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

Kirsten Rabe Smolensky
The University of Arizona
James E. Rogers College of Law

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Kirsten Rabe Smolensky[1]

ABSTRACT

Using preimplantation genetic diagnosis (PGD), parents can now screen embryos for genetic traits such as deafness and Achondroplasia (dwarfism). Studies show that some parents intentionally choose embryos with disabilities because that genetic trait runs in the family. This recent trend raises the important legal question of whether children can sue their parents in tort for selecting or engineering disabling genetic traits.

This article suggests that children should be able to successfully sue parents who engage in certain direct genetic interventions. Tort law should protect a child's moral right to an open future where parents' preimplantation genetic choices limit a child's ability to pursue a variety of different life paths. In reaching this conclusion, the article addresses various barriers to tort liability, including "no duty" arguments, parental tort immunity, and a variety of constitutional concerns.

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[1] Associate Professor of Law, The University of Arizona, James E. Rogers College of Law. Many thanks to the participants at the University of Arizona Faculty Enrichment Workshop. Special thanks to Barbara Atwood, Ellen Bublick, Judith Daar, Dan Dobbs, Jane Korn, Max Mehlman, Marc Miller, John Robertson, Ted Schneyer, and Roy Spece for their extraordinarily thoughtful comments.

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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 which 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. While the number of children affected by such decisions is likely to be small,[2] a recent scientific article reports that three percent 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 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

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[2] Susannah Baruch, et.al., Genetic Testing of Embryos: *Practices and Perspectives of US In Vitro Fertilization Clinecs,* 89 FERTILITY & STERILITY 1053, 1054-55 (2008), while it is impossible to translate this information into absolute numbers, the data presented by Baruch, et.al., suggests that at least five IVF clinics in the U.S. comply with requests to select for a disability.

[3] Susannah Baruch, et. al., *Genetic Testing of Embryos: Practices and Perspectives of US In Vitro Fertilization Clinics,* 89 FERTILITY & STERILITY 1053, 1055 (2008). 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. "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." JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT, 22-23 (1994).

[5] The 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 in section V (b). The article does not address these concerns in detail because it is designed to focus on the implications of new reproductive technologies such as PGD.

over the course of several months. For instance preimplantation genetic diagnosis (PGD)[6], an indirect genetic intervention, allows parents to create multiple embryos outside of the womb and have them tested prior to implantation for a specific genetic trait. Once the embryos have been tested, parents can select which embryos they wish to implant, those with the trait or those without the trait. The article concludes that intentional tort claims derived from indirect genetic interventions, such as PGD, should not be allowed because Parfit's Non-Identity Problem[7] prohibits the finding of a legally cognizable injury. 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, the 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 child parents' 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. While there are 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 regards to child rearing.[9] In a few instances courts allowing children to sue third parties for negligent prenatal actions have discussed that child's right to a "sound mind and body".[10] 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. Many of these changes are linked to technological

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[6] "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 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." John A. Collins, M.D., *Preimplantation Genetic Screening in Older Mothers*, 357 NEW ENG. J. MED. 61, 61 (2007) (internal citations omitted).

[7] DEREK PARFIT, REASONS AND PERSONS 351-380 (Oxford Univ. Press 1987). The Parfit Non-Identity Problem is used to argue that children born as a result of negligence, for example a negligent tubal ligation that results in pregnancy, have no tort claim. As the child's only alternative was to never have existed, he suffers no injury.

[8] ALLEN BUCHANAN, ET. AL., FROM CHANCE TO CHOICE: GENETICS & JUSTICE, pg. 170 (Cambridge: Cambridge University Press 2000).

[9] *See infra* Section V (c).

[10] *See infra* Section II.

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 forego 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.[11] The 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, the article proceeds as follows: First, it explores the magnitude of the proposed problem and provides current information about the uses of genetic interventions. In section II, the article discusses which genetic choices should constitute legally cognizable injuries. Where an injury is recognized, parents' procreative liberty should be limited. Section III addresses parental tort immunity. Section IV discusses intentional tort claims. Section V addresses negligence claims, including concerns about parental duties, bodily integrity, the Parfit Non-Identity Problem, and parental acts of nonfeasance. Finally, the article briefly addresses other practical concerns about parental tort liability in the preimplantation context and concludes.

I. THE CURRENT USES AND REGULATION OF PREIMPLANTATION GENETIC INTERVENTIONS

There are two types of genetic interventions: direct genetic interventions (intentional changes to a pre-determined set of DNA by adding, deleting or reorganizing the DNA sequence[12]) 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).[13] While direct genetic interventions are still ten to twenty years in the future, indirect genetic interventions are increasingly being used by prospective parents. 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.[14] In theory, PGD is available for virtually any condition that has a known genetic

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[11] "There is perhaps no essential reason why, under the modern law, 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." RESTATEMENT (SECOND) OF TORTS § 13 cmt. c (1977).

[12] ALLEN BUCHANAN, ET. AL., FROM CHANCE TO CHOICE: GENETICS & JUSTICE 6 (Cambridge: Cambridge University Press 2000).

[13] *Id.*

[14] "At present, PGD use appears to be growing rapidly, yet no comprehensive data exist about the practice of PGD in the United States. We do not know how often PGD is performed overall, by whom, for what reasons, and with what outcomes." Susannah Baruch, et. al., *Genetic Testing of Embryos: Practices and Perspectives of US In Vitro Fertilization Clinics,* 89 FERTILITY & STERILITY 1053(2008). "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

component.[15] But in practice, the cost of PGD and the complex, multifactorial[16] nature of most genetic conditions has limited much PGD testing to single gene disorders, chromosomal disorders, and x-linked disease.

