventional view—that intentional procreation is an unalloyed good, and unintentional or accidental procreation a sign of recklessness or just a sloppy life—warrant re-thinking? First, the extraordinarily high premium we now put on intentional procreation might overstate, and by a significant measure, the value to be had, both material and spiritual, around *all* planning in life, not only planning around family. What do we lose when we insist on a mapped out, intentional "life plan?" The question answers itself: to some degree, we lose the pleasures of spontaneity and fortuity, which may not be trivial. When we hitch our personal wagon to the promised rewards of the well-planned life, we lose an appreciation of the place of fortuity, luck, randomness, and the unexpected; randomness, luck, and fate all loom as threats to ward off rather than unexpected turns to welcome.[23] We also, though, may lose—and may become so guarded and possessive of our plans and intentions that we never have the chance to acquire—the humility and sense of connectivity that might come from relinquishing control over one's fate. We may lose the ability to contemplate with equanimity rather than anxiety the wild, natural and otherwise, and to honor the limits of willpower over fate. The value of willfulness, of intentionality, and of the ability to form a plan and then stick to it might—just might—be best not endorsed unequivocally but balanced again the values of a developed capacity for surrender, for living with connectivity

23. Think by analogy of the fairly familiar danger of having too rigid a "research agenda" when beginning an academic career: what is lost are the insights to be had from serendipity, from following a thought down unanticipated paths, from free reading, without consideration of the costs of departing from an agenda, alertness to the unexpected turn of an idea or argument. The same might be true of the too-well planned life.

rather than univocal penetrating forcefulness, and for developing an appreciation of the limits of one's own will.

Second: with respect to *parenting*, overplanning and overintending are pretty clearly ill-advised strategies. Children defy adult expectations daily, weekly, yearly, all the time. Not being flexible enough to give up one's own plan for one's child, and not being able to simply acquiesce in the unfolding of their nature rather than one's own ambitions for their nature, is a common and sometimes tragic parental foible. Might the same be true of overplanning for conception, gestation, and particularly, for some constellation of fetal traits? What have we given up, or what is obscured or denied, by the strong consensus on the overriding value of intentional procreation? There is at least this: in a world in which conception, gestation, and fetal traits are left to chance—or a world in which the decision to leave it to chance is at least not denigrated—would-be parents might accustom themselves to the humility required for the parenting that might follow a birth, should they conceive or adopt. And, not just incidentally, they might open both themselves and the rest of us to the value of other ways to spend an adult life, should they not.

Intentional procreation is now a part of a way of being in the world that is consonant with consumerism, careerism, and individualism all, and there may be reasons to resist its idealization on that basis alone. The idea that the *intent* to procreate is the interest that is injured by these negligent acts seemingly implies a conception of individual life that regards various plans of life as analogous to commodities from which individuals choose on a store shelf. College, a job, a spouse, a baby: as in the game of Life, so too in the real thing, are all possible options, and the choices between them are in ways more pivotal or more momentous or more defining than the job, college, or baby itself. All of this choosing, I'll suggest below, pretty clearly risks saddling the choosing individuals with full responsibility for the consequences of her choices beyond what is humane, and squarely to the detriment of communitarian bonds. If you *chose* it—and even more so if you fully intended it—you're stuck with the costs as well as benefits, whether the "it" is a tube of toothpaste, a risky ride at a carnival, a medical procedure, decisions about one's future, or the costs of bearing and raising a child. I will discuss this below in more detail. The suggestion I want to make here is broader, and more speculative: intentional procreation might also rest on a way of being in the world that is not just consumerist, but might also be reflective of an overly mechanistic conception of human fulfillment.

It is, no doubt, *one* such conception: being the author of one's own life plan, sticking to it, and reaping the awards, is one way to go through life. But it has its limits, which should be acknowledged, and to endorse it unqualifiedly is to be peculiarly blind, or dismissive, to a range of ways of being that might open unforeseen pleasures. And, to endorse it in the realm of procreation in particular, it seems to me, might set oneself up to be peculiarly blind to some of the unmovable realities of parenting itself. Parenting after all does indeed involve becoming a hostage to fate, but it is also involves being a hostage *to the baby*. A parent becomes the slave to the infant's or newborn's imperative demands. And obviously, their imperiousness extends beyond their infancy. The "individual," upon becoming a "parent," relinquishes control over—sovereignty over—the timing of his or her own graduate degrees, promotions, dinners, date nights, novels, TV shows, and showers. Eventually she might get some of that autonomy and self-sovereignty back. But she learns quickly that being a good parent is in some measure not sticking to one's plan, including one's own plan for one's own life.

