

ASSISTED REPRODUCTION AND THE FRUSTRATION OF GENETIC AFFINITY: INTEREST, INJURY, AND DAMAGES

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In 1978, Louise Brown became the first person born through in vitro fertilization—the world's first “test-tube baby.”¹ Since then, the use of reproductive technology has grown dramatically. In 1996 alone, 64,036 assisted reproductive technology procedures were performed in the United States,² resulting in the births of over 20,000 babies.³ There are at least 300 fertility clinics throughout 45 states, Puerto Rico, and the District of Columbia.⁴

Assisted reproductive technology (ART) includes all those procedures in which eggs or sperm are removed from the body of a prospective parent and subsequently transferred into the body of the woman who will carry the baby.⁵ Of these procedures, the best known and most frequently used is in vitro fertilization (IVF), in which a woman's

* Numerous staff members of the *New York University Law Review* provided insightful commentary on earlier drafts of this Note. The author would particularly like to thank Iris Bennett, Lewis Bossing, Jane Small, and Monica Washington for their dedicated and expert editorial assistance.

¹ See Richard M. Weintraub, *First Test-Tube Baby Born in British Hospital*, Wash. Post, July 26, 1978, at A1; *Test-Tube Baby Pioneers Disclose First Details*, Wash. Post, Aug. 12, 1978, at A17. For a more extensive contemporary account of the event and its perceived implications, see Peter Gwynne et al., *All About That Baby*, Newsweek, Aug. 7, 1978, at 66.

² See Centers for Disease Control and Prevention, *1996 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports 6 (1998)* [hereinafter CDC Report]. The Centers for Disease Control and Prevention define “assisted reproductive technology” (ART) as “[a]ll treatments or procedures that involve the handling of human eggs and sperm for the purpose of helping a woman become pregnant.” *Id.* at 339. The number given above includes all “ART cycles”: instances in which an ART procedure or treatment is carried out, those in which a woman has undergone ovarian stimulation intending to have an ART procedure, or, in the case of frozen embryos, those in which frozen embryos have been thawed for the purpose of implantation. See *id.*

³ See *id.* at 6.

⁴ See *id.* at 37-336 (reporting success rates and other data from fertility clinics in every state except Alaska, Idaho, Maine, Montana, and Wyoming).

⁵ See *id.* at 339. Other procedures for treating infertility, not relevant to this Note, include hormone therapy (to stimulate production of eggs or sperm), use of antibiotics (to treat reproductive tract infections), traditional surgical techniques, and microsurgery. See Office of Technology Assessment, 100th Cong., *Infertility: Medical and Social Choices* 49, 118-25 (May 1988) [hereinafter OTA, *Infertility*].

eggs are removed and fertilized in a laboratory.⁶ The resulting embryos are then implanted in a woman's uterus,⁷ and a conventional pregnancy ensues. Other procedures include gamete intrafallopian transfer (GIFT), in which unfertilized eggs and sperm are placed in a woman's fallopian tubes,⁸ and zygote intrafallopian transfer (ZIFT), in which the eggs are fertilized in the laboratory and likewise transferred to the fallopian tubes.⁹

In most cases, the eggs and sperm used in ART procedures come from the female and male partners, and the implanted zygote shares their genetic characteristics.¹⁰ However, a small percentage of ART procedures use donated eggs and sperm.¹¹ For the most part, the functional interchangeability of gametes has been beneficial since it permits egg and sperm donation, and thus enables many otherwise infertile¹² individuals to have children.¹³ At the same time, however, the physical separation of a person from his or her reproductive mate-

⁶ See CDC Report, *supra* note 2, at 6 (describing in vitro fertilization (IVF) and noting that it was used in 71% of ART procedures in 1996). IVF, which has been described as "[b]y far the most visible, dramatic, and important assisted reproductive technique," has been used in over 30,000 successful pregnancies worldwide. John A. Robertson, *Children of Choice* 8-9 (1994).

⁷ See CDC Report, *supra* note 2, at 6, 340.

⁸ See *id.* at 339.

⁹ See *id.* at 341.

¹⁰ See *id.* at 6 fig.1 (showing that 78% of ART procedures use fresh embryos created from egg and sperm of couple, 14% use frozen embryos previously created from egg and sperm of couple, and 8% use donated eggs or embryos).

¹¹ About 8% of ART procedures in 1996 used donated eggs or embryos. See *id.* Although there are no exact figures available for the number of pregnancies involving sperm obtained from sperm banks, estimates range from 6000 to 15,000 pregnancies per year. See John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. Cal. L. Rev. 939, 1004 & n.213 (1986) (providing estimate and citing other figures).