Currently, genetic tests are available for more than 1000 conditions, ranging from deadly childhood diseases to milder conditions such as hereditary deafness.[17] And at least one world-wide in vitro fertilization (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, Faconi Amemia, Hemophilia, Huntington Chorea, Marfan Syndrome, Muscular Dystrophy, Osteogenesis Imperfecta, Polycystic Kidney Disease, Retinoblastoma, Sickle Cell Anemia and Tay-Sachs Disease.[18] In the case of polygenic traits[19], such as breast cancer, PGD testing can be done for specific genes (e.g., BRCA 1 & 2). 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's Syndrome, so they could give their Down's affected child a similar sibling."[20] Another couple recently sought a deaf sperm donor in hopes of increasing their chances of conceiving children who are deaf.[21] Their plan succeeded, and the couple now has two children who are deaf, as well as many supporters and critics.[22]

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

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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." Susannah Baruch, et. al., *Genetic Testing of Embryos: A Critical Need For Data*, 11 REPRO. BIOMED. ONLINE 667, 667 (Oct. 2005) (internal citations omitted).

[15] 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 screen for aneuploidy." The Practice Committee of the Society for Assisted Reproductive Technology and the Practice Committee of the American Society for Reproductive Medicine, *Preimplantation Genetic Testing: A Practice Committee Opinion*, 88 FERTILITY & STERILITY 1497, 1497 (2007). This article talks exclusively about PGD because all of the reported cases of intentional diminishment involve situations where one or both genetic parents are known to be carriers of a gene mutation.

[16] A multifactorial trait is a "trait influenced by multiple genes and environmental factors." PETER J. RUSSELL, GENETICS G-8 (4th ed. 1996).

[17] Susan L. Crockin, et.al., *Genetic Tests are Testing the Law: The Fast-Growing Field of Genetic Testing Has Raised new Legal Questions: Who is Responsible When a Child is Born with a Severe Genetic Defect? And What Theories, Standards, and Choice of Law Apply to These New Technologies?*, 42 TRIAL 44, 45 (Oct. 2006)

[18] Reproductive Genetics Institute, *PGD for Single Gene Disorders*, http://www.reproductivegenetics.com/single_gene.html (last visited July 9, 2007).

[19] Polygenic traits are "[t]raits encoded by many [locations on the genome]." PETER J. RUSSELL, GENETICS G-10 (4th ed. 1996).

[20] 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, at 6(1).

[21] M. Spriggs, *Lesbian Couple Create a Child Who is Deaf Like Them*, 28 J. MED. ETHICS 283 (2000).

[22] *Id.*

disabling gene,[23] no laws in the United States currently prohibit such choices.[24] And 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.[25]

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[26] 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. If the fetus had Achondroplasia, they would continue the pregnancy. 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. While rare, this is not an isolated event. A recent survey of IVF clinics reports that "[s]ome 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

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[23] Many doctors may feel that purposefully selecting an embryo with a disability violates their ethical obligation to do no harm. While the American Society for Reproductive Medicine does not have an ethics opinions 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." The Ethics Committee of the American Society for Reproductive Medicine, *Child-rearing Ability and the Provision of Fertility Services*, 82 FERTILITY & STERILITY 595, 595 (2004). The primary concern is for the welfare of offspring. *Id.* at 565.

[24] 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 abnormality where non-affected embryos were available for use. Clare Murphy, *Is it Wrong to Select a Deaf Embryo?*, BBC News (March 10, 2008), http://news.bbc.co.uk/2/hi/health/7287508.stm. *See also, Transcript of "Debating Deafness and Embryo Selection: Are We Undermining Reproductive Confidence in the Deaf Community?"* Progress Education Trust (April9, 2008), http://stopeugenics.org/files/2008/04/debatingdeafness.pdf.

[25] 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." The Ethics Committee of the American Society for Reproductive Medicine, *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." ACOG Committee Opinion No. 360, *Sex Selection*, (Feb. 2007), 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., *100% Sex Selection, Family Balancing and Genetic Embryo Screening*, http://www.fertility-docs.com/fertility_gender.phtml

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

having provided PGD to couples who seek to use PGD in this manner."[27] In absolute numbers this means that at least four clinics responding to the survey have honored these requests.[28]

Concerns about the inadequacy of professional self-regulation have led some scholars to call for regulation to prevent ethical abuses of PGD technology.[29] But legal or professional guidelines limiting PGD use may only encourage "medical tourism",[30] and regulating genetic interventions abroad is nearly impossible.[31] Additionally, the small number of children likely to be negatively affected by preimplantation genetic interventions may not justify the expense of an extensive regulatory system like that managed by the Human Embryo Fertilisation Authority (HEFA) in the United Kingdom.[32] And, even if the U.S. were to adopt a comprehensive regulatory regime tomorrow, the question still remains whether children born as a result of certain preimplantation genetic choices would have the ability to seek a civil tort remedy from their parents.

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

Currently, the scope, and even existence, of a constitutionally protected procreative liberty interest is debatable.[33] If procreative liberty is not constitutionally guaranteed, then parental rights to choose their children's genetic traits are likely limited to parental decision-

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[27] Susannah Baruch, et. al., *Genetic Testing of Embryos: Practices and Perspectives of US In Vitro Fertilization Clinics*, __ FERTILITY & STERILITY (Sept. 19, 2006) (ePublished ahead of print and available on Pub Med, PMIK: 06996062). This is an earlier version of the article cited in footnote 2. In the final version of this article much of this cited text is removed.

[28] 186 clinics (45%) provided valid responses and only 74% of those reported that they provided PGD services. Susannah Baruch, et. al., *Genetic Testing of Embryos: Practices and Perspectives of US In Vitro Fertilization Clinics*, 89 FERTILITY & STERILITY 1053(2008). 225 clinics did not respond to the survey. *Id.* at 1053-54. If the percentages reported hold true for all IVF clinics that received the survey (415), then approximately nine IVF-PGD clinics in the United States have honored a request to select for a disabling trait. There is no data on how many children with disabilities have been born as a result.

[29] *See e.g.*, Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35 (2000) and 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).

[30] 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.). "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." Paul Claman, *The Assisted Human Reproduction Act*, J. OF OBSTETRICS & GYNAECOLOGY CANADA, Apr. 2007, at 303.

[31] *See e.g.*, Maxwell J. Mehlman & Kirsten M. Rabe, *Any DNA To Declare? Regulating Offshore Access To Genetic Enhancement*, 28 AM. J. LAW & MED. 179 (2002).