Let me sum this up. The valorization, particularly in liberal and capitalist cultures, of the "planned life" that so dominates our moral sense of "the good life" is peculiarly blind to the possibilities of other ways of being. We are not all planners. Of course, many people do not have the luxury or resources to plan one's life; there's a blatant class tilt to the bromide that the good life is the intentional life. And some of us just don't have the aptitude for it: life is hurled at us before we have the chance to reflect on the color of our parachute. We're passive, or clueless, or not much interested in the future, and may find ourselves in the thick of it without ever having the time or money or inclination to decide much of anything: whether or not to become a parent, or what our gender might be, or what our sexual orientation is, or what we should major in, or which graduate school to attend, or where to hold the wedding reception. And some of us don't do all that much planning, intending, or forming of a life plan—whether or not the plan includes parenting—by inclination: we are inclined to take life as it comes to us rather than taking the bull by the horns. Finally, some of us might even choose to live that way; we might take real pleasure in surrender and value our capacity for it. All that planning, to the non-planners among us, might seem so fetishistic as to be otherworldly.

The point here is simply that planning, the bromides of Planned Parenthood notwithstanding, is not so obviously an advance over other ways to approach the place of reproduction or of non-reproduction in one's life. To the extent that Fox's suggested doctrinal reform—which is basically that we should add to tort law causes of action for interfering with procreational intent—rests on the assumption that it is precisely that, it does indeed truncate, as Unger intimated might be true of doctrinal

reform scholarship across the board, possible grounds of doubt. Likewise, of course, to whatever extent we have *all* valorized it so as not to have even seen that we are doing so, we are all truncating our critical capacities. Here, that truncation might have some particularly perverse consequences: Intentional parenting, and perhaps the intentional procreation that led to it, may to some degree actually limit our ability to do that parenting well, since doing it well requires, in part, the capacity to relinquish some self-sovereignty, rather than doubling down on it. It may also perversely limit our enjoyment of it, to whatever degree enjoyment of parenting likewise requires the capacity to appreciate fortuity. These claims—which may be overstated or understated, founded, or unfounded—are muted, or truncated, by traditional doctrinal analysis. In law we proceed by analogy through surface practices: we protect privacy, and privacy is no more important than procreative intent, so if we protect the former, we should protect the latter. We protect the harm that follows from having a corpse mislaid, so we should protect the harm that follows from having a fertilized cell mislaid. We protect probabilistic harm in some circumstances but not in these. The possibility that the circumstances of parenting might differ from other circumstances, precisely by virtue of the divergence of the ideal of parenting from other activities the ideal version of which implicates intentionality, is left unexamined. The analogous reasoning so central to legal reasoning demands similarity, and abhors distinctiveness. What it almost definitionally avoids, though, is mucking around in the roots.

B. RIGHTS LEGITIMATING WRONGS

The second major criticism the critical legal studies movement launched against doctrinal legal scholarship, and which might also have some traction here, was that normative doctrinal scholarship legitimates preexisting and deeper injustices than those it targets.[24] There may be similar sorts of problems here. The rights for which Fox argues, and the legal reforms he advocates, might compensate some reproductive harms and recognize some procreative rights, but precisely by doing so they may thereby rhetorically legitimate other reproductive wrongs. If so, it is worth considering whether one could modify the contours of the rights he's articulating so as to

24. *See* Alan David Freedman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine,* 62 MINN. L. REV. 1049 (1978); Robert Gordon, *Unfreezing Legal Reality*, *supra* note 17.

minimize their legitimating impact. I'll suggest one way to do so in the conclusion.

