Hastings Law Journal

Volume 60 | Issue 2 Article 4

1-2008

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Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions

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At several recent health law conferences, scholars speaking about advanced reproductive technologies have been asked whether children born as a result of preimplantation genetic interventions could sue their parents. Their response is generally an unexplained "No." After these brief exchanges, other scholars have started back-of-the-room conversations about whether such a categorical answer was really warranted; perhaps liability could exist under the right circumstances. Yet no legal scholars have considered in depth whether parents could be found liable in tort for intervening in their child's DNA. This Article fills that gap, and concludes that parents making preimplantation genetic choices should be liable to their children in tort where they directly intervene in the child's DNA, and consequently cause that child to suffer a disability that limits the child's right to an open future.

Given recent and expected improvements in reproductive and genetic technologies, parents can now opt for a child with a potentially disabling genetic trait, and soon they may be able to create disabling traits by directly intervening in their child's DNA.[1] While the number of

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1. This Article is primarily concerned with genetic selection and manipulation of preimplantation embryos. Genetic selection of preimplantation embryos is occurring daily. *See, e.g.*, Susannah Baruch et al., *Genetic Testing of Embryos: Practices and Perspectives of US In Vitro Fertilization Clinics*, 89 FERTILITY & STERILITY 1053, 1054 (2008) (noting that "approximately 3000 cycles of PGD" were provided in 2005). "Gene therapy, the directed genetic change of human somatic cells[—specialized differentiated cells—]to treat a genetic disease or defect, has already produced positive results for a few diseases." The President's Council on Bioethics, Staff Background Paper, Human Genetic Enhancement, Dec. 3, 2002, http://www.bioethics.gov/background/humangenetic.html (discussing gene therapy in adults). While there have been no reports of direct genetic manipulation of human embryos, and though such techniques are probably several years away, it is important to

children affected by such decisions is likely to be small,[2] a recent scientific article reports that 3% of in vitro fertilization (IVF) clinics have allowed parents to use existing genetic technologies to *select for* a child with a disability prior to implantation, ostensibly because the trait ran in the family.[3]

Given the demonstrable parental demand for these services, the possibility of a tort suit is real. Even if the United States adopts an extensive regulatory regime prohibiting or limiting genetic choices, children injured by noncompliance would still have the option of bringing suit. Further, resolving these claims through the tort system may be preferable to a regulatory regime, particularly where there are difficult moral questions. Given the specter of eugenics,[4] it may be best to have the tort system, rather than the government, determine which traits are harmful.

This Article examines both intentional tort claims and ordinary negligence claims in the context of preimplantation genetic choices.[5] Parental decisions to affirmatively engage in preimplantation genetic interventions are analyzed under the rubric of intentional torts because such techniques require a series of intentional, affirmative actions by parents and their agents over the course of several months. For instance, preimplantation genetic diagnosis (PGD),[6] an indirect genetic

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discuss the possible ethical and legal ramifications of these techniques now. *See id.*

2. Baruch et al., *supra* note 1, at 1054–55 (explaining that while it is impossible to translate this information into absolute numbers, the data suggests that at least five IVF clinics in the United States comply with requests to select for a disability).

3. *Id.* at 1055. The article does not specify what the diseases or disabilities are, but conversations with some reproductive endocrinologists at a 2007 American Society for Reproductive Medicine (ASRM) meeting suggest that at least one infertility clinic has complied with a parental request to select for achondroplasia (dwarfism) because the trait ran in the family.

4. Often technological breakthroughs are viewed with distrust by the disability rights movement. JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 22–23 (1994). As Shapiro points out:

> Many activists fear that with the growth of such predictive tests, pregnant women will be expected or coerced to abort fetuses when there is an indication of disability. Others worry that if genetic engineering can one day wipe out an illness, a person who already has that disability will be seen as a freak or devalued as a preventable mistake.

Id.

5. This Article only briefly considers genetic choices that occur between implantation and birth. Examples of *prenatal*, not *preimplantation*, genetic interventions include any direct genetic manipulations that could be performed in utero and any indirect genetic changes that could be brought about by abortion or maternal decisions regarding diet and exercise. These prenatal genetic choices raise more complicated questions of bodily integrity, as discussed briefly *infra* Part V.B. This Article does not address these concerns in detail because it is designed to focus on the implications of new reproductive technologies such as PGD.

6. *See* John A. Collins, Editorial, *Preimplantation Genetic Screening in Older Mothers*, 357 NEW ENG. J. MED. 61, 61 (2007). As Collins points out:

> Preimplantation genetic diagnosis, first described in 1990, involves removing one or two cells from an embryo for genetic testing in order to prevent transmission of genetic

intervention, allows parents to create multiple embryos outside of the womb and have them tested for a specific genetic trait prior to implantation. Once the embryos have been tested, parents can select which embryos they wish to implant; those with the trait, or those without the trait. This Article concludes that intentional tort claims derived from indirect genetic interventions, such as PGD, should not be allowed because Parfit's Non-Identity Problem prohibits the finding of a legally cognizable injury.[7] PGD does not alter the identity of the selected embryo; it merely allows parents to select one genotype over another. Absent the parent's selection of that particular embryo, the child would not have existed. Therefore, except in extraordinarily rare instances, it is difficult to say that the child was harmed by being brought into existence.

In contrast, a child born as a result of direct genetic interventions, such as genetic additions, deletions, or modifications that alter an embryo's DNA, may have a legally cognizable injury if the child's genetic identity is modified in a way that causes the child harm. With direct genetic interventions, such as preimplantation genetic modifications, parents will be able to modify an embryo's DNA in the petri dish prior to implantation in the womb. In theory, these genetic modifications will produce the parents' desired genotype, and consequently the desired phenotype. The key question then becomes, which modified phenotypes constitute legally cognizable harms?

To address this question, this Article borrows an ethical framework from moral philosophy to determine which genetic traits might cause a child moral harm. The framework recognizes a child's right to an open future, and argues that parents have a moral obligation to help their children develop the capacities that will allow them to pursue a "reasonable array of different life plans available to members of their society."[8] If a parent's genetic choices unreasonably limit the life plans available to their child, the child suffers a moral harm.

There is some support in case law for the idea that limiting a child's right to an open future is also a legally cognizable harm.[9] While there are

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> disorders from a parent who is known to carry a genetic abnormality. Genetic tests are done on the third day after in vitro fertilization (IVF), when the embryos are at the eight-cell stage of development; only embryos without specific genetic traits are transferred to the mother a day or two later.... The effectiveness of preimplantation genetic diagnosis has been accepted without randomized trials, because its success in reducing transmission of genetic diseases is self-evident.

Id. (footnote omitted).

7. The Parfit Non-Identity Problem has been used by courts to argue that children born as a result of negligence—for example a negligent tubal ligation resulting in pregnancy—have no wrongful life tort claim; as the child would not have existed but for the negligence, he suffers no injury. *See* DEREK PARFIT, REASONS AND PERSONS 351–79 (rev. ed. 1987).

8. ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS AND JUSTICE 170 (2000).

9. *See, e.g.*, Stallman v. Youngquist, 531 N.E.2d 355, 360 (Ill. 1988); Womack v. Buchhorn, 187

apparently no tort cases against parents for limiting their child's right to an open future, a child's right to an open future is sometimes invoked to limit parental liberties with regard to child rearing.[10] In a few instances, courts allowing children to sue third parties for negligent prenatal actions have discussed that child's "right to begin life with a sound mind and body."[11] Furthermore, tort law now recognizes more legally cognizable injuries than it did a century ago, including stand-alone emotional distress, fear of cancer, and a variety of prenatal harms.[12] Many of these changes are linked to technological advances in medicine.

This Article argues that genetic technologies are revolutionizing the way we think about reproduction and parenting and, therefore, should also change our understanding of what constitutes a legally cognizable harm in the preimplantation context. Genetic traits created by direct genetic interventions that reduce capabilities, and thereby limit a child's future, should be considered legally cognizable injuries.

Parental decisions to forgo preimplantation genetic interventions of any type (for example a parental decision to forgo genetic modification or PGD where it might benefit a naturally created embryo) are also briefly considered. Because forgoing a genetic intervention is an act of parental nonfeasance it is analyzed as a negligence claim.[13] This Article concludes that these acts of nonfeasance fail to create parental tort liability because of Parfit's Non-Identity Problem. Furthermore, even in special instances where the Non-Identity Problem may not apply, there is an argument that parental duties should extend only to acts of misfeasance.

In reaching these conclusions, this Article proceeds as follows: Part I explores the magnitude of the proposed problem, and provides current information about the uses of genetic interventions. Part II discusses which genetic choices should constitute legally cognizable injuries. Where an injury is recognized, parents' procreative liberty should be limited. Part III addresses parental tort immunity. Part IV discusses intentional tort claims. Part V addresses negligence claims, including concerns about parental duties, bodily integrity, the Parfit Non-Identity Problem, and parental acts of nonfeasance. Finally, Part VI of this

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N.W.2d 218, 222 (Mich. 1971); Smith v. Brennan, 157 A.2d 497, 503 (N.J. 1960).

10. *See, e.g.*, *Stallman*, 531 N.E.2d at 360; *Womack*, 187 N.W.2d at 222; *Brennan*, 157 A.2d at 503.

11. *Brennan*, 157 A.2d at 503; *see also Womack*, 187 N.W.2d at 222 (citing *Brennan*); Sylvia v. Gobeille, 200 A.2d 223, 223–34 (R.I. 1961) (citing *Brennen* and further noting that "we deem it fitting and proper to protect a child's right to commence life unhampered and unimpaired by damage negligently caused to his body or mind by another").

12. Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 141–45 (1992).

13. RESTATEMENT (SECOND) OF TORTS § 14 cmt. c (1965) ("There is perhaps no essential reason why . . . liability for battery might not be based on inaction, where it is intended to result and does result in a harmful or offensive contact with the person. Apparently, however, no such case has arisen, and what little authority there is denies the liability.").

Article briefly addresses other practical concerns about parental tort liability in the preimplantation context.

I. THE CURRENT USES AND REGULATION OF PREIMPLANTATION GENETIC INTERVENTIONS

There are two types of genetic interventions: direct genetic interventions (intentional changes to a predetermined set of DNA by adding, deleting, or reorganizing the DNA sequence[14]) and indirect genetic interventions (including PGD for the purpose of embryo selection and elective abortions for the purpose of eliminating embryos with certain genetic traits[15]). While direct genetic interventions are still unavailable, indirect genetic interventions are increasingly being used by prospective parents.[16] For this reason, examining the current uses and regulation of indirect genetic interventions provides the best known information into how direct genetic interventions will be used and regulated.

The frequency of indirect genetic intervention is unknown, but it appears to be increasing rapidly.[17] In theory, PGD is available for virtually any condition that has a known genetic component.[18] But in practice, the cost of PGD and the complex, multifactorial[19] nature of most genetic conditions has limited much PGD testing to single gene disorders, chromosomal disorders, and x-linked disease.

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14. BUCHANAN ET AL., *supra* note 8, at 6.

15. *Id.*

16. *See, e.g.*, Baruch et al., *supra* note 1, at 1054–55.

17. Susannah Baruch et al., *Genetic Testing of Embryos: A Critical Need for Data*, 11 REPROD. BIOMED. ONLINE 667, 667 (2005) (on file with The Hastings Law Journal). As the authors explain:

> Since first reported, more than 1000 babies have been born following PGD, a number that is expected to grow dramatically. Indeed, some have suggested that in the future, PGD will become the standard of care for determining which embryos to transfer during IVF. Such a development would greatly increase the frequency of PGD, as IVF babies now make up 1% of all births in the United States, and that number, too, is growing.

Id. (citations omitted).

18. The Practice Comm. of the Soc'y for Assisted Reprod. Tech. & The Practice Comm. of the Am. Soc'y for Reprod. Med., *Preimplantation Genetic Testing: A Practice Committee Opinion*, 88 FERTILITY & STERILITY 1497, 1497 (2007) [hereinafter *Preimplantation Genetic Testing*] (explaining that there are two types of preimplantation genetic testing, PGD and preimplantation genetic screening (PGS)). The term PGD is used

> when one or both genetic parents carry a gene mutation or a balanced chromosomal rearrangement and testing is performed to determine whether that specific mutation or an unbalanced chromosomal complement has been transmitted to the oocyte or embryo. The term [PGS] applies when the genetic parents are known or presumed to be chromosomally normal and their embryos are being screened for aneuploidy.

Id. This Article talks exclusively about PGD because all of the reported cases of parents selecting for a disabling trait involve situations where one or both genetic parents are known to be carriers of the desired gene mutation.

19. PETER J. RUSSELL, GENETICS, at G-8 (4th ed. 1996) (explaining that a multifactorial trait is a "trait influenced by multiple genes and environmental factors").

Currently, genetic tests are available for more than one thousand conditions, ranging from deadly childhood diseases to milder conditions such as hereditary deafness.[20] And at least one world-wide IVF clinic advertises that it has performed PGD testing for 125 single-gene disorders, including some forms of colon cancer, cystic fibrosis, early-onset familial Alzheimer disease, Fanconi anemia, hemophilia, Huntington chorea, Marfan syndrome, muscular dystrophy, osteogenesis imperfecta, polycystic kidney disease, retinoblastoma, sickle cell anemia, and Tay-Sachs disease.[21] In the case of polygenic traits, such as breast cancer, PGD testing can be done for specific genes (e.g., BRCA 1 & 2).[22] If the genes are present, the embryo is at an increased risk for developing the particular disease. If they are not present, the embryo's chance of developing the condition is the same as the general population.

Furthermore, despite the general expectation that parents will make beneficial genetic choices for their future children, this may not always be the case. In fact, some evidence suggests that parental preferences for arguably harmful interventions are real. For example, one IVF doctor has reported that he "flatly refused a couple who asked him to identify an embryo with Down syndrome, so they could give their Down-affected child a similar sibling."[23] Another couple recently sought a deaf sperm donor in hopes of increasing their chances of conceiving children who are deaf.[24] Their plan succeeded, and the couple now has two children who are deaf, as well as many supporters and critics.[25]

If a prospective parent wants to create a child who is disabled, and has the financial resources, the only barrier is the physician at the IVF clinic. While many physicians specializing in IVF might balk at testing, selecting for, and implanting embryos carrying a potentially disabling gene,[26] no laws in the United States currently prohibit such choices.[27] And

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20. Susan L. Crockin et al., *Genetic Tests Are Testing the Law*, TRIAL, Oct. 2006, at 44, 45.

21. Reprod. Genetics Inst., PGD for Single Gene Disorders, http://www.reproductivegenetics.com/single_gene.html (last visited Dec. 15, 2008).

22. RUSSELL, *supra* note 19, at G-10 (explaining that polygenic traits are traits encoded by many locations on the genome).