[32] Alicia Ouellette, et. al., *Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States*, 31 AM. J. LAW & MED. 419 (2005) (describing in detail the United Kingdom's extensive regulatory regime).

[33] *See e.g.*, JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 22-42 (1994) (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) and 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."). For a more varied critique of Robertson's approach and his response, see the *Symposium on John A. Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 133-249 (1995). For a discussion of how recent Supreme Court rulings may have affected the right to procreative liberty see Katheryn D. Katz, *Lawrence v. Texas: A Case for Cautious Optimism Regarding Procreative Liberty*, 25 WOMEN'S RTS. L. REP. 249 (Fall 2004).

making rights guaranteed by the Fourteenth Amendment.[34] These rights may not extend to genetic choices.[35] 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."[36] In a technologically advanced society, procreative liberty 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."[37] While 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.[38] 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."[39] 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."[40] Robertson does not say which capabilities he has in mind nor does he define "normal and healthy".

A few scholars, including Robertson, have developed potential frameworks for defining harm more accurately. 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.[41] 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

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[34] *See e.g.*, Wisconsin v. Yoder , 406 U.S. 205 (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).

[35] *See* discussion *infra* Section V(c).

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

[37] *See generally*, John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J. L & MED. 439, 447-48 (2003).

[38] 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." John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J. L & MED. 439, 444 (2003).

[39] *Id.* at 446.

[40] *Id.* at 480.

[41] JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 171 (1994).

offspring abilities would not . . . interfere with their procreative liberty."[42] 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".[43] 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.[44] Every child that comes into existence has future interests[45] that can be doomed by the child's circumstances at birth.[46] 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."[47] 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, 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.[48]

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 the child has been legally harmed.[49] 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 section V (b).

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[42] *Id.*

[43] *See e.g.*, JOEL FEINBERG, THE MORAL LIMITS OF CRIMINAL LAW: HARM TO OTHERS, Vol. I (1984) and ALLEN BUCHANAN, ET. AL., FROM CHANCE TO CHOICE: GENETICS & JUSTICE, pg. 170-72 (Cambridge: Cambridge University Press 2000).

[44] 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).

[45] A person has an interest in something when he "stands to gain or lose" depending upon the outcome. JOEL FEINBERG, THE MORAL LIMITS OF CRIMINAL LAW: HARM TO OTHERS, 38 Vol. I (1984).

[46] "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 comes into existence he already is in what we would normally call a state of harm." *Id.* at 98.

[47] *Id.* at 98-99.

[48] JOEL FEINBERG, THE MORAL LIMITS OF CRIMINAL LAW: HARM TO OTHERS, Vol. I, 99 (1984).

[49] JOEL FEINBERG, THE MORAL LIMITS OF CRIMINAL LAW: HARM TO OTHERS, 98-99 Vol. I (1984).

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."[50] One example of a natural primary good is sight.[51] "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."[52] Under this definition, hearing, movement and minimal mental capacity would also qualify as natural primary goods.

Buchanan, et.al., does, 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."[53] Buchanan, et. al., "stress the two qualifications of *reasonable* range and array, since Feinberg sometimes asserts a stronger right to a maximally open future."[54] 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.[55] [56] 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 or in order to continue their own community that is committed to that conception of a good life."[57] 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 with Achondroplasia has suffered a legally cognizable injury, without which a tort claim will fail. Yet, such determinations are problematic because they are inherently value-laden.

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[50] ALLEN BUCHANAN, ET. AL., FROM CHANCE TO CHOICE: GENETICS & JUSTICE, pg. 167-68 (Cambridge: Cambridge University Press 2000).

[51] *Id.* at 167.

[52] *Id.*

[53] ALLEN BUCHANAN, ET. AL., FROM CHANCE TO CHOICE: GENETICS & JUSTICE, pg. 170 (Cambridge: Cambridge University Press 2000) (emphasis added).

[54] *Id.*

[55] *Id.* at 167.

[56] 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 284-85 (2002).

[57] *Id.* at 170.

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.[58] 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.[59] For Rakowski, the societal harms include the financial costs associated with extra social services that the child might need. He argues that the state should be able to recover the costs of these services from parents choosing to have a genetically disadvantaged child.[60] 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, but 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. A few international documents and court cases also find that children have a "right to an open future" or a "right to an unaltered genome." While there do not appear to be any American cases which have explicitly recognized a child's right to an open future or have 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.[61]

Several other courts have also taken this stance in similar contexts.[62]

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[58] Eric Rakowski, *Who Should Pay For Bad Genes?*, 90 CAL. L. REV. 1345 (2002).
[59] *Id.*
[60] *Id.*
[61] Smith v. Brennan, 31 N.J. 353, 364-365 (N.J. 1960).
[62] *See e.g.*, Stallman v. Youngquist, 531 N.E.2d 355, 360 (Ill. App. Ct. 1988) (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

Additionally, certain international documents, like the Universal Declaration on the Human Genome and Human Rights, state that everyone has a right to "just reparation for damage sustained as a direct and determining result of an intervention affecting his or her genome."[63] 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. 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.[64] 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 the field of psychiatry had taken hold. Medical proof of the impact of traumatic events on the psyche gave rise to a new understanding of mental illness and emotional distress. Terms such as post traumatic stress disorder became part of the everyday language. 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. 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 human health."[65] Advances in medical understanding and the creation of sensitive medical technologies for measuring toxin levels in 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.[66] And the growth of

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not be liable for the prenatal injuries she caused her child) and Womack v. Buchhorn, 384 Mich. 718, 725 (citing *Brennan* and recognizing a common law action for negligently inflicted prenatal injury).

[63] UNESCO, "The Universal Declaration on the Human Genome and Human Rights," Art. 8 (Nov. 11, 1997).

[64] *Id.*

[65] James F. deEntremont, *Fear Factor: The Future of Cancerphobia and Fear of Future Disease Claims in the Toxicogenomic Age*, 52 LOY. L. REV. 807, 810 (2006).