But first: how might the reforms suggested here legitimate deeper wrongs? The first is simply rhetorical: Fox wants to establish rights to intentional procreation, and then interests in having those rights protected against negligent invasion. But there are consequences to posing the issue in this way—as rights which ground interests—and not all of them are good. That which is encased within a right tends to be, first, insulated from even moral criticism, as well as from overt political attack, and then eventually enshrined as iconic, and perhaps as iconically American.[25] One result of that is that behavior that runs *against* the grain of the activity protected by the right is to some degree marginalized. So, one danger here is that as intentional procreation becomes a right, it then becomes a norm, and then a sort of moral standard for how we all should approach our reproductive lives. The "accidental procreation" I described above becomes marginalized, while not parenting at all, whether by choice or accident, is rendered all the more invisible, or un-American, or immature, or pitiable. The right to intentionally procreate includes of course a right to intentionally not procreate, as Fox insists.[26] But nevertheless, singling out reproduction as that to which we all have rights inescapably prioritizes our reproductive lives over other possible ways to envision an adult life. Those for whom reproduction is simply not at or near the center of adult life are by some measure rendered lesser.

Second, rights that tend to create, or insulate, or promote *choice*—including all reproductive rights, but also other more familiar choice-protecting rights such as contract rights, privacy rights, property rights, abortion rights, and familial rights—share a quite different and distinctive sort of legitimation cost: they legitimate the privatizing of the *costs* of whatever chosen activity is protected by the right, and then legitimate the resulting impoverishment, which may be considerable. The right to choose or possess something, in other words, goes a long way toward "legitimating" the privatization of the cost of that to which the right of ownership or choice extends. If I have a right to possess something, intend to possess it, and then do so, I am responsible for the full costs and risks the thing entails—whether that thing I have a "right to choose," or a right to buy, or a right to possess, is a risky real estate investment, or a losing lottery ticket, or a car's depreciation, or a stock's loss of value, or a disease-drenched private school. The "house" I've chosen to buy obviously includes the risk that

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25. Here as well, a large library of critical legal scholarship elaborated this critique of rights. *See generally* ROBIN WEST, RIGHTS, INTERNATIONAL LIBRARY OF ESSAYS IN LAW AND LEGAL THEORY, SECOND SERIES (2001).

26. FOX, BIRTH RIGHTS AND WRONGS, *supra* note 1, at 113–36.

it may lose value, the lottery ticket I've bought just as obviously includes the risk of it being a losing ticket, and so forth; that's just what ownership of a house or a lottery ticket is, at least in a market economy.[27] Ownership of a thing, and hence a right to own it, internalizes the costs of that thing to the owner of the thing and the holder of the right; the right owner owns the risk and cost as well as the potential benefits the thing bestows.

The right to intentional procreation suggested by Fox's project might share in this internalization, or privatization of costs. Thus, by creating rights to intentional procreation, the perhaps unintended side effect might be the further entrenchment of the already severe privatization of the costs of that procreation, including the cost of the parenting that follows, in the same way, and for the same reasons, that rights to choose or buy other things we've commodified—toothpaste, one's own death, one's health care, a body part, an abortion, a private school education—might generally privatize the costs of procuring those goods as well. The interest in intentional procreation, in other words, presupposes an individual's right to intentionally procreate without interference, which then might, as with all rights to choose or rights of commodification, impose the costs (and risks) of the purchase on the parents. And if so, then the strengthening of the individual's *right* to intentionally procreate, rather than relegate the fact of reproduction to luck or chance, may come with some diminution of the strength of our felt civic obligation to create a social welfare net that might help would-be parents without sufficient means to defray the exorbitant cost of parenting.

Another way to put this point is simply that rights to intentional procreation, by underscoring the intentionality of the act, and hence the privatized *causality* of parenting, might thereby likewise privatize the costs. After all, if I sail around the world or go to graduate school, and do so because I have so chosen and intended, there's no clear reason anyone else should help me with the costs of doing either of these things, and particularly with opportunity costs including the lost income from not being in the wage labor force for that time I've chosen to spend out on the open seas or sitting in a classroom. After all, I chose to be a sailor or a student, with all the attendant costs, it wasn't thrust upon me. It's not obvious why the same logic wouldn't or shouldn't hold here: if I parent only because I

27. The analogy I'm using here between the purchase of a lottery ticket and the purchase of a house was first suggested by Richard Posner. *See* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

formed and then acted on my intention to do so, then there is that much *less* reason to look to others for assisting me in shouldering the costs. Contract rights and tort actions might attach as well, as Fox here insists, in the event of breach or negligence, against co-contractors. But that only underscores, or legitimates, the pervasive privatization: shy of negligence or fraud, in the aggregate, the costs of whatever I have intentionally purchased, including the purchase price and the cost of upkeep and the opportunity costs, are imposed on me, and rightly so, if I freely chose and intended to assume them. There's no reason to impose them on the community. If we apply this plenty-straightforward market-based logic that we routinely apply to all purchases to these procreative purchases, then the bottom line is pretty clear: rights to intentional procreation might actually diminish our felt communal responsibility for sharing the costs of child raising, even while at the same time providing a means of compensating—through the remedies provided by a civil action in tort law—the relatively few whose intentions may have been thwarted by a defendant's negligence.