23. Melissa Healy, *Fertility's New Frontier: Advanced Genetic Screening Could Help Lead to the Birth of a Healthy Baby*, L.A. TIMES, July 21, 2003, § 6 (Health), at 1.

24. M. Spriggs, *Lesbian Couple Create a Child Who Is Deaf Like Them*, 28 J. MED. ETHICS 283, 283 (2002).

25. *Id.*

26. Ethics Comm., Am. Soc'y for Reprod. Med., *Child-rearing Ability and the Provision of Fertility Services*, 82 FERTILITY & STERILITY 564, 564 (2004). Many doctors may feel that purposefully selecting an embryo with a disability violates their ethical obligation to do no harm. *Id.* While the ASRM does not have an ethics opinion directly on point, it opines that "[f]ertility programs may withhold services from prospective patients on the basis of well-substantiated judgments that those patients will be unable to provide or have others provide adequate child-rearing for offspring." *Id.*; *see also id.* at 565 (explaining that the primary concern is for the welfare of offspring).

27. At the time of writing, the United Kingdom was debating an amendment to the Human Embryology and Fertilisation Bill that would make it illegal to use embryos with a known genetic

current ethical guidelines created by the American Society for Reproductive Medicine (ASRM) and the American College of Obstetricians and Gynecologists (ACOG), while laudable, can be inconsistent, and generally lack enforcement mechanisms.[28]

Off-the-record conversations with reproductive endocrinologists also suggest that patients may be "strong-arming" physicians into agreement. According to one account, parents with achondroplasia[29] told their physician that if he refused to help them select a child with achondroplasia, they would go to another IVF clinic, refuse PGD testing, get pregnant, have the fetus tested via amniocentesis for achondroplasia, and abort any child not carrying the gene.[30] If the fetus had achondroplasia, they would continue the pregnancy.[31] Not wanting to be the cause of an unnecessary abortion and recognizing that the end result would be the same with or without his assistance (a child with achondroplasia), the physician agreed to help the parents utilize PGD to select for a child with achondroplasia.[32] While rare, this is probably not an isolated event. A recent survey of IVF clinics reports that:

> Some prospective parents have sought PGD to select an embryo *for* the presence of a particular disease or disability, such as deafness, in order that the child would share that characteristic with the parents. Three percent of IVF-PGD clinics report having provided PGD to couples who seek to use PGD in this manner.[33]

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abnormality where nonaffected embryos were available for use. *See* Clare Murphy, *Is It Wrong to Select a Deaf Embryo?*, BBC NEWS, Mar. 10, 2008, *available at* http://news.bbc.co.uk/2/hi/health/7287508.stm; Progress Educ. Trust, Debate in Cardiff, Wales: Debating Deafness and Embryo Selection: Are We Undermining Reproductive Confidence in the Deaf Community? (Apr. 9, 2008) (transcript available at http://stopeugenics.org/files/2008/04/debatingdeafness.pdf).

28. For example, the ASRM guidelines for PGD sex selection say that "sex selection to prevent the transmission of serious genetic disease is ethically acceptable," whereas sex selection for "nonmedical reasons" should "not be encouraged." Ethics Comm., Am. Soc'y for Reprod. Med., *Sex Selection and Preimplantation Genetic Diagnosis*, 72 FERTILITY & STERILITY 595, 598 (1999). However, while a recent ACOG Committee on Ethics Opinion also "supports the practice of offering patients procedures for the purpose of preventing serious sex-linked genetic diseases," it "opposes meeting requests for sex selection for personal and family reasons, including family balancing, because of a concern that such requests may ultimately support sexist practices." AM. COLL. OF OBGYN, COMM. OPINION No. 360, SEX SELECTION (2007), *available at* http://www.acog.org./from_home/publications/ethics/co360.pdf. First, it is not clear that all professional organizations agree on the appropriate ethical response. Furthermore, even in light of ACOG's disapproval of sex selection for nonmedical reasons, several fertility clinics advertise sex selections services for family balancing purposes. *See, e.g.*, The Fertility Instit., 100% Sex Selection, Family Balancing and Genetic Embryo Screening, http://www.fertility-docs.com/fertility_gender.phtml (last visited Dec. 15, 2008).

29. Céline Moutou et al., *Preimplantation Genetic Diagnosis for Achondroplasia: Genetics and Gynaecological Limits and Difficulties*, 18 HUM. REPROD. 509, 509 (2003) (explaining that achondroplasia is an autosomal dominant genetic trait with 100% penetrance that results in abnormal bone growth and short stature or dwarfism).

30. Interview with Anonymous, in Vancouver, Can. (June 20, 2007).

31. *Id.*

32. *Id.*

33. Susannah Baruch et al., Genetic Testing of Embryos: Practices and Perspectives of US In

In absolute numbers, this means that at least four clinics responding to the survey have honored these requests.[34]

Concerns about the inadequacy of professional self-regulation have led some scholars to call for regulation to prevent ethical abuses of PGD technology.[35] But legal or professional guidelines limiting PGD use may only encourage "medical tourism,"[36] and regulating genetic interventions abroad is nearly impossible.[37] Additionally, the small number of children likely to be negatively affected by preimplantation genetic interventions may not, on its own, justify the expense of an extensive regulatory system like that managed by the Human Embryo Fertilisation Authority (HEFA) in the United Kingdom.[38] And, even if the United States were to adopt a comprehensive regulatory regime tomorrow, the question still remains whether a child born as a result of certain preimplantation genetic choices would have the ability to seek a civil tort remedy from his or her parents.[39]

II. THE LIMITS OF PROCREATIVE LIBERTY: AN ETHICAL FRAMEWORK FOR DETERMINING LEGALLY COGNIZABLE HARMS

Before delving into the specifics of what a claim for parental tort liability might look like, it is important to consider the impact of procreative liberty. This Article argues that procreative liberty, which is

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Vitro Fertilization Clinics (Sept. 19, 2006) (ePublished manuscript ahead of print, on file with The Hastings Law Journal) (this is an earlier version of the article cited in footnote two; much of the cited text is removed in the final version of the article).

34. Baruch et al., *supra* note 1, at 1053. Out of 415 clinics surveyed, 186 clinics (45%) provided valid responses, and only 74% of the respondents reported that they provided PGD services. *Id.* at 1053–54. The remaining clinics (225) did not respond to the survey. *See id.* If the percentages reported hold true for all IVF clinics that received the survey, then approximately nine IVF-PGD clinics in the United States have honored a request to select for a disabling trait. *Id.* There is no data on how many children with disabilities have been born as a result. *See, e.g., id.* at 1053–55.

35. *See, e.g.*, Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35 (2000); Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 637–56 (1997) (surveying current and proposed legal regulation of ART).

36. For example, the Canadian Assisted Human Reproduction Act, which prohibits the purchase of "sperm or ova from a donor" has resulted in rampant medical tourism. The Assisted Human Reproduction Act, 2004 S.C., ch. 2 (Can.); *see also* Paul Claman, *The Assisted Human Reproduction Act*, J. OBGYN CAN., Apr. 2007, at 303 ("Most [Canadian] patients in need of egg donation are currently traveling to clinics in the United States, where egg donors are paid fees averaging $4000 per donation, for treatment.").

37. *See, e.g.*, Maxwell J. Mehlman & Kirsten M. Rabe, *Any DNA to Declare? Regulating Offshore Access to Genetic Enhancement*, 28 AM. J.L. & MED. 179, 208–12 (2002).

38. *See, e.g.*, Alicia Ouellette et al., *Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States*, 31 AM. J.L. & MED. 419, 431–32 (2005) (describing in detail the United Kingdom's extensive regulatory regime).

39. A child, in theory, may also be able to sue the health care providers who allowed his parents to engage in harmful preimplantation genetic interventions. This Article does not examine potential provider liability because its purpose is to focus on potential parental liability. Parental liability, however, does not necessarily preclude provider liability.

most simply defined as "the freedom either to have children or to avoid having them,"[40] should be limited where later-born children are likely to suffer harm. In an attempt to define "harm," this Article borrows an ethical framework from moral philosophy to determine which genetic traits might cause a child moral harm. Finally, it considers which of these moral harms might be considered legally cognizable injuries in tort.

While questions concerning reproduction have frequently arisen in the Supreme Court,[41] the scope, and even existence, of a constitutionally protected interest in procreative liberty is debatable.[42] If procreative liberty is not constitutionally guaranteed, then parental rights to choose a child's genetic traits are likely limited to parental decision-making rights guaranteed by the Fourteenth Amendment.[43] These rights may not extend to genetic choices.[44] If procreative liberty is constitutionally guaranteed, then one must question its moral and legal limits in light of new reproductive technologies. While an affirmative recognition of procreative liberty might limit parental tort liability, it will not necessarily bar it.

Procreative liberty, in the words of John Robertson, a well-known supporter of a strong procreative liberty interest, is "best understood as a liberty or claim-right" with "two independently justified aspects: the liberty to avoid having offspring and the liberty to have offspring."[45] In a technologically advanced society, procreative liberty arguably creates a strong presumption for the use of technology in reproduction, "with the burden on opponents to show there is a good case for limiting it."[46] While

40. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 22 (1994).

41. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992); Webster v. Reprod. Health Servs., 492 U.S. 490, 499 (1989); Roe v. Wade, 410 U.S. 113, 116–17 (1973); Eisenstadt v. Baird, 405 U.S. 438, 440 (1972); Griswold v. Connecticut, 381 U.S. 479, 480–81 (1965); Skinner v. Oklahoma, 316 U.S. 535, 536–37 (1942); Buck v. Bell, 274 U.S. 200, 205 (1927).

42. *See, e.g.*, ROBERTSON, *supra* note 40, at 22–42 (arguing for a strong version of procreative liberty that recognizes both a right not to reproduce and a right to reproduce using virtually any available technology); Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1473 (1995) (arguing that Robertson's strong view of procreative liberty "lacks a solid foundation in Supreme Court jurisprudence"). *See generally* Symposium, *John A. Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 133 (1995) (providing for a more varied critique of Robertson's approach and his response); Katheryn D. Katz, Lawrence v. Texas: *A Case for Cautious Optimism Regarding Procreative Liberty*, 25 WOMEN'S RTS. L. REP. 249 (2004) (providing a discussion of how recent Supreme Court rulings may have affected the right to procreative liberty).

43. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (holding that Wisconsin's mandatory school attendance law unduly burdened the parents' rights under the First and Fourteenth Amendments by forcing Amish parents to send their children to public school after the eighth grade in violation of core Amish religious beliefs).

44. *See* discussion *infra* Part V.C.

45. John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439, 447 (2003).

46. *Id.* at 447–48.

Robertson, a modern traditionalist, readily admits that there are limits to procreative liberty, others, whom Robertson labels radical libertarians, would not recognize limits to procreative liberty.[47] This Article adopts the modern traditionalist view of procreative liberty, believing it to be the most palpable and mainstream version of procreative liberty.

Modern traditionalists

> hold[] that reproductive choice in a liberal, rights-based society is a basic freedom, including the use of genetic and reproductive technologies that are helpful in having healthy, biologically related offspring. . . . Its acceptance of reproductive and genetic technologies, however, exists only insofar as they aid the task of successful reproduction, and do not directly harm offspring, families, women, society, or others.[48]

Modern traditionalists, therefore, recognize limits to procreative liberty where there is harm to later-born children. While Robertson does not define "harm," he does assert that "[t]he least persuasive case for parental freedom to use non-medical genetic alteration techniques is for intentional diminishment of prospective offspring—genetic alteration that aims to reduce or remove capabilities that would otherwise have made the child normal and healthy."[49] Robertson does not say which capabilities he has in mind nor does he define "normal and healthy."[50]

A. A Framework for Defining Harm

A few scholars, including Robertson, have developed potential frameworks for defining harm more accurately.[51] In an earlier piece on genetic choices, Robertson imagines a potential real-world setting (now reality) where parents with a disability "such as deafness or extreme short stature" want "their offspring to share this disabling condition."[52] In such a scenario the parents

> would be using their reproductive capacity to produce a less than healthy child when a healthy normal child was possible. Unless it could be shown that children born to such parents are in fact better off if they share the parents' disability, stopping parents from prenatal lessening of offspring abilities would not . . . interfere with their procreative liberty.[53]

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47. *Id.* at 444 ("[Radical libertarians believe] that individuals are free to use any reproductive technique they wish for whatever reason, and no limits can appropriately be placed on what they do before the birth of a child. Individuals are thus free to select, screen, alter, engineer, or clone offspring as they choose." (footnotes omitted)).

48. *Id.* at 446 (footnote omitted).

49. *Id.* at 480.

50. *Id.*

51. *See generally* Buchanan et al., *supra* note 8; Robertson, *supra* note 40.

52. Robertson, *supra* note 40, at 171.

53. *Id.*

While the exact boundaries of what constitutes a "less than healthy child" are not discussed, Robertson's words suggest a starting point for measuring harm: if parents purposefully produce a child with fewer capabilities, or less health, when they could produce a more healthful or capable child, there is a presumption of harm unless it can be shown by a preponderance of the evidence that such children are at least as well-off as their more healthful or capable alternate selves.

A more complete definition of harm in the context of genetic choices comes from the work of several moral philosophers who argue that children have a right to an "open future."[54] Joel Feinberg, one of the first proponents of this approach, says that children possess "anticipatory autonomy rights" that are violated when a child's opportunities in life are limited.[55] Every child that comes into existence has future interests[56] that can be doomed by the child's circumstances at birth.[57] To say that the child has been deprived of his right to an open future, however, "[t]he doomed interests must be basic ones, including welfare interests in the possession of those unimpaired faculties that are essential to the existence and advancement of any ulterior interests."[58] Joel Feinberg writes:

> It bears repeating that not all interests of the newborn child should or can qualify for prenatal legal protection, but only those very basic ones whose satisfaction is known to be indispensable to a decent life. The state cannot insure all or even many of its citizens against bad luck in the lottery of life.... On the other hand, to be dealt severe mental retardation, congenital syphilis [sic], blindness, deafness, advanced heroin addiction, permanent paralysis or incontinence, guaranteed malnutrition, and economic deprivation so far below a reasonable minimum as to be inescapably degrading and sordid, is not merely to have "bad luck." It is to be dealt a card from a stacked deck in a transaction that is not a "game" so much as a swindle.[59]

Feinberg further argues that where parents are fully informed of the likelihood of certain handicaps, and yet permit a child to be born, they have wronged that child (in a moral sense) even if it cannot be said that

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54. *See, e.g.*, BUCHANAN ET AL., *supra* note 8, at 170–72; *see also* Joel Feinberg, *The Child's Right to an Open Future*, *in* WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 126 (William Aiken & Hugh LaFollette ed., 1980) (discussing a child's right to an open future generally).

55. Feinberg, *supra* note 54.

56. 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 38 (1984) (explaining that a person has an interest in something when he "stands to gain or lose" depending upon the outcome).