[66] *See e.g.*, Note, *Aren't You Lucky You Have Two Mamas?: Redefining Parenthood in Light of Evolving Reproductive Technologies and Social Change*, 81 CHIC.-KENT. L. REV. 773 (2006) and *DEVELOPMENTS IN THE LAW: IV. Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052 (2003) discussing how new reproductive technologies have changed the way we define parenthood and family.

assisted reproductive technologies in the 1970s, 80s and 90s has likely factored into judicial decisions arguably recognizing a right to procreative liberty.[67]

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 harm.

III. PARENTAL TORT IMMUNITY

Immunities are generally bright line rules designed to protect a defendant not merely from liability, but from suit.[68] 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 section IV and negligence in section V.

In 1891 the doctrine of parental tort immunity was established in *Hewlett v. George,* a case which held that parents could not be held liable in tort to their unemancipated minor children.[69] While *Hewlett* 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.[70] Since *Hewlett* 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."[71]

Courts began to retreat from the doctrine of parental tort immunity shortly after its inception.[72] 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[73] or willful battery that extends beyond the type of

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[67] JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994).

[68] DAN B. DOBBS, THE LAW OF TORTS § 225 (West Group 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."

[69] Hewlett v. George, 9 So.2d 885 (Miss. 1891), overruled in Glaskox v. Glaskox, 614 So.2d 906 (Miss. 1992).

[70] Glaskox v. Glaskox. 614 So.2d 906, 907, n.1 (Miss. 1992).

[71] M.J. Rooney, et. al., *Parental Tort Immunity: Spare the Liability, Spoil the Parent,* 25 NEW ENG. L. REV. 1161 (1991).

[72] *See e.g.*, DAN B. DOBBS, THE LAW OF TORTS § 280 (West Group 2000)(providing a complete, brief overview of the birth and erosion of parental tort immunity in the United States) and Martin J. Rooney & Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent,* 25 NEW ENG. L. REV. 1161, 1163 (1991)(noting that *Goller v. White* "began a national trend, and today, a majority of states has at least partially abolished parental tort immunity").

[73] *See e.g.*, Hurst v. Capitell, 539 So.2d 264 (Ala. 1989).

corporeal punishment that is accepted in a parenting situation.[74] The reasons for parental tort immunity, particularly the preservation of family harmony, are simply not applicable where parents intentionally harm their children.[75] Hence, parental tort immunity does 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,[76] 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, particularly those involving automobile accidents[77] or child injury in the course of the parent's business activities.[78] While some states do not have parental tort immunity, thirty-three states still have some limited form of parental tort immunity.[79] 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."[80] 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.[81] What is considered permissible conduct under these standards is not always clear and there has been wide-spread commentary that some cases improperly immunized parents from liability.[82]

Yet in thirty-three states potentially negligent parental decisions will be analyzed under one of these standards. In many of these jurisdictions parental tort immunity looks more like a privilege than an immunity.[83] This means that courts will carefully analyze parental actions under the existing standard instead of applying blanket immunity. No cases have examined parental tort immunity in the preimplantation context so it is unclear how a court will analyze parental tort immunity in an indirect preimplantation genetic intervention case.

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[74] Newman v. Cole, 872 So.2d 139 (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 step-mother sprayed him in the face with water from a garden hose, ultimately causing his death).

[75] DAN B. DOBBS, THE LAW OF TORTS § 280 (West Group 2000).

[76] *See infra* Section V for a discussion of why some claims may be brought as negligence claims and not as intentional tort claims.

[77] DAN B. DOBBS, THE LAW OF TORTS § 280 (West Group 2000) (citing courts that allowed claims to move forward in automobile accidents so the family access to insurance monies that would otherwise be unavailable).

[78] DAN B. DOBBS, THE LAW OF TORTS § 280 (West Group 2000) (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").

[79] 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. Newman, 872 So.2d at 141.

[80] DAN B. DOBBS, THE LAW OF TORTS § 280 (West Group 2000)(noting that the majority of states have adopted this standard often referred to as the *Goller* rule). *See also* Goller v. White, 122 N.W.2d 193 (Wis. 1963).

[81] *See* DAN B. DOBBS, THE LAW OF TORTS § 280 (West Group 2000).

[82] *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 32 (2007).

[83] "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 . . ." DAN B. DOBBS, THE LAW OF TORTS § 225 (West Group 2000).

Parental discretion is broadly applied in American jurisprudence.[84] As a result, the law often fails to find criminal guilt in women who engage in recognized dangerous activities while pregnant,[85] protects parents who negligently place their children in dangerous positions,[86] and assumes that parents are better decision-makers for their children than society might be[87]. 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. While medical custody of children is often given to the state where parents refuse standard life-saving or life-improving medical care, 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 Section 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 discussed in section V (d).

IV. INTENTIONAL TORT CLAIMS

Since 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.[88] An actor is subject to liability for battery "if he acts intending to cause a

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[84] "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." Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing the state's ability to permanently sever parental rights).

[85] *See e.g.*, State v Ashley, 701 S.2d 338 (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).

[86] *See e.g.*, Dubay v. Irish, 542 A.2d 711 (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) and Ball v. Ball, 269 P.2d 302 (Wyo. 1954) (finding 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 (Fla. 1982) (holding that a minor child could bring suit against his mother for injuries sustained when she negligently unloaded him from an automobile) and Anderson v. Stream, 295 N.W.2d 595 (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),

[87] "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. . . ." Broadwell v. Holmes, 871 S.W.2d 471, 475 (Tenn. 1994) (quoting Paige v. Bing Construction Co., 233 N.W.2d 46, 49 (Mich. App. 1975)).

[88] Depending upon the jurisdiction intentional infliction of emotional distress (IIED) may be another available tort claim.

harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and a harmful contact with the person of the other directly or indirectly results."[89] Therefore, parents are liable for battery in the preimplantation context where they make an intentional, unconsented to, 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. Then the eggs must be retrieved by inserting a needle into the woman's body. The genetic father must provide a sperm sample. 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. 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.[90] Various genetic tests are performed on that cell and the information provided to the intended parents. At this stage in the process, the parents must decide which embryos, if any, to implant. The implantation procedure which places the selected embryos into the womb is again a physically invasive procedure, both for the embryo and the gestational mother. 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.[91] 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.[92] 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.[93] It might be very difficult, indeed,

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[89] RESTATEMENT (SECOND) OF TORTS § 13 (1977).