Finally, there are distinctive legitimation dangers attached to tort rights generally that have particular salience here. Tort scholars have long recognized a "moral luck" problem that runs throughout the entire field[28]: a victim of negligence may recover in court for an injury which is similar or identical to that suffered by someone who had the bad luck *not* to have also been the victim of provable negligence. That party will recover nothing, through no fault of his or her own. Likewise, a negligent tortfeasor who causes injury and might therefore be held responsible for the damage may be no more at fault than a negligent actor who, for reasons unrelated to his actions, may have had the good luck not to hurt anyone. This very general problem with the structure and consequences of our tort regime also attach, and with considerably poignancy, to this proposed extension of tort to include the reproductive harms Fox wants to recognize. A couple that must bear the costs of raising a severely schizophrenic child and who has had its intentions to bear a healthy child thwarted by a negligent third party, on Fox's proposed expansion of tort law, may have an actionable claim against the private party whose negligence occasioned that harm. But a couple who conceives and then bears and raises a severely schizophrenic child without using the services of a sperm bank, and who likely never formed intentions regarding the quality of their child's mental health beyond very general parental hopes, is burdened with the same extraordinary costs. They may not have had intentions that were thwarted, but they are otherwise so similarly situated that the commonality between these two couples

28. For a discussion and refutation of this common objection, *see generally* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007).

seems to outweigh any sensible distinction that could or should be drawn between the two: the magnitude of the harm both couples are suffering—which at least financially might be identical—dwarfs the fact that the first couple had a thwarted intention, but not the second.

The problem is deeper than simply the lack of horizontal equity between very similarly situated couples. This is where "legitimation" comes into play with a bite, so to speak. The suggestion that justice requires that only the first couple receive compensation, because only that couple suffered thwarted *intentions*, strongly suggests that the second couple not only will have no tort action, but also has no justice-based grounds at all for assistance inside or outside of tort law. It seems to imply, in other words, that it is *only* thwarted intentions—and not the profound costs of coping with mental illness in a family—that are deserving of compensation. That is the work done by tort law's legitimating rhetoric: precisely by compensating for some injuries in life, it strongly suggests that *that* is all justice requires; that the injuries that otherwise befall us are of no communal concern. Of course, this is illogical: it doesn't *necessarily* follow, as a matter of law or logic. That the first couple receives compensation for thwarted intentions doesn't suggest that the second couple doesn't deserve assistance, for instance, as a matter of social justice. But nevertheless, it may well follow as a matter of loose, legitimating rhetoric. By compensating the first couple, it might seem, we've exhausted the demands of justice. Parents with profoundly disturbed young or adult children simply suffer from bad luck, which means they are on their own.

This seems like a very high rhetorical cost to bear. The first couple might well have relied on representations by a sperm bank regarding the health of the sperm donor, while the second couple did not. The first may therefore have had a legitimate expectation of having a healthy child, and had those expectations negligently thwarted, while the second had no such expectations, legitimate or otherwise, and were content to rest with the roll of the genetic dice. The first couple is compensated for the thwarting of that expectation, while the second of course is not. But the difficulties both couples will face as parents seemingly call out for some sort of sympathetic and societal response to both, rather than to one but not the other. The callousness or inhumanity of saddling the second couple with these extraordinary costs—rather than having any sort of rational and compassionate system for spreading the costs of coping with family members who suffer from severe mental illness across the board, and regardless of whether or not expectations were thwarted by negligence—may be perversely

legitimated by the identification of a very small subset of such parents who, unlike the others, receive the benefit of tort law, for redress of their thwarted intentions.