57. *Id.* at 98 (citation omitted) ("There can be no doubt in many cases that the condition of the infant at birth amounts to a *dooming* of his future interests to total defeat, so that when he comes into existence he already is in what we would normally call a state of harm.").

58. *Id.*

59. *Id.* at 99.

the child has been legally harmed.[60] While Feinberg is talking about situations where parents forgo a safe and legal abortion even though a disability has been detected in the womb (an act of nonfeasance post implantation), his words are equally applicable, and arguably less controversial, in the context of preimplantation genetic interventions where arguments about bodily integrity fall to the wayside as described in Part V, section B.

Later philosophers adopting the "open future" framework also agree that the "doomed interests" must be basic. In the words of Buchanan et al., they must be "natural primary goods" or capabilities that are "useful or valuable in carrying out nearly any plan of life or set of aims that humans typically have."[61] One example of a natural primary good is sight.[62]

> The typical human's capacity for sight . . . is a 'good' not only from a distinct perspective or plan of life that some may adopt but many others may reject. Instead, there are few perspectives from which the loss of sight is not a harm, and few perspectives from which having sight is not a benefit in carrying out the plan of life a person has adopted.[63]

Under this definition, hearing, movement, and minimal mental capacity would also qualify as natural primary goods. Buchanan et al., do, however, provide parents slightly more leeway than Feinberg might. They assert that "parents have a responsibility to help their children . . . [develop] . . . a *reasonable* range of the skills and capacities necessary to provide them the choice of a *reasonable* array of different life plans available to members of their society."[64] Buchanan et al. "stress the two qualifications of a *reasonable* range and array, since Feinberg sometimes asserts a stronger right to a maximally open future."[65] They also adeptly recognize that many will disagree with the "open future" framework and how it defines harm, particularly certain disabilities rights groups that would not consider being deaf or blind a harm.[66] Yet, Buchanan et al. still feel that it would be "wrong for parents substantially to close off most opportunities that would otherwise be available to their children in order to impose their own particular conception of a good life

60. *Id.* at 98–100.

61. BUCHANAN ET AL., *supra* note 8, at 167–68.

62. *Id.*

63. *Id.* at 167.

64. *Id.* at 170 (emphasis added).

65. *Id.* (emphasis added).

66. *Id.* at 167. Some scholars have argued that attempts to have a deaf child are justifiable because the deaf are a minority group and a cultural group. K.W. Anstey, *Are Attempts to Have Impaired Children Justifiable?*, 28 J. MED. ETHICS 286, 286–87 (2002).

or in order to continue their own community that is committed to that conception of a good life."[67]

Under either conception of the framework, all persons, particularly parents, have a responsibility to help their children gain and develop natural primary goods. This is not a surprising conclusion given that current law requires parents to provide food, clothing, shelter, adequate medical care, and a minimal level of education, all of which, in theory, provide for more opportunities in life.

While there are certainly problems with the "open future" approach to defining harm, not the least of which is the lack of a clear definition of what constitutes a "reasonable array of different life plans," it does provide a principled way for thinking about which genetic choices may cause harm to children. For these reasons, this Article adopts the "open future" approach for defining moral harms.

The moral calculus of the "open future" approach is helpful, but it is not clear that all morally problematic actions taken by parents should give rise to a tort claim. Of particular concern is whether a child born deaf, blind, or achondroplastic has suffered a legally cognizable injury, without which a tort claim will fail. Yet, such determinations are problematic because they are inherently value-laden.

B. Moral Harms and Legally Cognizable Injuries in Tort Law

There are several arguments for finding a legally cognizable injury where parents engage in genetic interventions. First, there may be harms to society, particularly from a utilitarian perspective. These societal harms may justify tort remedies. Second, there is an argument that a child's moral right to an open future is sufficiently strong that its violation necessitates the finding of a legally cognizable injury.

One might argue that parents who engage in preimplantation genetic intervention should be liable in tort because while the child born does not suffer a legally cognizable injury, society does. Eric Rakowski argues that parents who choose to have a genetically disadvantaged child should not be able to shift the additional costs of these children to society, but should instead be responsible for paying for their genetic choices.[68] While he does not advocate banning reproductive liberty, and only briefly touches on potential parental liability (discounting it because of the Non-Identity Problem), he does recognize that harm to society could come from parents' genetic choices.[69] For Rakowski, the societal harms include the financial costs associated with extra social services that the child

67. Buchanan et al., *supra* note 8.
68. Eric Rakowski, *Who Should Pay for Bad Genes?*, 90 Cal. L. Rev. 1345, 1345 (2002).
69. *Id.*

might need.[70] He argues that the state should be able to recover the costs of these services from parents choosing to have a genetically disadvantaged child.[71] While these arguments are interesting, they do not allow for an individual tort claim brought by the child. For a child to successfully sue his parents, he would have to show that he, not society, has suffered a legally cognizable harm. Thus, most conceptions of tort liability require a person-affecting conception of harm such as that seen in the Non-Identity Problem.

A second argument for liability is that future generations have not only a moral right, but also a legal right to an open future, and limiting a child's future should be considered a legally cognizable harm. There is some support for this argument in American case law dicta, particularly in some prenatal tort cases.[72] A few international documents also support this argument.[73] While there do not appear to be any American cases that have explicitly recognized a child's right to an open future or considered a limitation of that right to be a legally cognizable injury, there are good policy reasons to expand our definition of legally cognizable injuries to include limitations on a child's right to an open future.

Some American tort cases have suggested that children may have a legal right to a sound body and mind at birth. In *Smith v. Brennan*, the New Jersey Supreme Court, in recognizing a cause of action for prenatal injuries caused by a third party, wrote:

> [A] child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that right, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child.[74]

Several other courts have also taken this stance in similar contexts.[75]

Additionally, certain international documents, like the Universal Declaration on the Human Genome and Human Rights, state that

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70. *Id.*

71. *Id.* at 1390.

72. *See, e.g.*, Stallman v. Youngquist, 531 N.E.2d 355, 360 (Ill. 1988); Womack v. Buchhorn, 187 N.W.2d 218, 222 (Mich. 1971); Smith v. Brennan, 157 A.2d 497, 503 (N.J. 1960).

73. *See, e.g.*, The Universal Declaration on the Human Genome and Human Rights, UNESCO, 29th Sess., 29 C/Res. 16 (Nov. 11, 1997), *adopted by* G.A. Res. 53/152, U.N. Doc A/RES/53/152 (Dec. 9, 1998) [hereinafter The Universal Declaration]; Roger Brownsword, *Ahrens Torts Seminar: Genomic Torts: An Interest in Human Dignity as the Basis for Genomic Torts*, 42 WASHBURN L.J. 413, 415–16 (2003) (citing the Convention on Human Rights and Biomedicine, and suggesting that the United Kingdom incorporate a fundamental right of human dignity into tort law).

74. *Brennan*, 157 A.2d at 503.

75. *See, e.g.*, *Stallman*, 531 N.E.2d at 359 (recognizing that children have a "legal right to begin life with a sound mind and body" even though the court ultimately held that the mother could not be liable for the prenatal injuries she caused her child); *Womack*, 187 N.W.2d at 222–23 (citing *Brennan* and recognizing a common law action for negligently inflicted prenatal injury).

everyone has a right to "just reparation for damage sustained as a direct and determining result of an intervention affecting his or her genome."[76] This document suggests that it is injurious for one person to purposefully alter the genome where there is a resulting reduction in a basic human function such as seeing, hearing, or moving.[77] It calls for states to adopt national laws that provide for "just reparation" in the event a person's genome is altered without his or her consent.[78] While the United States has not signed this declaration, becoming a signatory would ostensibly require the United States to create a cause of action in tort for children whose parents reduce their health or capabilities through direct genetic interventions.

There are also good policy rationales for recognizing limitations to a child's future opportunities as a legally cognizable harm. Tort law now recognizes more legally cognizable injuries than it did a century ago, including stand alone emotional distress, fear of cancer, and a variety of prenatal harms. Many of these changes are linked to technological advances in medicine. For instance, stand alone emotional distress was recognized in the mid-twentieth century shortly after significant developments in the field of depth psychology.[79] Medical theories focusing on the "situational creation of mental conditions" and the "environmental shaping of behavioral responses" gave rise to a new understanding of mental illness and emotional distress.[80] Eventually, terms such as post-traumatic stress disorder became part of the everyday language and began appearing in cases a few decades later.[81] These changes in understanding promoted the recognition of emotional distress as a real injury, similar in severity to some physical injuries.

Similarly, courts began to recognize fear of cancer as a legally cognizable injury shortly after medicine learned about the link between exposure to toxic chemicals and cancer development.[82] Discussing the relationship between negligent infliction of emotional distress (NIED) claims and fear of cancer claims, one author writes that the erosion of the physical impact rule in NIED cases was partially fueled by "advances in science and medicine which linked exposure to commonly used chemicals and substances to increased risks of cancer and other harms to

76. The Universal Declaration, *supra* note 73, art. 8.

77. *See id.*

78. *Id.*

79. Levit, *supra* note 12, at 143.

80. *Id.*

81. According to a search of the LexisNexis database, the term "post-traumatic stress disorder" first began appearing in legal opinions in 1980. *See, e.g.*, State v. Gregory, No. 80 AP-461, 1980 Ohio App. LEXIS 13522, at *7 (Ohio Ct. App. Dec. 31, 1980).

82. *See* James F. d'Entremont, *Fear Factor: The Future of Cancerphobia and Fear of Future Disease Claims in the Toxicogenomic Age*, 52 LOY. L. REV. 807, 813–14 (2006).

human health."[83] Advances in medical understanding, and the creation of sensitive medical technologies for measuring toxin levels in the body, meant that courts were willing to consider increased cancer risks a legally cognizable harm, because the injuries were no longer speculative or unfounded.

Genetic technologies are revolutionizing the way we think about reproduction and parenting and, therefore, should also change our understanding of what constitutes a legally cognizable harm in the preimplantation context. For example, evolving reproductive technologies have driven the way courts and scholars define parenthood.[84] And the growth of assisted reproductive technologies in the 1970s, '80s, and '90s has likely factored into judicial decisions arguably recognizing a right to procreative liberty.[85]

With new reproductive rights come new reproductive responsibilities, the most important of which is to use reproductive technologies in a way that causes either minimal or no harm to the resulting child. Procreative liberty has it limits. Some case law dicta and international documents already suggest that the limits of procreative liberty are reached where a parent's reproductive rights conflict with a later-born child's right to an open future. Where preimplantation genetic choices unreasonably limit a child's opportunity to engage in a variety of life plans, courts should view this moral harm as a legally cognizable injury.

III. PARENTAL TORT IMMUNITY

Parental tort immunity should not prove a barrier to parental tort liability in preimplantation genetic intervention cases.[86] While no reported cases have examined parental tort immunity in the preimplantation context, intentional, harmful parental actions generally do not receive the protection of parental tort immunity. Furthermore,

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83. *Id.* at 810.

84. *See generally* John G. New, *"Aren't You Lucky You Have Two Mamas?": Redefining Parenthood in Light of Evolving Reproductive Technologies and Social Change*, 81 CHI.-KENT L. REV. 773 (2006); *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2052–74 (2003) (discussing how new reproductive technologies have changed the way we define parenthood and family).

85. ROBERTSON, *supra* note 40, at 104–07.

86. Immunities are generally bright-line rules designed to protect a defendant not merely from liability, but from suit. DAN B. DOBBS, THE LAW OF TORTS § 225 (2000) ("Courts sometimes emphasize the bright-line quality of immunity by saying that an immunity is an immunity from suit, not merely an immunity from liability. The point of that saying is to assert that the value of the immunity is to save the defendant from the costs and uncertainties of a trial and hence to claim that courts can rightly avoid considering the merits of the individual case."). Therefore, the applicability of a particular immunity necessarily arises before questions of duty, breach or injury. Hence, this Article addresses parental tort immunity before it reaches the specifics of intentional tort liability in Part IV and negligence in Part V.

even where parental actions are negligent, parental tort immunity is unlikely to preclude liability.

The doctrine of parental tort immunity was established in 1891, in *Hewellette v. George*, a case that held that parents could not be held liable in tort to their unemancipated minor children.[87] While *Hewellette* involved a case of false imprisonment, an intentional tort, it was often cited as the basis for parental tort immunity for both negligent and intentional torts.[88] Since *Hewellette*, several justifications for the doctrine of parental tort immunity have been offered, namely "a) the state's interest in maintaining and preserving family harmony, b) the fear of fraudulent, collusive claims, c) the protection of family finances, d) the protection of parental discretion and authority, and e) the analogy to spousal immunity."[89]

Courts began to retreat from the doctrine of parental tort immunity shortly after its inception.[90] During the late nineteenth- and the first half of the twentieth-century, courts began to make exceptions to the doctrine of parental tort immunity, primarily in cases involving intentional torts. Today the doctrine of parental immunity is almost uniformly ignored if there is an intentional injury, such as sexual abuse[91] or willful battery that extends beyond the type of corporeal punishment that is accepted in a parenting situation.[92] The reasons for parental tort immunity, particularly the preservation of family harmony, are simply not applicable where parents intentionally harm their children.[93] Hence, parental tort immunity should not relieve parents from tort liability where they intentionally engage in harmful preimplantation genetic interventions.

But where claims against parents for preimplantation genetic interventions are brought as negligence suits,[94] the doctrine of parental tort immunity may prove more of a barrier to liability. Since the 1950s courts have abrogated parental tort immunity in select negligence cases,

87. Hewellette v. George, 9 So. 885, 887 (Miss. 1891), *overruled by* Glaskox v. Glaskox, 614 So. 2d 906 (Miss. 1992).

88. *Glaskox*, 614 So. 2d at 907 n.1 (Miss. 1992).

89. Martin J. Rooney & Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent*, 25 NEW ENG. L. REV. 1161, 1163 (1991) (footnotes omitted).

90. *See, e.g.*, DOBBS, *supra* note 86, § 280 (providing a complete, brief overview of the birth and erosion of parental tort immunity in the United States, and noting that *Goller v. White* "began a national trend, and today, a majority of states has at least partially abolished parental tort immunity" (citing 122 N.W.2d 193 (Wis. 1963)).

91. *See, e.g.*, Hurst v. Capitell, 539 So. 2d 264, 266 (Ala. 1989).

92. Newman v. Cole, 872 So. 2d 139, 145–46 (Ala. 2003) (carving out an exception for civil wrongful death action where a father repeatedly hit his son in the chest and then held him on the ground in a choke hold while his stepmother sprayed him in the face with water from a garden hose, ultimately causing his death).