[90] John A. Collins, M.D., *Preimplantation Genetic Screening in Older Mothers*, 357 NEW ENG. J. MED. 61, 61 (2007).

[91] *E.g.*, White v. Univ. of Idaho, 797 P.2d 108, 109 (Idaho 1990).

[92] 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(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 once the patient learns of the contact. Similarly, suits for battery have been successful where the plaintiff acquired a sexually transmitted disease after contact with the defendant. 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 pre-conception negligence cases).

[93] *E.g.*, White v. Muniz, 999 P.2d 814 (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* Dan B. Dobbs, THE LAW OF TORTS (2007 pocket part, § 30).

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.[94] Therefore, whether parents subjectively intend to harm their 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.[95] Under an objective standard of offense, genetic traits such as deafness or Achondroplasia are almost certain to be considered offensive 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 section 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."[96] 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.[97] 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. 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.[98] While parental intent to contact in these cases may be clear (supporting liability in single intent jurisdictions), intent to harm or offend is not. Further scientific knowledge about the risks inherent in selecting for particular polygenic traits is necessary before battery could be proven (in a dual intent jurisdiction). 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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[94] DAN B. DOBBS, THE LAW OF TORTS § 30 (West Group 2000).

[95] In situations where the plaintiff lacks capacity to consent, "an objective standard based on the objective reasonable sense of personal dignity may be desirable." DAN B. DOBBS, THE LAW OF TORTS § 29 (West Group 2000).

[96] DAN B. DOBBS, THE LAW OF TORTS § 30 (West Group 2000).

[97] "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." The Practice Committee of the Society for Assisted Reproductive Technology and the Practice Committee of the American Society for Reproductive Medicine, *Preimplantation Genetic Testing: A Practice Committee Opinion,* 88 FERTILITY & STERILITY 1497, 1499 (2007).

[98] Colin B. Begg, et. al., *Variation of Breast Cancer Risk Among* BRCA1/2 *Carriers,* 299 JAMA 194 (2008) (finding a large variation in risk among patients that carried *BRCA1* and *BRCA2* genes; the authors hypothesize 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).

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.[99] Arguably, parents sharing the inability to hear with their children may bond better with their 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 bodily integrity, parents' constitutionally protected right to parental autonomy under the Fourteenth Amendment and the Parfit Non-Identity Problem.[100] This section 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 section 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. The article concludes that parental nonfeasance should never result in a legally cognizable claim.

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[101] while three do not.[102]

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[99] M. Hayry, *There is a Difference Between Selecting a Deaf Embryo and Deafening a Hearing Child*, 30 J. MED. ETHICS 510 (2004).

[100] 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.

[101] Grodin v. Grodin, 301 N.W.2d 869 (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 (N.H. 1992) (allowing a child to recover where he suffered a prenatal injury after his mother negligently crossed the street while pregnant); and National Casualty Co. v. Northern Trust Bank, 807 So.2d 86 (Fla. 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).

[102] Remy v. MacDonald, 801 N.E.2d 260 (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); Stallman v. Youngquist, 531 N.E.2d 355 (Ill. Ct. App. 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); and Chenault v. Huie, 989

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. After thorough analysis these courts determine that pregnant women do not owe a duty of care to their fetuses. 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. 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.[103]

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"[104] that liability for prenatal harms extend to parents. But that conclusion does not necessarily follow. In order for liability to extend to parents, they must first have a duty toward their children that is equal to or greater than that owed by a stranger.

This article argues that parents have a duty to act as a reasonably prudent parent when making preimplantation genetic choices.[105] Several scholars and some courts writing about parental duties to already born children agree.[106] 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,[107] 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.

S.W.2d 474 (Tex. Ct. App. 1999) (holding that a mother who abused narcotics while pregnant had no liability to her child who sustained related prenatal injuries).

[103] Chenualt, 989 S.W.2d at 474. The role of juries where courts recognize a parental duty to act as a reasonably prudent parent is discussed in section VI.

[104] Chenault v. Huie, 989 S.E.2d 474, 475 (Tex. Ct. App. 1999).

[105] 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.

[106] *See e.g.,* Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification,* 50 FORDHAM L. REV. 489, 525-26 (1982) (arguing that "courts 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.'"); Note, *Rock-A-Bye Lawsuit: Can a Baby Sue the Hand that Rocked the Cradle?,* 28 J. MARSHALL L. REV. 429, 430 (Winter 1995) (arguing that parents should owe their children an ordinary, reasonable standard of care); and *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."). *Cf.* DAN B. DOBBS, THE LAW OF TORTS § 280 (West Group 2000) (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* Martin J. Rooney & Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent,* 25 NEW ENG. L. REV. 1161, 1181-82 (1991) (arguing against a reasonable parent standard because "[s]uch 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").

[107] 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 (Ky. Ct. App. 1968) (reducing the wrongful death judgment against the City because of the mother's contributory negligence in tripping while pregnant).

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. 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 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,[108] have *no duty* towards a fetus where a third party might.[109] For example, many states allow children harmed by third parties in utero to recover for these injuries after they are born alive.[110] 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;[111] pharmaceutical companies that marketed and supplied prescription drugs to pregnant women knowing they might cause harm; [112] motorists who injured pregnant women in automobile accidents;[113] and employers who failed to provide appropriate safeguards for pregnant employees.[114] In some jurisdictions later-born children have even been allowed to pursue claims for harm resulting from preconception

[108] 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.

[109] Remy v. MacDonald, 801 N.E.2d 260 (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); Stallman v. Youngquist, 531 N.E.2d 355 (Ill. Ct. App. 1988) (finding that a fetus did not have a cause of action for negligent infliction of emotional distress against its mother where she negligently caused a car accident during the fifth month of pregnancy); Chenault v. Huie, 989 S.W.2d 474 (Tex. Ct. App. 1999) (holding that a mother who abused narcotics while pregnant had no liability to her child who sustained related prenatal injuries).