C. CONCLUSION

Neither of these objections—first, that Fox's endorsement of a right to intentional procreation truncates critique of that practice, and second, that his proposed reforms of tort law to protect the right runs the risk of legitimating larger wrongs—is fatal. Thus, a fair response to the first objection—that a doctrinal analysis truncates critique of the underlying social practice—may be simply that more intentionality in reproductive life carries so many clear social as well as individual goods over the constellation of force, social pressure, and ignorance in the reproductive regimes that it replaces, that whatever is lost by virtue of the lack of criticism of the practice—whether it be an appreciation of spontaneity in life, or an admirable humility in parenting, or too much deference to plans and intentionality generally—may be well worth the gain in the happiness, health, and wellbeing of well-planned families. A toting of those benefits make this conclusion seem plausible. First and as noted, the separation of reproduction from sexuality, and in some measure its commodification, opens up the possibility of procreation to a much larger number of people who wish to parent, and that alone is clearly a reason to applaud it. Second, a shift to intentional rather than accidental or forced procreation—including intentional conception, contraception, gestation, childbirth and childrearing —goes some distance toward recognizing women's full humanity, and centering rather than marginalizing women's interests. It has been a two-millennia struggle to reach a point where women are accorded the right to exercise their will over reproduction; it doesn't seem too much to ask that both women and men therefore make some effort to use the means that facilitate that exercise of will. And third, there are clear society-wide benefits to the practice of intentional procreation, as Planned Parenthood has long stressed. To the degree that we succeed in urging would-be parents and nonparents to plan, we have fewer unintended pregnancies, fewer abortions, fewer impoverished families, and perhaps better cared for children as well. We also have more parents, and particularly more mothers, better prepared to navigate the shoals of work and family life, by virtue of having thought things through ahead of time. On the other side of the ledger the rhetorical costs I've rehearsed above are speculative. Very generally, our lives may well be both happier and more rational if we both formulate and then act on intentions to reproduce rather than leaving reproduction to chance. Our planet and communities might be healthier as well, if we

encourage all co-citizens to do likewise. Giving up a bit of spontaneity along the way? It might be a trade worth making.

It is not so easy, I think, to counter the possible legitimating consequences of valorizing intentional procreation. To recap: the creation and then reliance on a legal right to intentional procreation, protected in part through tort law, might rhetorically valorize intentional procreation, to the detriment of non- and accidental parents; it might further legitimate the imposition of the costs of child care exclusively on parents, rather than the spreading of those costs through a social welfare net; and it might further legitimate, to some measure, the imposition of the extraordinary costs of raising children with disabilities on those parents who did not have thwarted intentions, and therefore do not have grounds for a lawsuit. Of course, legitimation costs are also virtually by definition speculative—their very logic rests on the assertion of counterfactuals—and it is possible the politics of all of this could run in the opposite direction. Highlighting the advisability of having one's intentions, rather than either fate or force, govern the role of reproduction in one's own life might actually spark support for parents whose purses are stretched thin by their disabled children's needs, rather than threaten that support. It's also possible that intentional rather than accidental parenting will increase rather than challenge our appreciation of the value of childless lives, and that it will increase across the board the awareness of a greater need for societal support of vulnerable families.

So, the consequences of both of these critical legal studies-era-inspired objections—that the creation of torts for the thwarting of procreative intentions might truncate critique on the one hand, and legitimate deeper harms on the other—are clearly speculative, untestable, and may be outweighed by the tangible benefits of the legal reform for which Fox is advocating. Nevertheless, it doesn't follow that these legitimating and truncating costs don't exist. If we take them seriously, it might be worth asking whether there's a way to promote fair results for those whose reproductive intentions are thwarted in the way Fox describes, but without going down the path of creating a right in those intentions—a right which might valorize reproduction, legitimate the privatization of costs, and marginalize other ways of living in unappealing ways.

I think there is. The novel causes of action Fox suggests, and to which I've suggested these objections, all rest on a fundamental "right" to intentional procreation: specifically, rights to intentional conception, contraception, and particularized conception where traits are specified. But is it necessary to create a *right* to intentional procreation for those tort actions to proceed?

Maybe not. By his own telling, Fox was apparently drawn to this path—to assert and then recognize a right, which grounds an interest, which then supports three novel causes of action around intentional procreation—by the power of the example set by an article by Warren and Brandeis in the 1890s, which ultimately resulted in the creation of new tort actions for invasion of privacy. The authors in that piece likewise first identified a set of interests in privacy, then argued for a right that would protect those interests, and then for particular causes of action in tort where the interest is violated by private parties. It worked. But there is nothing here that requires a Warren-and-Brandeisian, invasion-of-privacy-styled "rights-to-interests-to-causes-of-action" strategy. There may be another way to reach the same end.