93. DOBBS, *supra* note 86, § 280.

94. *See infra* Part V for a discussion of why some claims may be brought as negligence claims and not as intentional tort claims.

particularly those involving automobile accidents[95] or child injury in the course of the parent's business activities.[96] Today, only thirty-three states retain some limited form of parental tort immunity.[97] In the majority of these states immunity is recognized where the alleged negligent act involves either "an exercise of parental authority over the child" or "an exercise of parental discretion with respect to the provision of food, clothing, housing or other care."[98] Under this standard, often referred to as the *Goller* standard, parental tort immunity begins to look more like a privilege than an immunity, meaning that courts should carefully perform a case-by-case analysis of parental actions instead of applying blanket immunity.[99] Yet, courts have not been particularly clear in delineating which actions involve the appropriate exercise of parental authority or discretion under the *Goller* standard, and there has been wide-spread commentary that some cases improperly immunized parents from liability.[100] Parental discretion is broadly applied in American jurisprudence.[101] As a result, the law often fails to find criminal guilt in women who engage in recognized dangerous activities while pregnant,[102] protects parents who negligently place their children in dangerous positions,[103] and assumes that parents are better decision makers for their

95. DOBBS, *supra* note 86, § 280 (citing courts that allowed claims to move forward in automobile accidents so the family could have access to insurance monies that would otherwise be unavailable).

96. *Id.* (noting that parental tort immunity has been removed in cases where "the child was injured in the course of the parent's business activity or by acts that were tortious to people generally").

97. *Newman*, 872 So. 2d at 140 n.1 (explaining that six states never adopted the doctrine of parental tort immunity, eleven adopted it but have since abolished it completely, and the remaining thirty-three states abolished parental tort immunity with a few limited exceptions).

98. Goller v. White, 122 N.W.2d 193, 196 (Wis. 1963); DOBBS, *supra* note 86, § 280 (noting that the majority of states have adopted this standard often referred to as the *Goller* rule). An alternative statement of limited parental tort immunity comes from some New York cases, which allow immunity only for injuries resulting from parental supervision or a lack thereof. *See id.*

99. DOBBS, *supra* note 86 ("Immunities tend to shield defendants because of their legal status, while privileges tend to shield defendants because their actions were justified in the particular case. . . . The line between status and justification is blurred, however, when immunity turns on the defendant's power to exercise discretion . . . .").

100. *See, e.g.*, Kimberly A. Sackmann, *What Happened to Protecting the Children? An Argument Against Parental Immunity for Foster Parents*, 19 DUPAGE COUNTY BAR ASS'N BRIEF, Apr. 2007, at 32, 45.

101. Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course."); *cf. id.* (discussing the state's ability to permanently sever parental rights).

102. *See, e.g.*, State v. Ashley, 701 So. 2d 338, 341 (Fla. 1997) (holding that the state could not prosecute a teenage woman who shot herself in the abdomen during the third trimester of pregnancy because the state homicide and abortion statutes did not abrogate the common law doctrine of immunity for pregnant women causing injury or death to their fetuses).

103. *See, e.g.*, Dubay v. Irish, 542 A.2d 711, 715 (Conn. 1988) (finding a mother immune from suit where she waited four hours before taking her seventeen-year-old daughter to the hospital after she overdosed on her mother's prescription medicine); Ball v. Ball, 269 P.2d 302, 314 (Wyo. 1954) (finding

children than society might be.[104] Given the strong and consistent recognition of parental discretion, it might be argued that all preimplantation genetic choices are well within the bounds of acceptable parental discretion, even without the special standards recognized in parental tort immunity cases.

Under the parental tort immunity standards, PGD and direct genetic interventions, including the initial decision whether to undertake an intervention, arguably involve a large element of parental authority and discretion, perhaps most akin to parental decisions involving medical care. Yet cases applying the standard do not yield many bright-line rules as to what constitutes a valid exercise of parental authority, particularly in the medical setting.[105] While medical custody of children is often given to the state where parents refuse standard life-saving or life-improving medical care,[106] the vast majority of these decisions are unreported, again making it difficult to determine the boundaries of parental authority and discretion. Nonetheless, it is reasonable to expect that parental discretion would probably be curtailed in cases of intentional diminishment because, as stated in Part II, indirect genetic interventions that select for a disability would result in reduced health and capabilities. Reaching a conclusion in indirect genetic intervention cases is not necessary, however, because such cases will fail because of the Non-Identity Problem.[107]

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parental immunity where a son was injured in a plane crash caused by his father's negligent piloting). *But see, e.g.*, Ard v. Ard, 414 So. 2d 1066, 1070 (Fla. 1982) (holding that a minor child could bring suit against his mother for injuries sustained when she negligently unloaded him from an automobile); Anderson v. Stream, 295 N.W.2d 595, 600–01 (Minn. 1980) (holding that minor child could bring suit against his father after the child was struck by an automobile after the father negligently directed him across a street).

104. Broadwell v. Holmes, 871 S.W.2d 471, 475 (Tenn. 1994) ("'Each parent has unique and inimitable methods and attitudes on how children should be supervised. Likewise, each child requires individualized guidance depending on intuitive concerns which only a parent can understand.... Consequently, [a]llowing a cause of action for negligent supervision would enable others, ignorant of a case's peculiar familial distinctions and bereft of any standards, to second-guess a parent's management of family affairs....'" (alteration in original) (quoting Paige v. Bing Constr. Co., 233 N.W.2d 46, 49 (Mich. Ct. App. 1975)).

105. *See, e.g.*, Bonin v. Vannaman, 929 P.2d 754, 779–80 (Kan. 1996) ("A parent's decision regarding whether a child's medical conditions should be investigated for signs of malpractice or whether a malpractice action should be pursued is an exercise of parental discretion regarding a child's medical condition and financial well-being in which a court should not interfere.... If immunity for such actions is not provided, then a parent will always feel obligated to sue on behalf of his or her child, whether or not the parent thinks it is the right decision for the family...."). While this case does provide some guidance as to the boundaries of parental discretion, the court's reasoning is arguably cursory.

106. *See* Martha Swartz, *The Patient Who Refuses Medical Treatment: A Dilemma for Hospitals and Physicians*, 11 AM. J.L. & MED. 147, 183–92 (1985) (providing descriptions of some medical custody cases).

107. *See* discussion *infra* Part V.D.

IV. INTENTIONAL TORT CLAIMS

Because genetic interventions involve purposeful choices, an intentional tort claim is more appropriate in many instances than a negligence claim. Battery is probably the most practicable intentional tort claim.[108]

> An actor is subject to liability . . . for battery if
>
> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
>
> (b) a harmful contact with the person of the other directly or indirectly results.[109]

Therefore, parents are liable for battery in the preimplantation context where they make an intentional, nonconsensual, harmful, or offensive contact with the embryo.

Every preimplantation genetic intervention, whether direct or indirect, requires parents to make multiple, intentional choices over an extended period of time. Parents must enlist the services of a cadre of health professionals, including doctors, nurses, scientists, and often psychologists before they successfully undergo any preimplantation genetic intervention. Genetic mothers, whether the intended social mother or the egg donor, must endure multiple injections of hormones over a period of several weeks to stimulate ovulation.[110] Then the eggs must be retrieved by inserting a needle into the woman's body.[111] The genetic father must provide a sperm sample.[112] The desired genetic material is then given to a laboratory which combines the gametes in a sterile environment, ideally producing several petri dishes filled with developing embryos.[113] In the case of PGD, these embryos are allowed to develop to the four to eight-cell stage, where a single cell is plucked from the embryo for genetic testing.[114] Various genetic tests are performed on that cell, and the information is provided to the intended parents.[115] At this stage in the process, the parents must decide which embryos, if any, to implant.[116] The implantation procedure, which places the selected

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108. Arguably, intentional infliction of emotional distress (IIED) may be another available tort claim.

109. RESTATEMENT (SECOND) OF TORTS § 13 (1977).

110. THE N.Y. STATE TASK FORCE ON LIFE & THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 52–53 (1998) [hereinafter ASSISTED REPRODUCTIVE TECHNOLOGIES].

111. *Id.* at 54.

112. *Id.* at 56.

113. *Id.*

114. Collins, *supra* note 6.

115. *Id.*

116. *Id.*

embryos into the womb, is again a physically invasive procedure, both for the embryo and the gestational mother.[117] Each step of this detailed and costly process requires parental intent.

Whether these actions are intentional for the purposes of proving a battery claim may depend on the jurisdiction in which the genetic intervention takes place. In single intent jurisdictions, intent to make a contact that turns out to be harmful or offensive is sufficient for concluding that intent exists.[118] In the preimplantation context, there is intent to make contact with the embryo when it is formed in the petri dish, when it is manipulated or has cells removed, and when it is implanted in the womb.[119] These intentional contacts are sufficient for satisfying the intent requirement in a single intent jurisdiction as long as the later-born child is harmed or offended as a result of the contact.

Dual intent jurisdictions, however, require the plaintiff to prove that the defendant intended both a touching *and* a harmful or offensive contact.[120] It might be very difficult, indeed, for a court to imagine that a parent would undertake an expensive preimplantation genetic intervention with the intent of harming his or her later-born child. Harm or offense, however, is often considered in the objective, not subjective sense.[121] Therefore, whether a parent subjectively intends to harm his or her later-born child may be irrelevant. In all preimplantation genetic interventions the parents cannot know the wishes of their later-born child or obtain his consent. Therefore, an objective standard of harm or offense may make the most sense in analyzing these cases.[122] Under an objective standard of offense the creation of genetic traits such as deafness or achondroplasia are almost certain to be considered offensive

117. ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 110, at 58–59.

118. *See, e.g.*, White v. Univ. of Idaho, 797 P.2d 108, 109 (Idaho 1990).

119. Some readers may question whether intent to make contact with the embryo is sufficient where the contact is with a cell mass that has not developed awareness. But contemporary awareness of a harmful or offensive contact is not required. RESTATEMENT (SECOND) OF TORTS § 18 cmt. d (1977). "In any battery case where the alleged harmful or offensive contact occurs during a surgery involving general anesthesia, the patient is unaware of the contact at the time it occurs. Nonetheless, a claim for battery may lie." *Id.* illus. 1. Similarly, suits for battery have been successful where the plaintiff acquired a sexually transmitted disease after contact with the defendant. *See, e.g.*, Doe v. Johnson, 817 F. Supp. 1382 (W.D. Mich. 1993); Hogan v. Tavzel, 660 So. 2d 350 (Fla. Dist. Ct. App. 1995). In these cases, the plaintiff had no awareness that the contact was harmful or offensive at the time. Furthermore, courts have allowed suits where the later-born child was not conceived at the time of the alleged injury. *See generally* Julie A. Greenberg, *Reconceptualizing Preconception Torts*, 64 TENN. L. REV. 315 (1997) (discussing preconception negligence cases).

120. *See, e.g.*, White v. Muniz, 999 P.2d 814, 815 (Colo. 2000). Note that some scholars believe that dual intent, or more specifically the requirement of an intent to cause a harmful or offensive contact, is always superfluous. Ken Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1067 (2006). *But see* DOBBS, *supra* note 86, § 30 (Supp. 2007).

121. DOBBS, *supra* note 86, § 30.

122. *Id.* (explaining that in situations where the plaintiff lacks capacity to consent, "an objective standard based on the objective reasonable sense of personal dignity may be desirable").

to a reasonable sense of personal dignity. This is illustrated by the fact that most people would be offended if they were unconscious and another person removed their sense of hearing. These conditions are also likely to be considered to be moral harms that unreasonably limit a child's right to an open future as discussed in Part II.

Readers familiar with the science of preimplantation genetic interventions might argue that not all genetic selections or modifications are always guaranteed to result in the desired trait, and hence the uncertainty associated with these techniques might make fulfilling the intent requirement impossible. The *Restatement (Second) of Torts*' substantial certainty test, however, supports tort liability in these situations. Intent includes either a "purpose to effect some result or a substantial certainty that the result will follow from the defendant's actions."[123] If parents select an embryo for a particular genetic trait, there is a 90% or greater chance that the embryo will be born with that trait given the accuracy of PGD screening.[124] This accuracy should satisfy the intent requirement.

In situations where parents are selecting for a polygenic trait that only increases the risk of harm, satisfying the intent requirement may be more difficult. Take for example, BRCA1 and BRCA2, genes associated with breast cancer. If parents select for or create an embryo with the BRCA1 and BRCA2 genes, the later-born child is at an increased risk for developing breast cancer.[125] The increased risk, however, does not mean that a child is substantially certain to develop breast cancer. In fact, in many situations, it may be difficult to predict exactly what the child's increased risk is with certainty.[126] While parental intent to contact in these cases may be clear (supporting liability in single intent jurisdictions), intent to harm or offend is not. In dual intent jurisdictions, further scientific knowledge about the risks inherent in selecting for particular polygenic traits is necessary before battery could be proven. Children carrying BRCA1 and BRCA2 genes as a result of their parents' preimplantation genetic choices may, however, successfully sue if and when they develop breast cancer. At this point, the genetic risk becomes a certainty.

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123. *Id.*

124. *Preimplantation Genetic Testing*, *supra* note 18, at 1499 ("The estimated risk of transferring an affected embryo mistakenly identified as normal by PGD is approximately 2% for recessive disorders and 11% for dominant disorders.").

125. Colin B. Begg et al., *Variation of Breast Cancer Risk Among* BRCA1/2 *Carriers*, 299 JAMA 194, 200 (2008) (finding a large variation in risk among patients that carried BRCA1 and BRCA2 genes and hypothesizing that this risk variation may be due to additional unknown environmental or genetic risk factors or perhaps individual genetic variants in the BRCA1 and BRCA2 genes).

126. *Id.*

V. NEGLIGENCE CLAIMS

While battery is the most plausible claim for children harmed via genetic interventions, a negligence claim may sometimes make more sense. For instance, in a jurisdiction that recognizes dual intent it may be enormously difficult or impossible to prove that parents intended to make a contact that was harmful or offensive. Parents selecting for deafness, for example, may argue that deafness is not a disability, but a difference.[127] Arguably, parents sharing the inability to hear with their children may bond better with children who are deaf than with hearing children. Parents who are deaf may also be able to better incorporate a child who is deaf into the Deaf community and culture. The intent of the genetic intervention is therefore not to harm or offend, but to benefit the child. Under this scenario, a court may reject a battery claim but remain open to a negligence claim. Nonetheless, proving a negligence claim has its own difficulties.

Courts may decline to hold parents civilly liable for the preimplantation harms that they cause for at least four reasons: the absence of a parental duty (particularly a maternal duty) to the fetus, a concern about maternal bodily integrity, parents' constitutionally protected right to parental autonomy under the Fourteenth Amendment, and the Parfit Non-Identity Problem.[128] This Part addresses each of these in turn, and concludes that none of them necessarily preclude parental liability for all preimplantation genetic interventions. Parental liability for *direct genetic interventions* should be allowed if recovery is limited to children who are born alive and suffer a legally cognizable harm related to the genetic intervention, whereas parental liability for *indirect genetic interventions* should not be allowed because of the Parfit Non-Identity Problem.