[110] Roland F. Chase, Annotation, *Liability for Prenatal Injuries,* 40 A.L.R.3d 1222, § 2(a) (2006) (noting that "[m]any 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.")

[111] *See e.g.*, Bailey v. Khoury, 891 So.2d 1268 (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) and Seattle-First Nat'l. Bank v. Rankin, 367 P.2d 835, 837-838 (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).

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

[113] *See e.g.*, Kalafut v. Gruver, 389 S.E.2d 681, 682 (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) and Mallison v. Pomeroy, 291 P.2d 225, 228 (Or. 1955) (holding that the born alive child, but not the child's still born twin, could recover against a motorist who negligently crashed into a car carrying the plaintiff's then-pregnant mother).

[114] *See e.g.*, Crussell v. Electrolux Home Prods., Inc., 499 F.Supp.2d 1137, 1141 (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) and 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).

negligence.[115] In all of these cases, third parties owe the child the ordinary standard of care, and there little reason, with perhaps the exception of bodily integrity and parental decision-making interests discussed below and the procreative liberty concerns discussed in section 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[116] and in cases finding a fundamental right to privacy under the Constitution.[117] 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."[118] In the spirit of these words, the United States Supreme Court has established a wide variety of freedoms which reflect an interest in bodily integrity: freedom from forced stomach pumping,[119] freedom from unwanted medical treatment,[120] freedom to use contraceptives,[121] and the freedom of a woman to abort a pregnancy.[122]

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,[123] it would negatively impact a woman's actions while pregnant,[124] and it might interfere with abortion rights.[125] 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 the court because PGD cases should be dismissed because of the Parfit Non-Identity Problem discussed below. The number of direct genetic intervention cases is likely

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[115] *See generally*, Julie A. Greenberg, *Reconceptualizing Preconception Torts*, 64 TENN. L. REV. 315 (1997). Cases involving preimplantation genetic interventions are not preconception cases because the alleged tort occurs after conception, but prior to implantation in the womb. Nonetheless, some courts seem unconcerned with the fact that the later-born child was not in existence at the time of the alleged injury. 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.

[116] *E.g.*, Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92 (N.Y. 1914); Strickland v. Deaconess Hosp., 735 P.2d 74 (Wash. App. 1987).

[117] Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (holding that the constitutional right to privacy includes the right to bodily privacy).

[118] Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

[119] Rochin v. California, 342 U.S. 165 (1952).

[120] Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990).

[121] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[122] Roe v. Wade, 410 U.S. 113 (1973).

[123] Remy v. MacDonald, 801 N.E.2d 260 (Mass. 2004).

[124] Chenault v. Huie, 989 S.E.2d 474 (Tex. Ct. App. 1999).

[125] Stallman v. Youngquist, 531 N.E.2d 355 (Ill. App. Ct. 1988) and Remy v. MacDonald, 801 N.E.2d 260 (Mass. 2004).

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.[126] The court focused on the "unique symbiotic relationship between a mother and her fetus" 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."[127]

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 the women 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 integrity concerns have prevented forced stomach pumping[128] and unwanted medical treatment.[129] It also appears to be the case where bodily integrity concerns have supported the right to use contraceptives[130] or obtain an abortion.[131] 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, this is really an argument about the

[126] Chenault v. Huie, 989 S.E.2d 474 (Tex. Ct. App. 1999).
[127] *Id.* at 475-76.
[128] Rochin v. California, 342 U.S. 165 (1952).
[129] Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990)
[130] Eisenstadt v. Baird, 405 U.S. 438 (1972).
[131] Roe v. Wade, 410 U.S. 113 (1973).

woman's right to procreative liberty, not bodily integrity. As discussed in Section 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 Appellate 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."[132] 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.[133] 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 women's right to obtain an abortion, particularly where recovery is limited to born-alive children. Harms 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.[134] 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. In light of these cases and additional concerns about the legal status of fetus', this article proposes that recovery for preimplantation harms be limited to children born alive.

The 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.[135] 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.

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[132] Stallman v. Youngquist, 531 N.E.2d 355 (Ill. App. Ct. 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.

[133] Remy v. MacDonald, 801 N.E.2d 260 (Mass. 2004).

[134] A mother's potential liability for non-genetic 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.

[135] 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. 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. Chenault, 989 S.E.2d 474, 475 (Tex. Ct. App. 1999).

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."[136] 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.[137] While the long line of 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," they are firmly rooted in American jurisprudence.[138] 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."[139] 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."[140] 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.[141] While the decision is based on both the First and Fourteenth Amendments,[142] 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

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[136] U.S. CONST. amend. XIV, § 1.

[137] *See e.g.*, 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); 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"); Parham v. J. R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children"); 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"); and Troxel v. Granville, 530 U.S. 57, 67 (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). *But see*, Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, A., dissenting) (arguing that the "right of parents to direct the upbringing of their children" lies not within the Fourteenth Amendment, but is an unalienable right "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'").

[138] Troxel v. Granville, 530 U.S. 57, 78 (2000) (citing *Meyers v. Nebraska*).

[139] Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, dissenting).

[140] *Id.* at 89.

[141] 406 U.S. 205 (1972).

[142] *Id.* at 234.

unable to support themselves.[143] 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 exist."[144] 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".[145] The dissent even said that "[t]his would be a very different case [if the parents'] 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] must prevail . . . ."[146] 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."[147] 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.[148] 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 section II, the court will find appropriate reasons to limit parental decision-making rights.

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.[149] In the context of preimplantation genetic interventions this means

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[143] *Id.* at 224.

[144] *Id.* at 224-25.

[145] *Id.* at 230.

[146] *Id.* at 238 (White, dissenting).

[147] Troxel v. Granville, 530 U.S. 57, 90-91 (2000) (Stevens, dissenting).

[148] *See e.g.,* Pierce v. Society of Sisters, 268 U.S. 510, 535-36 (1925) (commenting that a "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"); Prince v. Mass., 321 U.S. 158, 166 (1944) (stating that "the custody, care and nurture of the child [should] reside first in the parents, whose primary function and freedom include preparation for obligations that state can neither supply nor hinder").