From Fox's own recounting, it seems that courts have not been recognizing these causes of action for a series of reasons that have little to do with reproduction and much to do with general limitations on what types of harm are recognized in tort law across the board. Thus, some courts are predisposed to disfavor and discount emotional distress or mental harm, at least where the breach of the duty of care was negligent but not intentional or reckless. That is sufficient to foreclose some of these claims.[29] Other courts have been reluctant to recognize so-called "foregone benefits" as the gravamen of a tort action, which again accounts for much of the injury in these cases: the negligent reduction of a probability for a wished-for conception, or the negligent increase of a risk of a dangerous pregnancy or birth.[30] Still others have found the injury too hard to define, or quantify.[31] If courts would remove just these traditional obstacles to the types of injuries recoverable in tort, these lawsuits could proceed as straightforward malpractice or negligence cases against medical providers or commercial entities for a currently disfavored form of harm—emotional, probabilistic, or nonquantifiable. And they very well may do so, as these cases proliferate. The tort law system might, in other words, better self-correct so as to address these meritorious cases by emphasizing their *ordinariness*, and their striking similarities to cases in which recoveries are allowed, rather than underscoring their distinctiveness through the articulation of newfound fundamental interests in intentional conception, contraception, or specification of particularized traits. Doing so would at least avoid the risks of valorizing intentional procreation at the cost of marginalizing nonintentional procreation, and legitimating the absence of decent childcare and healthcare assistance for parents and others, who cannot spread the costs of coping with a seriously ill child through a lawsuit.

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29. FOX, BIRTH RIGHTS AND WRONGS, *supra* note 1, at 64–68.
30. *Id.* at 55–64.
31. *Id.* at 68–71.

There may also be strategic reasons, completely aside from the truncating and legitimating risks recited above, to continue to fashion these causes of action along familiar preexisting lines, albeit while also arguing for the overdue recognition of the seriousness of heretofore disfavored emotional and probabilistic harms. Those harms are plenty real, as scholars have been arguing for decades, and they may be more recognizable, more understandable, and more consonant with the harms these plaintiffs actually sustain, than the harms to intentionality that Fox is propounding. They may also simply have a better chance of success, if framed in these traditional ways. As long recognized, common law courts have a propensity to not fuel social conflict, and an inclination to render law more rather than less general. And judges might just be more inclined to go with the devil they know than the devil they don't. The novelty of these claims—the devil they don't know—will create problems of generality and horizontal equity for common law courts, beyond those I've tried to articulate here. To cite just one example alluded to above: we don't recognize "thwarted intentions" across the board, either as the basis for a tort action, or as a fundamental interest. Treating reproductive intentions as more weighty than others which are not protected by tort, and therefore deserving of compensation when they are thwarted, involves the court in a two-fold speculative enterprise: first, engaging in whatever reasoning is required to conclude that conceiving, gestating and parenting are more worthy, as objects of intentionality, than hedonic plans such as sailing or noble plans such as disease-curing, and second, treating the intentions themselves as that which, when thwarted, are so injurious as to be the sensible subject of a lawsuit. Both are heavy lifts.

My suggestion is simply that, if faced with a sympathetic plaintiff alleging a reproductive harm and a clearly negligent defendant, a court may be more inclined to uphold an action against a motion to dismiss on the basis of a clear-cut argument that courts should no longer denigrate emotional or probabilistic harm, than it would be inclined to find a new tort of thwarted intentions, whether those intentions be characterized as intentions to conceive, contracept, gestate or parent. Fox has perhaps too quickly discarded the Occam's Razor solution to the very real problem he has uncovered: apply ordinary tort law to these ordinary breaches of a general duty of professional or vendor care that result in harm. For these breaches to lead to recoveries, plaintiffs and their lawyers need to convince the courts that the class of harms that should be compensable should include emotional as well as probabilistic harms. If they succeeded

in doing so, it seems to me we could leave the fundamental interests, and fundamental rights, in our procreative intentions for another day. That might be the better way to go.