This Part also briefly addresses parental liability for nonfeasance or failure to engage in preimplantation genetic interventions that might have a positive effect on the health or welfare of the later-born children. Because nonfeasance does not result in a contact, claims based on parental inaction are likely to be brought as negligence claims. This Article concludes that parental nonfeasance should never result in a legally cognizable claim.

127. M. Hayry, *There Is a Difference Between Selecting a Deaf Embryo and Deafening a Hearing Child*, 30 J. MED. ETHICS 510, 510–11 (2004).

128. Arguably, all four of these concerns are also potential barriers to intentional tort claims. They are addressed here because these concerns have been raised most frequently in negligence cases involving prenatal harms.

A. Parental Duty in the Preimplantation Context

There are six reported cases that discuss parental liability for prenatal harms, none of which address potential parental liability for genetic interventions. Of these six cases, three allow a claim for parental liability to go forward,[129] while three do not.[130]

The outcome in each case heavily depends on how the court frames the issue. The three cases barring a claim for parental liability focus on whether a pregnant woman owes her fetus a duty of care.[131] After thorough analyses these courts determined that pregnant women do not owe a duty of care to their fetuses.[132] The primary reason for the no-duty decisions is a fear that recognizing a duty might impinge on the mother's bodily integrity or procreative liberty.[133] Courts also argue that juries should not be making "value laden" decisions about whether a parent's prenatal actions violate a duty owed to a fetus.[134]

The three cases recognizing a potential claim against the parents take a different approach. They first examine whether parental tort immunity exists and then discuss whether a third party would be liable to the fetus under similar factual circumstances. In approaching the cases this way, these courts apparently confound parental tort immunity and duty, concluding that if the state allows third party liability for prenatal harms and if there is limited parental tort immunity, then "logic demands" that liability for prenatal harms extend to parents.[135] But that conclusion does not necessarily follow. In order for liability to extend to parents, they need only have a duty toward their children that is equal to or greater than that owed by a stranger.

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129. Nat'l Cas. Co. v. N. Trust Bank, 807 So. 2d 86, 87 (Fla. Dist. Ct. App. 2001) (permitting a child to successfully sue for prenatal injuries suffered in an automobile accident caused by his mother's negligence up to the limits of the parents' insurance coverage); Grodin v. Grodin, 301 N.W.2d 869, 871 (Mich. Ct. App. 1980) (permitting a claim to go forward where a pregnant mother took a drug that caused the child to develop discolored teeth); Bonte v. Bonte, 616 A.2d 464, 464–65 (N.H. 1992) (allowing a child to recover where he suffered a prenatal injury after his mother negligently crossed the street while pregnant).

130. Stallman v. Youngquist, 531 N.E.2d 355, 361 (Ill. 1988) (finding that a fetus did not have a cause of action against its mother where she negligently caused a car accident during the fifth month of pregnancy); Remy v. MacDonald, 801 N.E.2d 260, 266–67 (Mass. 2004) (holding that a child born alive could not maintain an action against its mother for prenatal injuries suffered as a result of the mother's negligent driving); Chenault v. Huie, 989 S.W.2d 474, 478 (Tex. App. 1999) (holding that a mother who abused narcotics while pregnant had no liability to her child who sustained related prenatal injuries).

131. *Stallman*, 531 N.E.2d at 359; *Remy*, 801 N.E.2d at 262; *Chenault*, 989 S.W.2d at 475.

132. *See* cases cited *supra* note 131.

133. *See infra* Part V.B.

134. *Chenault*, 989 S.W.2d at 478. The role of juries where courts recognize a parental duty to act as a reasonably prudent parent is discussed *infra* Part VI.

135. *Chenault*, 989 S.W.2d at 478.

This Article argues that parents have a duty to act as a reasonably prudent parent when making preimplantation genetic choices.[136] Several scholars and some courts writing about parental duties to already-born children agree.[137] This duty is created because the special relationship between parent and child should, at the very least, maintain the ordinary standard of care. While this may not be a particularly popular view because of its implications for the parent-child relationship,[138] a parental duty in the preimplantation genetic intervention context is especially appropriate because of the unparalleled position of power that parents have prior to implantation. There is no reciprocal risk; the parents are in complete control.

The parental duty to act as a reasonably prudent parent in the preimplantation genetic intervention context is based, in part, on the relationship between parent and child just as many other tort duties are based on the relationship between the parties. For example, common carriers sometimes owe a special duty of care to their passengers.[139] Most special duties, those where the standard of care owed is greater than that of the reasonably prudent person, are created because the person with the duty (say, a bus driver) is either in a position of power (controlling the vehicle) or has special knowledge (either about the route or equipment being used). The same is true of the parent-child relationship where parents undertake preimplantation genetic interventions; parents are in a position of power and they have special knowledge. Based on

136. By "reasonably prudent parent" I mean that parents owe their children the ordinary standard of care, that of a reasonably prudent person in the same or similar circumstances (including familial circumstances). I chose the former terminology, even though it may slightly conflate duty and breach, because that is the language often used in scholarship discussing parental duties. *See, e.g.*, Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 525–26 (1982).

137. *See, e.g.*, Gibson v. Gibson, 479 P.2d 648, 653 (Cal. 1971) (holding that the standard for parental liability should be that of "an ordinarily reasonable and prudent [p]arent . . . in similar circumstances"); Hollister, *supra* note 136 ("[C]ourts should recognize that parents do have duties toward their children, including the duty to act as 'an ordinarily reasonable and prudent parent [would act] in similar circumstances.'" (footnote omitted)); Geoffrey A. Vance, *Rock-A-Bye Lawsuit: Can a Baby Sue the Hand That Rocked the Cradle?*, 28 J. MARSHALL L. REV. 429, 430 (1995) (arguing that parents should owe their children an ordinary, reasonable standard of care); *cf.* DOBBS, *supra* note 86, § 280 (noting that there is a question whether categories like "supervision" or "parental discretion" will "help judges focus on relevant polices better than the ordinary negligence rules" which "have the advantage of doing what courts do best by focusing on the facts and the justice of the particular case"). *But see* Rooney & Rooney, *supra* note 89, at 1181–82 ("Such a standard not only allows the possibility of too many opportunities for trivial interferences with the family, but also fails to accord due respect to family autonomy and parental discretion.").

138. The reasonably prudent parent standard would arguably place parental decision making under more scrutiny. Additionally, it could reduce the liability of third parties. *See, e.g.*, City of Louisville v. Stuckenborg, 438 S.W.2d 94, 96–97 (Ky. 1968) (reducing the wrongful death judgment against the City because of the mother's contributory negligence in tripping while pregnant).

139. *See, e.g.*, Serna v. Pettey Leach Trucking, Inc., 2 Cal. Rptr. 3d 835, 839–40 (Cal. Ct. App. 2003).

this reasoning, parents should owe a *greater* duty of care to their children than third persons.

But when it comes to prenatal injuries courts often seem to reverse their thinking and hold that parents, or at least mothers,[140] have *no duty* towards a fetus where a third party might.[141] For example, many states allow children harmed by third parties in utero to recover for these injuries after they are born alive.[142] Born-alive children have been allowed to pursue negligence claims against doctors who prescribed, or failed to prescribe, medications to their pregnant mothers causing the child to suffer birth defects;[143] pharmaceutical companies that marketed and supplied prescription drugs to pregnant women knowing they might cause harm;[144] motorists who injured pregnant women in automobile accidents;[145] and employers who failed to provide appropriate safeguards for pregnant employees.[146] In some jurisdictions later-born children have even been allowed to pursue claims for harm resulting from preconception negligence.[147] In all of these cases, third parties owe the child the ordinary standard of care, and there is little reason—with

140. To date, I am unaware of any cases involving potential paternal tort liability for prenatal harms; all of the reported cases focus on maternal liability.

141. *See* cases cited *supra* note 130.

142. Roland F. Chase, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222, 1230 § 3(a) (2006) ("Many cases—especially the more recent ones—have expressed the view that an action may be maintained to recover damages for prenatal injuries negligently inflicted regardless of whether the unborn child was viable or nonviable at the time of injury, provided it was subsequently born alive.").

143. *See, e.g.*, Bailey v. Khoury, 891 So. 2d 1268, 1285–86 (La. 2005) (holding that an infant had cause of action against a physician who prescribed medication to its mother but failed to warn her of the risks of becoming pregnant while taking the drug); Seattle-First Nat'l Bank v. Rankin, 367 P.2d 835, 837–38 (Wash. 1962) (holding that an infant had cause of action against its mother's physician when he failed to diagnose and medicate the mother for anemia during pregnancy, a condition that ultimately harmed the fetus).

144. *See, e.g.*, Payton v. Abbott Labs, 437 N.E.2d 171, 190 (Mass. 1982) (holding that women who were harmed because their mothers took diethylstilbestrol (DES) while pregnant could maintain a cause of action).

145. *See, e.g.*, Mallison v. Pomeroy, 291 P.2d 225, 228 (Or. 1955) (holding that the born-alive child, but not the child's stillborn twin, could recover against a motorist who negligently crashed into a car carrying the plaintiff's then-pregnant mother); Kalafut v. Gruver, 389 S.E.2d 681, 683–84 (Va. 1990) (allowing a child's estate to bring suit against a negligent driver who hit his mother's car while the plaintiff was in utero causing the child's premature birth and subsequent death).

146. *See, e.g.*, Crussell v. Electrolux Home Prods., Inc., 499 F. Supp. 2d 1137, 1141 (W.D. Ark. 2007) (allowing an infant to sue her mother's employer when a work-place accident caused the child's premature birth resulting in "numerous physical and mental ailments" for the child); Snyder v. Michael's Stores, Inc., 945 P.2d 781, 791 (Cal. 1997) (holding that a born-alive child could sue for injuries incurred when child's mother inhaled toxic fumes on the job while pregnant).

147. *See generally* Greenberg, *supra* note 119. Cases involving preimplantation genetic interventions are not preconception cases because the alleged tort occurs after conception, but prior to implantation in the womb. Nonetheless, courts allowing preconception negligence claims seem unconcerned with the fact that the later-born child was not in existence at the time of the alleged injury. *Id.* This line of cases, therefore, suggests that children harmed as a result of preimplantation harms should not be barred from recovery simply because they may have less moral status than an already-born person.

perhaps the exception of bodily integrity and parental decision-making interests discussed below, and the procreative liberty concerns discussed in Part II—to treat parents differently. In fact, parents' close relationship with their child probably advocates for an even higher standard of care.

B. Bodily Integrity and Its Effects on Maternal Duty

A person's interest in his or her bodily integrity is not set out plainly in the Constitution, but it is recognized in the common law[148] and in cases finding a fundamental right to privacy under the Constitution.[149] It is clearly understood that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[150] In the spirit of these words, the United States Supreme Court has established a wide variety of freedoms that reflect an interest in bodily integrity: freedom from forced stomach pumping,[151] freedom from unwanted medical treatment,[152] freedom to use contraceptives,[153] and the freedom of a woman to abort a pregnancy.[154]

While there are no legal cases discussing preimplantation parental duties, three courts have found that a pregnant woman does not owe a prenatal duty of care to her fetus, largely because of her interest in bodily integrity. Courts give various reasons why rights to bodily integrity should bar a finding of a parental duty: it would encourage the expansion of tort law,[155] it would negatively impact a woman's actions while pregnant,[156] and it might interfere with abortion rights.[157] None of these concerns, however, is particularly persuasive in the preimplantation context.

The first concern, expansion of tort law, is not particularly troubling in circumstances involving prenatal genetic interventions. The cases in which parents make negligent (or intentionally harmful) genetic choices for their children are likely to be few in number. Furthermore, only cases involving direct genetic interventions, such as genetic manipulation, are likely to come before courts because PGD cases should be dismissed as

148. *See, e.g.*, Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914); Strickland v. Deaconess Hosp., 735 P.2d 74, 76 (Wash. Ct. App. 1987).

149. Washington v. Glucksberg, 521 U.S. 702, 734–36 (1997) (holding that the constitutional right to privacy includes the right to bodily privacy).

150. Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

151. Rochin v. California, 342 U.S. 165, 172 (1952).

152. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 265 (1990).

153. Eisenstadt v. Baird, 405 U.S. 438, 440 (1972).

154. Roe v. Wade, 410 U.S. 113, 116–17 (1973).

155. Remy v. MacDonald, 801 N.E.2d 260, 263 (Mass. 2004).

156. Chenault v. Huie, 989 S.W.2d 474, 474 (Tex. App. 1999).

157. Stallman v. Youngquist, 531 N.E.2d 355, 360–61 (Ill. 1988); *Remy*, 801 N.E.2d at 265.

discussed in Part V, section D, below. The number of direct genetic intervention cases is likely to be further limited by child ignorance or discretion. Some children may never know that their parents modified their DNA, just as many children never learn that they are adopted. Of the children who learn about the modification, many may choose not to sue their parents. The cases actually going to trial, therefore, are likely to be egregious, both because the modifications are easier to discover, and because the children are more likely to be angered by their parents' decision.

The second concern is more compelling. In *Chenault v. Huie*, the Texas Court of Appeals perceived no duty to refrain from negligent or grossly negligent conduct while pregnant, for fear it might have a detrimental impact on the mother's activities before and during pregnancy.[158] The court focused on the "unique symbiotic relationship between a mother and her unborn child" and argued that while "it is true, both in reality and under the law, that a fetus is more than merely a part of its mother," the law should not ignore the "important physical realities of pregnancy."[159]

But there is not necessarily a violation of a woman's interest in her bodily integrity where she chooses to engage in preimplantation genetic interventions. All of the woman's preimplantation decisions are being made in a space that exists, by definition, outside of the woman's body. In indirect genetic interventions, such as PGD, the embryo testing and selection are done in a laboratory, prior to implantation in the womb. In direct preimplantation genetic interventions, such as genetic manipulation, the genetic addition, deletion, or alteration would also be done in a laboratory. Once the embryos are implanted in the womb, the pregnant woman can still make autonomous decisions about her body, including what substances to ingest, and whether to exercise. A woman could also still choose to abort, although that would seem an unlikely decision given the costly and physically taxing process of conception that she just undertook. There is very little about preimplantation genetic interventions, therefore, that interferes with a woman's decision about what happens to her body during pregnancy.

One might, however, argue that a woman's interest in her bodily integrity is still implicated. To the extent a parental duty of ordinary care restricts a woman's options as to the type of child she wishes to carry, it may negatively impact her right to bodily integrity.