[149] DEREK PARFIT, REASONS AND PERSONS, 351-379 (1982; Reprinted with further corrections 1987). Parfit's primary example for identifying the Non-Identity Problem is that of a 14-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:

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.[150] The Non-Identity Problem, which focuses on personal outcomes as a basis for determining moral harm[151], often forms the theoretical basis for dismissal of wrongful life claims brought by children who argue that they would have been better off aborted than born.[152] This section of the article addresses the implications of the Non-Identity Problem for both direct and indirect genetic interventions.

> 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 the 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.

[150] 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 plaintiff did not have a legally cognizable injury where his mother was not given the option of terminating her pregnancy, and hence his existence, prior to his birth).

[151] 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 . . . ." M. Hayry, *There is a Difference Between Selecting a Deaf Embryo and Deafening a Hearing Child*, 30, 30 J. Med. Ethics 510 (2004)(discussing how this analogy breaks down once it is personalized).

[152] *See e.g.*, Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967); Elliott v. Brown, 361 So.2d 546 (Ala. 1978); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987); Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988); Willis v. Wu, 607 S.E.2d 63 (S.C. 2004). *But see* Turpin v. Sortini, 643 P.2d 954 (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-Science Laboratories, 106 Cal.App.3d 811 (Cal. App. 2 Dist. 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).

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.[153] 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 section 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 conception to the moment of death.[154] Any intentional modification of this sequence, therefore, changes an already existing set of DNA and, arguably, changes the resulting person's identity. [155] 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. 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 is a trait that makes a person different from some number of other people, and therefore is a component of one's identity.[156] Some people who are deaf view themselves as part of the "deaf culture", and in this way recognize

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[153] A single gene may be modified to create a deaf child. Most traits, however, are polygenic, meaning that many genes interact with one another to create a particular phenotype. Another complication is that certain traits, like intelligence, are not determined solely by one's genotype, but have a significant environmental component.

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

[155] 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. Parfit discusses some of these views in REASONS AND PERSONS at 351-355. Recounting this debate here would subsume this article and so I discuss the role of personal identity in a very limited fashion.

[156] 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 their 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.

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 significantly 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. 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 him.[157] In most 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 fifty percent of the same DNA with the child.[158] Parfit suggests that it is impossible to know whether this child, one that shares at least fifty percent of his DNA, would have been him.[159] 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.[160] 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.[161] 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, seem particularly problematic in the torts context.

First, one might argue 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

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[157] REASONS AND PERSONS at 351-52.

[158] Id. Both he and the other child would have had the same genes contained in his mother's egg, roughly fifty percent.

[159] Parfit acknowledges that this is a controversial claim. He does, however, say 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." Id.

[160] Identical twins never have perfectly identical genes. There may be slight differences in mitochondrial DNA and differences in telomere length, etc.

[161] Some have even argued that there is no difference between choosing a deaf embryo via PGD and deliberately deafening a hearing child. J. Harris, *Is there a Coherent Social Conception of Disability?* 26 J. Med. Ethics 95, 97 (2000); *But see* M. Hayry, *There is a Difference Between Selecting a Deaf Embryo and Deafening a Hearing Child*, 30 J. Med. Ethics 510 (2004)(arguing that Harris is wrong because his argument focuses improperly on impersonal outcomes and not personal outcomes).

question does not alter my conclusion for reasons already discussed on pages 20 and 21. 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. 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.

The second argument focuses on the difference in the level of physical intrusion. While both genetic intervention and post-birth 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. 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 cognitively process his loss of hearing.[162] 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; a problem that 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 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. 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 is worse than nonexistence his claim will fail.[163] 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.

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[162] At least one case has held that a minor child could recover damages where medical providers failed to diagnose the child's hereditary hearing defect before birth. Turpin v. Sortini, 643 P.2d 954 (Cal. 1982).

[163] Of all the genetic conditions that exist, very few could be said to make life worse than nonexistence. One of the few diseases which might create a valid claim is Tay Sachs. *See* Curlender, 106 Cal.App.3d 811. *See also* Maxine A. Sonnenburg, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice*, S. CAL. L. REV. 477 (1982) (discussing the need for a new cause of action to benefit plaintiffs like the child with Tay Sachs in *Curlender*).

E. Parental Liability for Nonfeasance[164]

One question that inevitably appears 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. 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, however, liability should not attach to parental nonfeasance.

Parental decisions to forgo genetic interventions (for example a parental decision to forego a genetic modification that would correct a genetic defect prior to implantation) should not create parental tort liability. It is a basic tenant 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 . . . ."[165] "The fact that the defendant foresees harm to a particular individual from his failure to act does not change the general rule."[166] 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' action. 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 only created where the defendant assumes a duty to act or has a special relationship with the plaintiff.[167]

According to tort law, a defendant can assume a duty to act reasonably where the defendant innocently causes harm,[168] innocently increases the risk of harm to others,[169] or acts affirmatively to provide assistance to one who is helpless.[170] 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 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.

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[164] 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 § 13 cmt. c (1977). Therefore, this article conceives of tort claims for parental nonfeasance as negligence claims.

[165] DAN B. DOBBS, THE LAW OF TORTS § 314 (West Group 2000).

[166] Id.

[167] DAN B. DOBBS, THE LAW OF TORTS § 314 (West Group 2000).

[168] RESTATEMENT (SECOND) OF TORTS § 322 (1977). *See also,* DAN B. DOBBS, THE LAW OF TORTS § 316 (West Group 2000) (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).

[169] RESTATEMENT (SECOND) OF TORTS § 321 (1977). *See also,* DAN B. DOBBS, THE LAW OF TORTS § 316 (West Group 2000) (For example, "if 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").

[170] RESTATEMENT (SECOND) OF TORTS § 324 (1977). *See also,* DAN B. DOBBS, THE LAW OF TORTS § 318 (West Group 2000).

While this line of reasoning may be persuasive to some readers, it has yet to appear in any tort cases, and recent trends suggest that it is unlikely to take hold in future cases. Early courts permitted the sterilization of the mentally incompetent in part because they feared the spread of "bad genes."[171] But concerns about the right to privacy and the right to procreative liberty have put in place strict requirements for those who wish to sterilize the mentally incompetent.[172] Given these advances in the law, it is unlikely that tort law will limit procreative liberty of any person who may be 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.[173]

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.[174] 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 (see section V(b)), 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

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

[172] *See e.g.,* Matter of Romero, 790 P.2d 819 (Colo. 1990).