¹² The medical term "infertility" refers to the reduced ability of an individual or couple to produce children; the total inability to reproduce denotes "sterility." See Mabelle M. Seibel, *Infertility* 4 (2d ed. 1997) (distinguishing between infertility and sterility); OTA, *Infertility*, *supra* note 5, at 49 (distinguishing between "surgically sterile" (impossible to have baby), "impaired fecundity" (nonsurgically sterile or difficult or dangerous to have baby), and "fecund" (no known physical problem)). Typically, a couple is considered "infertile" when no pregnancy has occurred in a year of coital intercourse without contraception. See Seibel, *supra*, at 4 (citing "widely accepted definition" proposed by American Fertility Society). At least one commentator has noted that gay and lesbian couples who wish to have children are similarly "infertile." See Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 *Hastings L.J.* 1007, 1008-09 (1996).

¹³ See Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 *Wis. L. Rev.* 297, 310-11 ("Reproductive technology's ability to subdivide biological procreation both multiplies the options and makes them available to individuals whose choices were previously limited.").

rial creates new problems, and with them, questions about custody,¹⁴ paternity and maternity,¹⁵ and identity.

This physical disjunction creates a risk that fraud or negligence, committed by a medical provider, may frustrate a person's desire to have a child with whom he or she shares certain heritable traits. A number of such incidents have occurred, and more may be expected as the use of ART becomes increasingly widespread. Consequently, users of ART face hazards not like any encountered by those who procreate coitally.

One recent, well-publicized example involved a scandal at a fertility clinic at the University of California at Irvine. Beginning in 1994, over one hundred lawsuits were brought against the clinic, alleging that doctors there had stolen the eggs of female patients and, without the knowledge or consent of those women, had implanted the eggs in other patients.¹⁶ In another highly publicized case, a fertility doctor in Virginia, Cecil Jacobson, repeatedly substituted his own sperm for that of promised anonymous donors over a ten-year period.¹⁷ There have been at least three reported cases in which women sued fertility clinics alleging that, due to the negligence of the clinic, they were im-

¹⁴ See, e.g., *McDonald v. McDonald*, 608 N.Y.S.2d 477, 480 (App. Div. 1994) (holding, in custody dispute, that divorced woman who had used donor eggs was "natural mother" and entitled to custody since she had both borne child and acted as social mother).

¹⁵ See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (holding in surrogate pregnancy case that identity of natural parent is determined by who intends to procreate and to raise child); *Belsito v. Clark*, 644 N.E.2d 760, 767 (Ohio Ct. C.P. 1994) (holding in surrogate pregnancy case that, absent contrary consent or waiver, individuals who provide genes of child are "natural parents"); see also John Lawrence Hill, *What Does It Mean to Be a "Parent"?* *The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. Rev. 353, 413-20 (1991) (arguing for definition of parentage based on intent rather than biology).

¹⁶ The number of lawsuits arising out of the University of California at Irvine (UC-Irvine) scandal continues to grow, even as others are settled. See Susan Kelleher, *Woman Sues Hospital, UCI, Saying Her Eggs Were Misused*, Orange County Reg., Mar. 5, 1998, at B2, available in 1998 WL 2616257 (reporting filing of 106th lawsuit arising from incident, and reporting 74 settled lawsuits); Tracy Weber & Julie Marquis, *University Accuses Doctors of Several Violations*, L.A. Times, May 26, 1995, at A3 (reporting lawsuit filed by UC-Irvine officials); *Notable Settlement*, Nat'l L.J., Aug. 25, 1997, at A11 (reporting \$10 million in settlements for 50 couples). Exactly why doctors would steal eggs from some women and implant them in others may require some explanation. Because the causes of infertility differ between patients, one woman's eggs (or one man's sperm) may be more likely to create a viable pregnancy than another's. See Seibel, *supra* note 12, at 5. Since fertility clinics make their reputations, in part, by their success rates, there may be substantial incentives for fraud where substitution of reproductive material increases the odds of successful pregnancy. See Keith Alan Byers, *Infertility and In Vitro Fertilization*, 18 J. Legal Med. 265, 302 (1997) (describing importance of success rates to consumers).

¹⁷ See Robert F. Howe, *Citing Cruel Lies by Jacobson, Judge Gives Him 5 Years, Fine*, Wash. Post, May 9, 1992, at D1 (describing Jacobson's conduct). Jacobson was eventually convicted on 52 counts of fraud and perjury. See *id.*; see also Robertson, *supra* note 6, at 8, 237 n.3 (noting conviction).

pregnated with sperm of men other than their chosen donors.¹⁸ In each of these cases, these women expected that their children would possess certain genetic characteristics; that expectation was frustrated. Because none of these cases has ever resulted in a civil trial, the relevant legal questions remain unresolved.¹⁹

These incidents certainly involve an invasion of legal rights. Plaintiffs might bring suit on any number of theories, ranging from breach of contract to conversion, misappropriation, and fraud.²⁰ Regardless of the basis for the cause of action, however, two aspects of such cases are plagued by uncertainty and ambiguity: the nature of the injury suffered, and the extent of damages. This Note addresses both of these difficult areas.