Usually, bodily integrity reflects an interest to be free from some forced intrusion to the body. This is clearly the case where bodily

158. 989 S.W.2d at 477.
159. *Id.* at 475–76.

integrity concerns have prevented forced stomach pumping[160] and unwanted medical treatment.[161] It also appears to be the case where bodily integrity concerns have supported the right to use contraceptives[162] or obtain an abortion.[163] In these latter situations, the concerns supporting a woman's right to bodily integrity do not focus on her desire to take a pill every day or to undergo a medical procedure; rather they focus on her right to be free from the intrusiveness of an unwanted pregnancy. While a parental duty may limit the type of fetuses one can choose to implant, it does not change the physical aspects of the pregnancy experience, or cause a forced physical intrusion to befall the woman.

To the extent that the underlying concern, then, is really about the right to choose which *type* of fetus the woman wants growing in her body, but instead is really an argument about the woman's right to procreative liberty, not bodily integrity. As discussed in Part II, procreative liberty should be limited where there is harm to the fetus and others.

The third and final concern raised by courts considering bodily integrity is that creating a parental duty might negatively impact abortion rights. In a thoughtful decision, the Illinois Supreme Court recognized that children have a "legal right to begin life with a sound mind and body," and could bring an action for prenatal injury against third parties, but found that there was "no reason to treat the pregnant woman as a stranger to her developing fetus."[164] Implicit in this holding is a belief that the mother and fetus should be treated as one when their interests are pitted against one another to the benefit of the mother (as in the case of abortion), but treated independently when their interests are aligned against a third person (as in cases where a third party causes harm to a fetus). The *Remy* Court also refused to find a maternal duty, in part, because there is still considerable disagreement as to whether a woman's right to bodily integrity trumps the rights of her fetus.[165] These references to the abortion debate suggest that courts are concerned about creating a tort duty that might be inconsistent with abortion laws.

But creating a parental duty in preimplantation genetic intervention cases does not implicate a woman's right to obtain an abortion, particularly where recovery is limited to born-alive children. Harms

160. Rochin v. California, 342 U.S. 165, 172 (1952).

161. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 265 (1990).

162. Eisenstadt v. Baird, 405 U.S. 438, 440 (1972).

163. Roe v. Wade, 410 U.S. 113, 116–17 (1973).

164. Stallman v. Youngquist, 531 N.E.2d 355, 360 (Ill. 1988). While it is true that the fetus and the mother are not strangers to one another, the conclusions drawn from this reasoning seem inapposite. Because the mother and her fetus are not strangers, and because the mother has power over all aspects of the prenatal relationship, and special knowledge as to what effects her actions will have on the fetus, the court's reasoning actually cuts in favor of recognizing a mother's duty toward her fetus.

165. 801 N.E.2d 260, 264 (Mass. 2004).

suffered from the time of implantation to the time of birth could be excluded from recovery because of the conflict between the child's interests and the mother's interest in bodily integrity.[166] For instance, a court might say that a weighing of the harms and benefits of a woman's actions during pregnancy can never result in a breach of duty because the benefit of a woman's interest in her bodily integrity while pregnant far outweighs any harm that might befall the fetus. This is, in fact, the conclusion that some prenatal tort cases seem to be reaching.[167] In light of these cases and additional concerns about the legal status of fetuses', this Article proposes that recovery for preimplantation harms be limited to children born alive.

Courts' focus on bodily integrity also suggests that male parents might be liable for prenatal harms, while female parents may not. This is particularly problematic where the alleged parental liability stems from ordinary actions, like driving a car, and not from activity related to bodily integrity, like ingesting a particular substance. There may, therefore, be a potential concern about legal policies which discriminate against men.[168] In the case of preimplantation genetic interventions, it seems that this concern is less problematic and both male and female partners would be treated equally except in situations where the male partner has no input into or knowledge of the genetic choice.

C. Parental Decision Making Under the Fourteenth Amendment

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[169] Courts have interpreted the Due Process Clause to protect various fundamental liberty interests, including parents' interests in the care, custody, and control of their children.[170] While the long line of

166. A mother's potential liability for nongenetic prenatal actions that negatively impact her fetus is not within the intended scope of this Article. Instead, this Article focuses on preimplantation, not prenatal, harms.

167. *See* cases cited *supra* note 130.

168. Most cases focus on maternal liability for prenatal harm and do not address the question of whether a father could be liable for prenatal torts. *See, e.g.*, Chenault v. Huie, 989 S.W.2d 474, 475 (Tex. App. 1999). Given the reasoning in the cases rejecting maternal liability, it is still a distinct possibility that a father who injures his unborn child could be found liable for negligence while a woman in the exact same situation would not. For example, a father who negligently injures his pregnant wife in an automobile accident could presumably be found liable for the prenatal injuries of his child in Massachusetts, Illinois, and Texas, but his wife, if driving negligently, would not be liable because of her "unique symbiotic relationship" to the child. *See, e.g.*, *id.*

169. U.S. CONST. amend. XIV, § 1.

170. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 66 (2000) (finding order granting parental grandparents visitation an unconstitutional infringement on the mother's right to make decisions about the "care, custody and control" of her two daughters); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child"); Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically

Supreme Court cases protecting parents' decision-making interests "have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child,"[171] they are firmly rooted in American jurisprudence. Arguably, these protected parental interests in the care, custody, and control of children could prove a constitutional barrier to parental tort liability in preimplantation genetic intervention cases.

But parents' liberty interests in directing the upbringing of their child is not absolute. Many cases explicitly recognize that parents' rights are limited by the interests of the State and the child. "[A] parent's interests in a child must be balanced against the State's long-recognized interests as parens patriae."[172] Furthermore, children are "constitutionally protected actors," meaning that any "constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child."[173] Where children might be harmed by their parents' constitutionally protected decision making, the State should limit the parents' rights.

In *Wisconsin v. Yoder*, the Court found that compulsory school attendance laws violated Amish parents' constitutional rights to free exercise of religion.[174] While the decision is based on both the First and Fourteenth Amendments,[175] the case's dicta is instructive as to when a parent's liberty interests might be restricted. In *Yoder* the State argued that an additional one or two years of compulsory high school education was necessary because children who left the Amish community without that additional education would be ill-equipped for modern life, and unable to support themselves.[176] The Court rejected this argument as "highly speculative" because it doubted that an additional two years of schooling "would serve to eliminate any such problem that might

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has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children"); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding that the Due Process Clause protects the liberty interest of parents to "bring up children" and control their education). *But see Troxel*, 530 U.S. at 91 (2000) (Scalia, J., dissenting) (arguing that "a right of parents to direct the upbringing of their children" is an unalienable right "with which the Declaration of Independence proclaims 'all Men . . . are endowed by their Creator,'" and that it is also a right "'retained by the people' which the Ninth Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage'").

171. *Troxel*, 530 U.S. at 78 (referring to *Meyer*).

172. *Id.* at 88 (Stevens, J., dissenting).

173. *Id.* at 89.

174. 406 U.S. at 236.

175. *Id.* at 234.

176. *Id.* at 224.

exist."[177] It did recognize, however, that parental decision making should be restricted if it creates "any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare."[178] The dissent even said that:

> This would be a very different case . . . if [the parents'] claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State. Since the Amish children are permitted to acquire the basic tools of literacy to survive in modern society by attending grades one through eight and since the deviation from the State's compulsory-education law is relatively slight . . . [the parents] claim must prevail . . . .[179]

This language suggests that parents' decision-making rights might end where children are not provided with the "basic tools" of life necessary to survive in a modern society.

Similarly, more modern cases focusing on parental decision-making authority under the Fourteenth Amendment have supported this line of reasoning, arguing "against the creation . . . of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily."[180] Some cases even suggest that parental rights under the Fourteenth Amendment also carry with them a corollary parental duty to act in the best interests of their children.[181] Therefore, while parents certainly have constitutional rights to make decisions about the care, custody, and control of their children, these rights are limited where they physically or mentally harm the child or do not serve the child's best interests.

Where a particular preimplantation genetic intervention unreasonably limits a child's opportunity to engage in a variety of life plans as discussed above, it clearly does not serve the child's best interests. In many cases, genetic interventions which reduce a child's capabilities are also physically or mentally harming the child. While care should be taken not to infringe on parental decision-making rights guaranteed by the Fourteenth Amendment, in almost all tort cases where a court finds a legally cognizable harm as discussed in Part II, the court will find appropriate reasons to limit parental decision-making rights.

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177. *Id.* at 224–25.

178. *Id.* at 230.

179. *Id.* at 238 (White, J., concurring).

180. Troxel v. Granville, 530 U.S. 57, 90 (2000) (Stevens, J., dissenting).

181. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[T]he custody, care and nurture of the child [should] reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

D. THE NON-IDENTITY PROBLEM

Derek Parfit's Non-Identity Problem may also pose a theoretical barrier to parental liability for preimplantation genetic interventions. The Non-Identity Problem postulates that a child born with a "bad start in life" has not been harmed where the child's only alternative was not to have been born at all.[182] In the context of preimplantation genetic interventions this means that parents who choose to implant an embryo with Down syndrome instead of an embryo without Down syndrome cannot be said to have harmed the resulting child. In these situations, the child's only alternative to birth with Down syndrome is not being selected (nonexistence), and therefore the child has suffered no injury by being born.[183] The Non-Identity Problem, which focuses on personal outcomes as a basis for determining moral harm,[184] often forms the theoretical basis for dismissal of wrongful life claims brought by children

182. PARFIT, *supra* note 7. Parfit's primary example for identifying the Non-Identity Problem is that of a fourteen-year-old girl who has a child and gives it a bad start in life by not waiting to have a child until she is older. Parfit explains the problem as follows:

> Suppose that we tried to persuade this girl that she ought to wait. We claimed: 'If you have a child now, you will soon regret this. If you wait, this will be better for you.' She replied: 'This is my affair. Even if I am doing what will be worse for me, I have a right to do what I want.'
>
> We replied: 'This is not entirely your affair. You should think not only of yourself, but also of your child. It will be worse for him if you have him now. If you have him later, you will give him a better start in life.'
>
> We failed to persuade this girl. She had a child when she was 14, and, as we predicted, she gave him a bad start in life. Were we right to claim that her decision was worse for her child? If she had waited, this particular child would never have existed. And, despite its bad start, his life is worth living. Suppose first that we do *not* believe that causing to exist can benefit. We should ask, 'If someone lives a life that is worth living, is this worse for this person than if he had never existed?' Our answer must be No. Suppose next that we believe that causing to exist *can* benefit. On this view, this girl's decision benefits her child.
>
> On both views, this girl's decision was not worse for her child. When we see this, do we change our mind about this decision? Do we cease to believe that it would have been better if this girl had waited, so that she could give to her first child a better start in life? I continue to have this belief, as do most of those who consider this case. But we cannot defend this belief in the natural way that I suggested. We cannot claim that this girl's decision was worse for her child. What is the objection to her decision? This question arises because, in the different outcomes, different people would be born. I shall therefore call this the *Non-Identity Problem.*

Id. at 358–59 (footnote omitted).

183. This conclusion was reached in tort cases prior to Derek Parfit's work on the Non-Identity Problem. *See, e.g.*, Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967) (holding that the child did not have a legally cognizable injury where his mother was not given the option of terminating her pregnancy, and hence the plaintiff's existence, prior to his birth).

184. This Article focuses on the Non-Identity Problem and person-affecting conceptions of harm because it is concerned primarily with tort law. In almost all situations a successful tort claim necessitates the finding of a legally cognizable injury, i.e., a person-affecting harm. There are, however, other conceptions of harm that are relevant in policy and ethical debates outside of the torts realm. For example, from an objective (impersonal) perspective selecting an embryo with a disabling trait is similar to deafening a hearing child because the "outcomes do not differ from one choice to the other." *Cf.* Hayry, *supra* note 127, at 510 (discussing how this analogy breaks down once it is personalized).

who argue that they would have been better off aborted than born.[185] This section addresses the implications of the Non-Identity Problem for both direct and indirect genetic interventions.

While direct genetic interventions, such as gene addition, deletion, or modification, are still a few years away, they provide the best case for preimplantation parental tort liability because the parents are altering a fixed set of DNA prior to implantation in the womb. This technology, therefore, makes the Non-Identity Problem—which has been used successfully to stave off wrongful life suits—irrelevant.

Imagine that parents have conceived an embryo using IVF. The fertility clinic now gives them the option to modify that embryo's DNA; they can add a gene for deafness.[186] Absent any modification, the embryo once born would grow to be a child of average hearing. The parents, both deaf since birth, choose to add the gene for deafness because they do not view deafness as a disability, and because they wish to have a non-hearing child who will fit easily into their community. Several years pass, and the embryo is now a sixteen-year-old boy angered by his parents' decision. While he is living a successful and fulfilling life, he wishes that he could hear, and is angered that his parents took this ability away from him. Feeling that he would have more opportunities available to him if he could hear, he seeks legal counsel and decides to sue his parents in tort. This child should have a valid claim against his parents because he has a legally cognizable injury under the moral and legal framework provided in Part II. Furthermore, none of the traditional arguments—the Non-Identity Problem, parental tort immunity, bodily integrity, or parental discretion—bar suit.

At fertilization, every conceptus is endowed with its own, unique set of DNA. The conceptus' nuclear DNA sequence, comprised of DNA coming from the nucleus of its mother's egg and the nucleus of its father's sperm, remains virtually unchanged from the moment of

185. *See, e.g.*, Elliott v. Brown, 361 So. 2d 546, 547–48 (Ala. 1978); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 693–95 (Ill. 1987); Wilson v. Kuenzi, 751 S.W.2d 741, 743 (Mo. 1988); *Gleitman*, 227 A.2d at 692; Willis v. Wu, 607 S.E.2d 63, 65–66 (S.C. 2004). *But see* Turpin v. Sortini, 643 P.2d 954, 965–66 (Cal. 1982) (holding that a minor child could recover special damages from medical care providers that negligently failed to advise the child's parents of a hereditary hearing defect); Curlender v. Bio-Sci. Labs., 165 Cal. Rptr. 477, 489–90 (Cal. Ct. App. 1980) (holding that a minor child born with Tay-Sachs disease could maintain a "wrongful life" suit against two laboratories that negligently failed to inform the child's parents of the possibility that the child would be born with the disease).

186. A single gene may be modified to create a deaf child. *See, e.g.*, *Signing 'Increases Deafness Rates': Sign Language May Be Behind Rising Rates of Inherited Deafness, According to Researchers*, BBC NEWS, Apr. 28, 2004, http://news.bbc.co.uk/1/hi/health/3665939.stm. Most traits, however, are polygenic, meaning that many genes interact with one another to create a particular phenotype. *See* RUSSELL, *supra* note 19, at G-10. Another complication is that certain traits are not determined solely by one's genotype, but have a significant environmental component. N.Y. STATE TASK FORCE ON LIFE & THE LAW, GENETIC TESTING AND SCREENING IN THE AGE OF GENOMIC MEDICINE 13 (2000).

conception to the moment of death.[187] Any intentional modification of this sequence, therefore, changes an already existing set of DNA and, arguably, changes the resulting person's identity.[188] This begs a difficult question: is the modification of one gene sufficient to create a new person?