[173] Curlender v. Bioscience Laboratories, 106 Cal. App. 3d 811, 829 (Cal. App. Ct. 1980).

[174] West's Ann. Cal. Civ. Code § 43.6.

technologies for the purposes of creating a disabled child because the decision being constrained by the duty occurs prior to implantation.

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[175] 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 techniques 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.[176] 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.[177] 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 section 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. This troubles many commentators. 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."[178] 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 subjective values".[179] "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."[180]

But this concern seems overly broad. Juries make inherently value laden decisions daily.[181] 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. In fact, the vagueness of the standard for negligence, "that of a reasonably prudent person",

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[175] 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.

[176] Most insurance companies do not cover the costs of genetic screening unless the couple is at a known risk for having a fetus with a genetic abnormality.

[177] Many embryos conceived via IVF never develop well enough to be implanted, and the number of surviving embryos drops even more when invasive technological procedures like PGD are used.

[178] Chenault v. Huie, 989 S.E.2d 474, 477 (Tex. Ct. App. 1999).

[179] *Id.*

[180] Chenault v. Huie, 989 S.E.2d 474, 477 (Tex. Ct. App. 1999).

[181] DAN B. DOBBS, THE LAW OF TORTS § 148 (West Group 2000) (noting that "part of the jury's role is to make normative decisions or value judgments . . .").

encourages juries to make value laden decisions. As Steven Hetcher writes, "In 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."[182] This is a well-recognized feature of juries, and one that troubles may 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."[183] Jurors would be asked to consider the religious and moral beliefs of the parents as well as the parents' socioeconomic situation.[184] Ideally, this approach would allow juries to adopt a reasonably prudent parent standard of care, while giving a little extra 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.[185] 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.[186]

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

[183] Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 525-26 (1982).

[184] 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. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM (1985).

[185] Zepeda v. Zepeda, 41 Ill. App. 2d 240 (1963).

[186] Id. at 260.

Of course, most of these suits 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.

Yet quotes such as this do beg certain questions. Why is choosing your child's genetic composition different from all of the other choices that parents make in an effort to have their child fit the image that parents aspire to? For example, a person hoping to sire an NBA basketball star might choose a mate who is extraordinarily tall and athletically gifted.[187] 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, 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 encourage their child to become something the parent desires may be psychologically harming the child,[188] 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 to 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 the course of his life upon reaching the age of majority. Furthermore, the child basketball star has the option of rebelling against his parents' choice while an embryo does not. Try as they might parents cannot force a child to try their best at sports or school. And much to the chagrin of many parents of pre-teens and teenagers, it is virtually impossible to force a child to do something that they do not want to do, especially since the law protects children from corporal punishment. The law also requires parents to leave a wide variety of life options open to children. Parents are required to send their children to school, and to provide food, clothing and shelter. 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 cannot be reversed. Where

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[187] 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*, 103 SPORTS ILLUSTRATED 12, 64-68, 70-72, 75-56 (adapted from the book *Operation Yao Ming* by Larmer).

[188] Wendy S. Grolnick, The Psychology of Parental Control: How Well-Meant Parenting Backfires (Lawrence Erlbaum Assocs. 2003).

parents are able to use direct genetic technologies, such as genetic manipulations prior to implantation, the technology may not exist to reverse theses choices. But even where the technology exists to reverse these genetic decisions, employing it may be both emotionally exhausting and physically invasive, not to mention costly. All of these things, particularly physically invasive nature and cost of reversing genetic decisions, makes them more difficult to reverse than environmental interferences.

C. Who Pays?

Where family members sue each other, one valid concern is where the money is coming from to compensate the injured child. In fact part of the rationale for parental tort immunity was based on monetary concerns. In particular, courts were concerned with family members colluding to create fraudulent claims against one another with the hopes of obtaining money from insurers and the preservation of family finances.[189] While these rationales for parental tort immunity have been repeatedly dismissed as no longer relevant,[190] 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 and PGD adds an average of $3,000-5,000 to that cost.[191] Direct genetic interventions are likely to cost more, and only 20-30% of health insurance plans currently cover the costs of IVF.[192] These numbers suggest that many parents using advanced reproductive technologies to create children with disabilities are likely to be relatively wealthy. 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, if any, insurance money will be paid to cover judgments against parents.

A final option is that no one pays. Some studies show that as few as 25% of civil judgments in the United States are fully satisfied.[193] If this number is correct, then large numbers of judgments are either unsatisfied or partially satisfied each year. Yet citizens still believe in and champion the torts 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.

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[189] Since the advent of parental tort immunity several reasons for the doctrine have been espoused, 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." M.J. Rooney, et. al., *Parental Tort Immunity: Spare the Liability, Spoil the Parent*, 25 NEW ENG. L. REV. 1161 (1991).

[190] Id.

[191] Debora L. Spar, *Where Babies Come From: Supply and Demand in an Infant Marketplace*, 84 HARV. BUS. REV. 2, 133-42 (Feb. 2006). PGD adds an average of $3,000-$5,000 to the cost of an IVF cycle. See John A. Collins, M.D., *Preimplantation Genetic Screening in Older Mothers*, 357 NEW ENG. J. MED. 61, 61 (2007) (internal citations omitted).

[192] Jessica L. Hawkins, *Separating Fact from Fiction: Mandated Insurance Coverage of Infertility Treatments*, 23 WASH. U. J. L. & POL'Y 203 (2007). Currently, fifteen states have laws mandating coverage for infertility treatments. *Id.*

[193] Fiona D'Souza, *LLM Perspective: The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China*, 30 Fordham Int'l L. J. 1318 at n. 299 (2007)(noting that data is hard to come but citing a 1987 study from New Jersey);

VII. 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 successfully sue his parents 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 forego 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 later-born children to suffer a moral harm, these moral harms are not legally cognizable.