One possibility is that modifying an embryo's DNA sequence in a way that produces a phenotypic change necessarily creates a different person. While this view lends much importance to the role of genetics in the creation of identity, it does not necessarily invoke genetic determinism. Environmental factors, including a person's lived experiences, also play a large role in shaping an individual's identity.[189] For example, it is not difficult to imagine that the ability or inability to hear might fundamentally alter the way that a person perceives himself, and the way the world perceives him. Being hearing or deaf are traits that makes a person different from some number of other people, and therefore is a component of one's identity.[190] Some people who are deaf view themselves as part of the "deaf culture," and in this way recognize deafness as a central component of their identity. The next question, then, is whether an embryonic genetic modification which changes a later-born child from a hearing child into a non-hearing child alters that person's identity in such a profound way that it ultimately creates a different person. If the answer is yes, then a different person is created, and any later-born child cannot be said to be harmed because he would not have existed absent the genetic modification. Hence, the Non-Identity Problem seems to prohibit liability.

But to argue that changing a single gene, even a gene that controls for a central component of one's identity, always results in the creation of a different person seems to place too much emphasis on genetics. Parfit recognizes this problem.[191] He writes about a situation where his mother conceives a child a few seconds later from when she in fact conceived him and he questions whether this child would have been

187. Some genetic changes do happen to nuclear DNA between the time of conception and death, but they are likely limited. *See* Randy L. Jirtle et al., *Genomic Imprinting and Environmental Disease Susceptibility*, 108 ENVTL. HEALTH PERSP. 3, 271–78 (2000); Paul A. Wade & Trevor K. Archer, *Epigenetics: Environmental Instructions for the Genome*, 114 ENVTL. HEALTH PERSP. 3, A140–41 (2006).

188. PARFIT, *supra* note 7, at 351–55 (explaining that there are myriad ways to define personal identity and philosophers have debated for centuries what is necessary and sufficient for a personal identity to be formed). Recounting this debate here would subsume this Article, and so I discuss the role of personal identity in a very limited fashion.

189. *See, e.g.*, Jonathan Kahn, *Biotechnology and the Legal Constitution of the Self: Managing Identity in Science, the Market, and Society*, 51 HASTINGS L.J. 909, 940 (2000).

190. I *do not* mean to suggest that being deaf or hearing alone defines a person's identity. If someone is blonde or brunette, dark skinned or light skinned, these traits are a component of his or her identity. Even if these traits do not affect a person's conception of self, they do, inevitably, and in many instances unfortunately, affect the way that others perceive and respond to them.

191. PARFIT, *supra* note 7, at 351–52.

him.[192] In all likelihood, that few seconds of time would have resulted in a different sperm reaching his mother's egg, and as a result he would have shared at least 50% of the same DNA with the child.[193] Parfit suggests that it is impossible to know whether this child, one that shares at least 50% of his DNA, would have been him.[194] Under this view, genes play a relatively small role in creating a person's identity.

If this hypothetical is unpersuasive, take the case of two genetically identical twins. Most readers would accept that twins have unique identities and are different persons even if they are genetically identical.[195] If genes are only a small part of a person's identity, as these two hypotheticals suggest, then it cannot be true that altering a single gene in an embryo's DNA necessarily results in the creation of a different person. Instead, the alteration must do something else; it must change the later-born child.

For these reasons, I propose that genetically modifying an embryo's naturally occurring set of DNA to choose a particular genetic trait, say deafness, is similar to removing a newborn's hearing via a surgical procedure.[196] While deafening a hearing child may cause the child to have different life experiences, it does not create a different person. In the same way, embryonic genetic modification does not involve a choice between living a differently-abled (or disabled) life and nonexistence; it is the choice between living a differently-abled life and living a life absent genetic modification (in the above case, presumably one without disability). Hence, the Non-Identity Problem seems irrelevant. At least two arguments might be made to refute this conclusion, one relating to the moral status of the embryo, and one discussing the difference in the level of physical intrusion. Neither of these arguments, however, is particularly problematic in the torts context.

One might argue, first, that the moral status of the embryo at the time of the genetic modification prohibits it from having an identity which may be altered. The moral status question does not alter my

192. *Id.*

193. *Id.* Both he and the other child would have had the same genes contained in his mother's egg, roughly 50%.

194. *Id.* (acknowledging that this is a controversial claim, but stating that "[i]f any particular person had not been conceived within a month of the time when he was in fact conceived, he would in fact never have existed").

195. Identical twins never have perfectly identical genes. C.E. Bruder et al., *Phenotypically Concordant and Discordant Monozygotic Twins Display Different DNA Copy-Number-Variation Profiles*, 82 AM. J. HUM. GENETICS 763 (2008); *see also* Anahad O'Connor, *The Claim: Identical Twins Have Identical DNA*, N.Y. TIMES, Mar. 11, 2008, at F5.

196. J. Harris, *Is There a Coherent Social Conception of Disability?*, 26 J. MED. ETHICS 95, 97 (2000) (explaining that some have even argued that there is no difference between choosing a deaf embryo via PGD and deliberately deafening a hearing child). *But see* Hayry, *supra* note 127, at 510–11 (arguing that Harris is wrong because his argument focuses improperly on impersonal outcomes and not personal outcomes).

conclusion for reasons already discussed above. While the moral (and legal) status of a preimplantation embryo is generally considered to be less than that of a newborn, tort law does not generally distinguish between harms caused after birth, prenatally or prior to conception for purposes of stating a cause of action.[197] As long as the alleged negligent action causes a born-alive child to suffer a legally cognizable harm, a tort injury will be recognized even if the injury was suffered prior to the achievement of legal personhood.[198]

The second argument focuses on the difference in the level of physical intrusion. While both genetic intervention and postbirth surgery involve an intrusion into the cells of the subject and a risk of death or serious injury, the level of physical intrusion associated with surgery is more problematic because it creates perceivable physical pain, and perhaps a cognitively perceived loss by the newborn. Any perceivable physical pain or cognitively perceived loss, while an additional harm, is not necessarily enough *standing alone* to create a tort claim where one might not otherwise exist.[199] In the case of the newborn, we would still consider the loss of hearing to be a legally cognizable harm even where there was absolutely no pain from the surgery, and the newborn failed to process cognitively his loss of hearing.[200] The end result in both cases, deafness, is the same. The difference between preimplantation genetic modifications and post-birth surgery, therefore, only seems to be a difference in the severity of injury. This problem is easily solved by allowing additional recovery for the perceived pain and mental suffering.

The Non-Identity Problem does, however, bar tort liability in cases of indirect genetic interventions such as PGD. Imagine the following scenario: a couple completes an IVF cycle and creates five embryos that look good enough to be implanted in the womb. The parents, in addition to undergoing IVF, also request PGD for the purpose of selecting *for* embryos with the gene for deafness. Of the five embryos tested, two have the gene for deafness, and three do not. The doctor recommends implanting a maximum of two embryos based on the mother's age and

197. *See, e.g.*, Turpin v. Sortini, 643 P.2d 954, 965–66 (Cal. 1982) (holding that a minor child could recover damages where medical providers failed to diagnose the child's hereditary hearing defect before birth); Iraida J. Alvarez, Note, *A Critique of the Motivational Analysis in Wrongful Conception Cases*, 41 B.C. L. REV. 585, 586 (2000) ("Today, pre-natal torts and birth-related causes of action have become more accepted by courts and legislatures nationwide.").

198. *See* sources cited *supra* note 197.

199. *See, e.g.*, Donna M.D. MacDonald, Note, *Torts—Successor Corporations—Defective Products—Can the Law and Policies of Strict Liability Be Reconciled with Corporate Law Policies Which Protect Successor Corporations in Order to Respond Fairly to the Legitimate Interests of the Products Liability Plaintiff?* Nissen Corp. v. Miller, *323 Md. 613, 594 A.2d 564 (1991) (4–2 decision)*, 22 U. BALT. L. REV. 147, 159 (1992) (explaining that causation is also required to establish liability in tort actions).

200. *Turpin*, 643 P.2d at 965–66.

her likelihood of achieving a pregnancy. The parents, both deaf, choose to implant the two embryos with the gene for deafness and freeze the other embryos for later implantation if this cycle fails to achieve a live birth. A few days after implantation, a singleton pregnancy is confirmed and roughly nine months later the mother gives birth to a baby who is deaf.

The Non-Identity Problem suggests that any child born as a result of this PGD choice lacks a valid tort claim because he has not suffered a legally cognizable injury.[201] A child who is born deaf is alive because of the choice his parents made. His other alternative was nonexistence (or in this case being indefinitely frozen), and unless the child can successfully argue that his life was not worth living, his claim will fail.[202] Such an argument is sure to fail in the case of a child who is deaf. Therefore, the Non-Identity Problem likely bars tort claims in cases involving PGD or other indirect genetic interventions even though it would not bar claims based on direct genetic interventions.

E. Parental Liability for Nonfeasance

One question that will likely appear when there is a discussion about parental liability for preimplantation (or prenatal) harms is whether a parent could ever be found liable in tort for *not* taking advantage of a particular genetic intervention.[203] Again, there are two types of genetic interventions that are relevant: direct genetic interventions such as genetic manipulation, and indirect genetic interventions such as PGD. In either case liability should not attach to parental nonfeasance.

Parental decisions to forgo genetic interventions (for example, a parental decision to forgo a genetic modification that would correct a genetic defect prior to implantation) should not create parental tort liability. It is a basic tenet of tort law that there is no liability for a failure to act unless "the defendant has assumed a duty to act, or stands in a special relationship to the plaintiff.... The fact that the defendant foresees harm to a particular individual from his failure to act does not

201. *See, e.g.*, Parfit, *supra* note 7.

202. *See, e.g.*, Curlender v. Bio-Sci. Labs., 165 Cal. Rptr. 477, 488–90 (Cal. Ct. App. 1980) (reviewing several wrongful life cases, including cases where such arguments failed); *see also* Maxine A. Sonnenburg, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice*, 55 S. Cal. L. Rev. 477, 509–10 (1982) (discussing the need for preserving the cause of action in *Curlender*).

203. Any claim of parental liability for nonfeasance is likely to be raised as a negligence claim. While, in theory, there is no reason why "liability for battery might not be based on inaction, where it is intended to result and does result in a harmful or offensive contact with the person.... [N]o such case has arisen, and what little authority there is denies the liability." Restatement (Second) of Torts § 14 cmt. c (1977). Therefore, this Article conceives of tort claims for parental nonfeasance as negligence claims.

change the general rule."[204] While a parent's failure to engage in genetic manipulation may limit a child's right to an open future, thereby creating both a moral harm and a legally cognizable injury, the genetic harm suffered is not created by the parents' inaction. Even if it is foreseeable that the parents' inaction may result in harm to the later-born child, an affirmative duty to act (i.e., engage in preimplantation genetic intervention) is created only where the defendant assumes a duty to act or has a special relationship with the plaintiff.[205]

According to tort law, a defendant can assume a duty to act reasonably where the defendant innocently causes harm,[206] innocently increases the risk of harm to others,[207] or acts affirmatively to provide assistance to one who is helpless.[208] It is difficult to see how parents could assume a duty to act prior to implantation where the parent is not engaging in advanced reproductive technologies. One might argue that a person who knows he carries the gene for a particular genetic trait and yet engages in natural procreative activities that may result in an affected child innocently acts in a way that creates a risk of harm. If the resulting child is born with that particular trait and suffers a legally cognizable injury as a result, then the parent should be liable. Even though the risk of harm was innocently created, the parent had a duty to exercise reasonable care to reduce the risk or minimize the harm. Failure to engage in preimplantation genetic interventions (or prevent conception) was an unreasonable exercise of care.

While this line of reasoning may be persuasive to some readers, it has yet to appear in any tort cases. Recent trends suggest that it is unlikely to take hold in future cases because courts value the right to privacy and the right to procreative liberty more. For example, while early courts permitted the sterilization of the mentally incompetent in part to prevent the spread of "bad genes,"[209] more modern courts have created strict requirements for anyone who wishes to sterilize the mentally incompetent.[210] Given these advances in the law, it is unlikely that tort law will limit procreative liberty of any person who may be

204. DOBBS, *supra* note 86, § 314.

205. *Id.*

206. RESTATEMENT (SECOND) OF TORTS § 322; *see also* DOBBS, *supra* note 86, § 316 (providing that a defendant must render assistance to a plaintiff where the defendant's train runs over the plaintiff and severs a limb; it does not matter if the defendant was not negligent or if the plaintiff was contributorily negligent).

207. RESTATEMENT (SECOND) OF TORTS § 321; *see also* DOBBS, *supra* note 86, § 316 ("[I]f the defendant, without fault, collides with and kills a horse on the highway, reasonable care may oblige him to take steps to warn others or have the animal removed.").

208. RESTATEMENT (SECOND) OF TORTS § 324; *see also* DOBBS, *supra* note 86, § 318.

209. Buck v. Bell, 274 U.S. 200, 207 (1927) (allowing sterilization of a mentally incompetent woman because "three generations of imbeciles are enough").

210. *See, e.g.*, *In re* Romero, 790 P.2d 819, 823 (Colo. 1990).

carrying a gene for a disabling genetic condition where the person's nonfeasance innocently increases the risk of harm.

Perhaps a better argument for liability is that parents owe a special duty to their children beyond that which third parties would owe, because of their superior knowledge and absolute control over the child's existence. This special duty could include an affirmative duty to act (i.e., a duty to abort prenatally or engage in preimplantation genetic interventions) where parents learn of a genetic defect in their naturally conceived child. At least one court allowing an early wrongful life case to proceed against a physician seems to feel that parents might have an affirmative duty to act in these situations:

> If a case arose where, despite due care by the medical profession in transmitting the necessary warnings, parents made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice would provide an intervening act of proximate cause to preclude liability insofar as defendants other than the parents were concerned. Under such circumstances, we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring.[211]

Yet shortly after this opinion was written, the California Legislature enacted legislation to protect parents where the only alternative for the child was not to have been born at all.[212] This legislation, while still in effect, does not prevent suits against parents who might fail to genetically modify their child prenatally because there would be another alternative to nonexistence, but it would prevent liability where a parent fails to abort a fetus with a genetic abnormality or fails to undertake PGD.

Even absent such legislation, some constitutional concerns might limit a parent's duty to a naturally conceived fetus carrying a gene for a disabling trait. For example, concerns about maternal bodily integrity would likely prohibit parental liability in cases where parents failed to abort or engage in prenatal genetic interventions. While the bodily integrity concerns at the preimplantation stage are limited,[213] they are much more pressing once a fetus is implanted in the womb, as any attempt to abort or genetically modify the fetus is sure to be invasive. A parental claim of freedom of religion might also limit a parent's duty to its naturally conceived fetus if the parents balk at abortion or direct genetic manipulations. The same constitutional concerns do not arise where parents intentionally engage in assisted reproductive technologies for the purpose of creating a disabled child because the decision being constrained by the duty occurs prior to implantation.

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211. Curlender v. Bio-Sci. Labs., 165 Cal. Rptr. 477, 488 (Cal. Ct. App. 1980).

212. Cal. Civ. Code § 43.6 (West 2008).

213. *See supra* Part V.B.

Furthermore, even if one does not find the constitutional concerns persuasive, recognizing an affirmative parental duty to engage in genetic interventions might cause more harm than good. Such a duty may require *all* parents to undergo IVF and PGS,[214] or genetic screening and abortions, for fear that they might be found negligent for not exploring the possibility that a genetic harm exists. The high costs associated with assisted reproductive technologies such as IVF and PGS may not allow such techniques to be a financial possibility for many couples. Even lower-tech practices, such as genetic screening following amniocentesis and abortion in cases where a genetic abnormality is discovered, are costly when used by the entire procreating population.[215] And even if the duty is restricted to children who are already conceived via IVF, suggesting perhaps that the parents have the financial means to do the appropriate genetic testing, there are potential risks to the embryo from undergoing genetic manipulation and testing prior to implantation.[216] Given these concerns, there should be no parental tort liability for nonfeasance in the preimplantation genetic interventions context.

VI. PRACTICAL CONCERNS

Allowing parental tort liability for preimplantation genetic interventions creates a number of practical concerns. This Part addresses three of the most pressing concerns: jury behavior, the slippery slope problem, and questions related to compensation.

A. JURIES IN A "REASONABLY PRUDENT PARENT" WORLD

One concern with creating a parental duty of reasonable care is that juries will have to make value-laden decisions.[217] In particular, the *Chenault* court reasoned that an ordinary standard of care is "not designed to apply to matters involving intimate, private, and personal decisions."[218] The court was particularly concerned that it would be too difficult to determine how a "reasonable pregnant woman" should act and feared that jurors' decisions would involve "applying inherently

214. PGS, or preimplantation genetic screening, is distinct from PGD. PGD is used where the parents are known to be carriers of a particular trait. PGS is used where the parents are not known carriers. *See, e.g.*, Baruch et al., *supra* note 1.

215. Insurance coverage for genetic screening is widely variable, "but coverage is more likely for women over 35 whose screening tests returned positive results, and for others (like those with a family history for abnormalities) for whom the tests may be deemed a 'medical necessity.'" Carolyn Jacobs Chachkin, *What Potent Blood: Non-Invasive Prenatal Genetic Diagnosis and the Transformation of Modern Prenatal Care*, 33 AM. J.L. & MED. 9, 14 (2007).

216. *See generally* Sebastiaan Mastenbroek et al., *In Vitro Fertilization with Preimplantation Genetic Screening*, 357 NEW ENG. J. MED. 9 (2007).

217. *See, e.g.*, Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. Rev. 293, 347–48 (1997) (discussing the role of subjectivity in the reasonable person standard when applied in the context of contract law).

218. 989 S.W.2d 474, 477 (Tex. App. 1999).

subjective values."[219] "Inevitably," the court reasoned, "jurors would apply their own personal views to the facts presented resulting in verdicts that would be varied and, in all probability, inconsistent and unpredictable."[220]

But this concern seems overly broad. Juries make inherently value-laden decisions daily.[221] While we want to avoid juries making *biased* or *discriminatory* decisions, it is the role of the jury to make *value-laden* decisions, or decisions about what is right and wrong under the law.[222] In fact, the vagueness of the standard for negligence, "that of a reasonably prudent person," encourages juries to make value-laden decisions.[223] As Steven Hetcher writes, "[i]n the absence of a specific legal test for negligence, it is predictable that jurors, when attempting to engage in good faith deliberations, will fall back on their ordinary moral intuitions regarding the demands of reasonableness."[224] This is a well-recognized feature of juries, and one that troubles many first-year law students because it seems to encourage inconsistent results. Yet the fluidity of the reasonableness standard is exactly what makes it so wonderful. As social norms fluctuate over time and space, so too will jury determinations of liability. The reasonableness test, therefore, is a rule of law that is certain to stand the test of time. It never becomes outdated.

Of course, one might still have a strong feeling that a variety of parenting styles and techniques, even those in the minority, should be preserved to respect the pluralistic nature of American society. One solution is to have courts

> emphasize parental child-rearing rights by including in their jury instructions an admonition to recognize the wide discretion that parents must be accorded in determining how best to raise their children. A reasonable parent standard, if adequately explained to the jury, would thus protect legitimate parental prerogatives without depriving the injured child of the possibility of recovery, where recovery would be appropriate.[225]

Jurors would be asked to consider the religious and moral beliefs of the parents as well as the parents' socioeconomic situation.[226] Ideally, this

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219. *Id.* at 478.

220. *Id.*

221. DOBBS, *supra* note 86, § 148 (noting that "part of the jury's role is to make normative decisions or value judgments").

222. *See* 57A AM. JUR. 2D *Negligence* § 24 (2008).

223. *Id.*

224. Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 640 (2003).

225. Hollister, *supra* note 136, at 526.

226. In theory, jurors might even be asked to decide what a reasonably deaf parent might do. The law, however, generally considers a wider variety of beliefs for plaintiffs than for those who are defendants. *See generally* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM (1985).

approach would allow juries to adopt a reasonably prudent parent standard of care, while giving latitude for pluralism in society.

B. Slippery Slope Concerns

Another concern is that allowing parental liability in preimplantation genetic intervention cases will open up the flood gates of liability. Such a concern is common in tort law. In *Zepeda v. Zepeda,* for example, the Appellate Court of Illinois rejects an illegitimate son's wrongful life suit against his father.[227] In doing so, it writes:

> It is not the suits of illegitimates which give use concern, great in numbers as these may be. What does disturb us is the nature of the new action and the related suits which would be encouraged. Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation.[228]

Of course, most of these wrongful life suits likely would be prohibited by the Non-Identity Problem. Furthermore, this Article is only concerned with a small subset of genetic intervention cases where the Non-Identity Problem does not exist, meaning that the number of cases is likely to be small. Finally, even where viable cases exist, it seems likely that a child will only sue his or her parents in the most egregious cases.

Yet slippery slope concerns are not without merit. Why, for example, is choosing your child's genetic composition different from other parental choices that are designed to change children so they meet a particular parental ideal? For example, a person hoping to sire an NBA basketball star might choose a mate who is extraordinarily tall and athletically gifted.[229] Once a child is born, the parents could monitor his diet and social environment so that he would have the best chance possible of becoming a basketball star. The parents could send the child to basketball camp, and the best elementary school, middle school, high school, and college basketball programs in the country. But if a person is the product of both his genes and the environment, why should courts treat parental choices about genetics differently from parental choices about environment?

It is not clear that one type of choice is necessarily more damaging than another. Studies have shown that parents who aggressively

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227. 190 N.E.2d 849, 859 (Ill. App. Ct. 1963).

228. *Id.* at 858.

229. Such is the case of NBA star Yao Ming, whose parents, both very tall former basketball players, were hand-picked by the Chinese government to mate as part of the government's plan to create world-class athletes. Brook Larmer, *The Creation of Yao Ming*, Sports Illustrated, Sept. 26, 2005, at 64, 70.

encourage their child to become something the parent desires may be psychologically harming the child[230]—perhaps to the same extent, if not more, than a parent who makes a harmful genetic choice. Therefore, one reason for drawing the genetic/environment distinction may simply be ease of discovery and enforceability.

While society may want to stop parents from forcing their child toward NBA stardom or movie star status for fear that it might negatively impact the child's psychological and perhaps physical well-being, it is more difficult to monitor and discover environmental impacts than it is to discover genetic choices. Genetic choices require cooperation of the medical profession, an already heavily regulated field, whereas private choices in the home do not require any person's assistance or approval.

Another response is that genetic choices are, in theory, more permanent. While a child basketball star may be under the watchful eye of his parents until he is eighteen, he ultimately has the ability to change his life course upon reaching the age of majority. Furthermore, he has the option of rebelling against his parents' choice at a younger age. While parents may be able to force attendance at basketball practice, they cannot force a child to exert the effort necessary to achieve basketball stardom or the dean's list. Even when a child is at the 'top of his game,' he has the ability to purposefully make a bad shot or fail an exam. The law also requires parents to leave a wide variety of life options open to children.[231] Parents are required to send their children to school, and to provide food, clothing, and shelter.[232] While these minimum requirements might not preserve every possible life option that a child might want to pursue (say, perhaps, the option of becoming an Olympic gymnast), there is nothing to prevent the child from pursuing a wide variety of options, including non-Olympic gymnastics, later in life.

In contrast, the permanency of genetic choices makes them more difficult to rebel against. Using reproductive technologies available today parents can select an embryo with achondroplasia or deafness. Once a child has that condition, it often cannot be reversed.[233] Where parents are able to use direct genetic technologies, such as genetic manipulations prior to implantation, the technology may not exist to reverse these choices. But even where the technology exists to reverse these genetic decisions, employing it may be both emotionally exhausting and

230. *See, e.g.*, WENDY S. GROLNICK, THE PSYCHOLOGY OF PARENTAL CONTROL: HOW WELL-MEANT PARENTING BACKFIRES 29–30 (2003).

231. *See, e.g.*, M. Cathleen Kaveny, *Cloning and Positive Liberty*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 15, 31 (1999).

232. *See id.*

233. Even if a cochlear implant could reverse the child's deafness, arguably no physician would implant one absent parental consent.

physically invasive, not to mention costly. All of these things, particularly the physically invasive nature and cost of reversing genetic decisions, make them more difficult to reverse than environmental interferences.

C. Financial Considerations

Where a child sues his or her parents, a valid concern is the source of the money compensating the injured child. In fact, one rationale for parental tort immunity is the preservation of family resources.[234] While this rationale for parental tort immunity has been repeatedly dismissed as no longer relevant,[235] readers may still be concerned about who is going to pay for any successful tort claims.

One option is that the parents pay. IVF cycles are expensive, often $12,400 or more per cycle[236] and PGD adds an average of $3000 to $5000 to that cost.[237] Direct genetic interventions are likely to cost more, and only 20% to 30% of health insurance plans currently cover the costs of IVF.[238] These numbers suggest that many parents using advanced reproductive technologies to create children with disabilities are relatively wealthy.[239] If this is true, then a certain percentage of parents engaging in preimplantation genetic interventions will have the financial resources to pay all or part of a judgment against them.

A second option, albeit the least likely, is that insurance pays. As described above, the only suits likely to be successful are those involving parents' intentional acts. Most liability insurance plans are unlikely to cover intentional acts. Therefore, very little insurance money, if any, will be paid to cover judgments against parents.

A final option is that no one pays. Data on the payment of civil judgments is virtually nonexistent.[240] But a 1993 report examining the payment of civil judgments in eleven New Jersey counties suggests that a significant percentage of civil judgments are never satisfied.[241] If this

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234. *See supra* note 89 and accompanying text.

235. Rooney & Rooney, *supra* note 89.

236. Debora L. Spar, *Where Babies Come from: Supply and Demand in an Infant Marketplace*, Harv. Bus. Rev., Feb. 2006, at 133, 135.

237. *See* Collins, *supra* note 6, at 61 (explaining that PGD adds an average of $3000 to $5000 to the cost of an IVF cycle).

238. Jessica L. Hawkins, *Separating Fact from Fiction: Mandated Insurance Coverage of Infertility Treatments*, 23 Wash. U. J.L. & Pol'y 203, 204 (2007). Currently, fifteen states have laws mandating coverage for infertility treatments. *Id.*

239. *See id.*

240. Fiona D'Souza, *The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China*, 30 Fordham Int'l L.J. 1318, 1653 n.299 (2007) (noting that data is hard to find).

241. The Committee on Post-Judgment Collection Procedures in the Special Civil Part reported that:

> [O]nly 32% of the writs of execution issued in civil cases (Special Civil, exclusive of landlord/tenant and small claims) were returned fully or partially satisfied, while 52% were

number is correct and applicable to other courts, then large numbers of judgments are either unsatisfied or partially satisfied each year. Yet citizens still believe in and champion the tort system. This suggests that there is something to be said for the hedonic value of a successful suit even if there is never a monetary collection.

CONCLUSION

While current tort doctrine likely prohibits parental tort liability for many preimplantation genetic interventions, it does not prohibit liability in all instances. Children born as a result of direct preimplantation genetic interventions, such as genetic additions, deletions, or modifications that alter a unique set of DNA, have a legally cognizable injury if the child's genetic identity is modified in a way that limits the child's right to an open future. In these situations, concerns about parental tort immunity, procreative liberty, bodily integrity, parental decision making under the Fourteenth Amendment and the Non-Identity Problem are inapplicable. Therefore, a born-alive child harmed by direct genetic interventions should be able to sue his parents successfully for battery where the parents intentionally engage in a process that is substantially certain to make a harmful or offensive contact with the embryo, and to cause legal harm to the later-born child.

Where parents engage in indirect preimplantation genetic interventions, such as PGD, children should not be able to sue in tort. Indirect preimplantation genetic interventions do not create a legally cognizable injury to the born-alive child because of the Non-Identity Problem. Therefore, parental tort liability would be improper.

Parental decisions to forgo preimplantation genetic interventions of any type (for example, a parental decision to forgo genetic modification or PGD where it might benefit a naturally created embryo) also fail to create parental tort liability. While such acts of nonfeasance may cause

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returned unsatisfied. Wage executions orders issued in civil cases appear to be somewhat more successful, with a total of 36% being returned fully or partially satisfied.

COMM. ON POST-JUDGMENT COLLECTION PROC. IN THE SPECIAL CIVIL PART, REPORT TO THE SUPREME COURT OF NEW JERSEY 14 (1993). During the same time period:

> A total of 42% of the small claims writs of execution were returned fully or partially satisfied and 44% were returned unsatisfied. Forty-four percent (44%) of the wage execution orders issued in small claims cases were returned fully or partially satisfied. Thirty-three (33%) of the wage execution orders issued in small claims cases were returned unsatisfied and 20% remained outstanding as of December 1988.

Id. at 14–15. While this data does not capture all of the relevant data relating to judgment collection in either the Special Civil Part or Small Claims Court, is does suggest that a significant portion of these judgments are never paid. Furthermore, these numbers deal only with judgments smaller than $5000. N.J. R. CT. 6:1-2. Nonetheless, these judgments represent a wide variety of claims, including breach of contract, property damage, landlord/tenant, and professional malpractice. NJCourtsOnline.com, Special Civil FAQ, http://www.judiciary.state.nj.us/civil/civ-03.htm (last visited Dec. 15, 2008).

later-born children to suffer a moral harm, these moral harms are not legally cognizable.

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