The premise of this Note is that parents have an interest in having children with whom they share symbolically identifying traits,²¹ and that this interest is a significant motivation in the decision to use ART. Consequently, if fraud, negligence, or other breach of legal duty frus-

¹⁸ See Edward A. Adams, Court Rejects Child's Claim in Alleged Sperm Bank Mix-Up, N.Y. L.J., Sept. 10, 1990, at 2 (dismissing \$10 million damage claim against sperm bank, processing unit, and three physicians); Ann Davis, High-Tech Births Spawn Legal Riddles, Wall St. J., Jan. 26, 1998, at B1 (describing lawsuit alleging that hospital used wrong sperm, with result that interracial couple had white children); Frances D'Emilio, Gynecologist Accused of Abuse in "Test-Tube" Birth, Associated Press, Apr. 5, 1995, available in 1995 WL 4381894 (reporting indictment of fertility doctor in Naples, Italy, for allegedly using sperm of only two donors to impregnate hundreds or thousands of women); Ronald Sullivan, Mother Accuses Sperm Bank of a Mixup, N.Y. Times, Mar. 9, 1990, at B1 (same); Sperm Mix-Up Lawsuit Is Settled, N.Y. Times, Aug. 1, 1991, at B4 (describing *Skolnick v. Idant Laboratories*, which ultimately settled for \$400,000); see also Dateline NBC, Inconceivable (NBC television broadcast, Oct. 19, 1998) (describing incident in which sperm were inadvertently mixed, causing IVF patient to give birth to "twins," one son of her husband, and other son of different, unidentified man). In another recent incident, a New Jersey couple sued a fertility clinic after several of their embryos accidentally were implanted in another of the clinic's patients. See New Jersey Couple Sue over an Embryo Mix-Up at Doctor's Office, N.Y. Times, Mar. 28, 1999, at 45. Given the deeply personal nature of such incidents, it is likely that a substantial percentage are never reported at all.

¹⁹ The absence of any caselaw on this point may be attributed to the confluence of two factors, both of which ultimately encourage settlement. First, the novelty of the legal claims and of the appropriate measure of damages may deter potential litigants from proceeding to trial. Second, given the deeply personal nature of the claims for plaintiffs and the adverse effects of negative publicity for defendants, all parties may wish to avoid publicizing the incident through a lawsuit. See *infra* note 117.

²⁰ See, e.g., Judith F. Daar, Regulating Reproductive Technologies: Panacea or Paper Tiger?, 34 Hous. L. Rev. 609, 646-47 (1997) (arguing that embryos and eggs are appropriately classified as property, and that their theft may be regulated under laws protecting property); John A. Robertson, Assisted Reproductive Technology and the Family, 47 Hastings L.J. 911, 918-19 (1996) (making similar argument).

²¹ In theory, a child has a similar (but not identical) interest in sharing a common genetic identity with his or her parents. This Note, however, confines its analysis to the parental interest.

trates that interest, those parents suffer a cognizable injury—even when that breach of duty results in the birth of a healthy baby. Recognition of the injury, however, raises more questions than it resolves, not the least of which is the problem of damages: Assuming that parents in these cases have a cognizable claim, what would the remedy be? Since no court has confronted this question, this Note analogizes it to wrongful pregnancy caselaw, concluding that the balance of countervailing harms and benefits developed in those cases best redresses the contemplated injury.

At the very outset, it is necessary to emphasize the difference between the interest in sharing symbolically significant identifying traits—defined here as the “interest in genetic affinity”—and the desire to have children with superlative genetic traits, often described as “eugenics.” When individuals use assisted reproduction so that their children will have the same heritable traits that they do, they act out of an interest in affinity and a desire to replicate the familial experience that results from coital reproduction. This interest in affinity is implicated whether the parents use their own genetic material (referred to here as “actual genetic affinity”) or that of donors whom they have selected because of their common genetic traits (here, “constructed genetic affinity”).²² When individuals make use of assisted reproduction and other technologies to have children who possess desirable attributes that the parents lack, they act out of an interest in eugenics. The interests thus defined are analytically, and critically, distinct.²³

Part I of this Note describes the context in which infertile persons use reproductive technologies, arguing that the decision to use assisted reproduction is motivated significantly by a desire to share certain personal, familial, and cultural traits with one’s offspring. The Note then addresses potential objections to recognizing a parental interest in a child’s genes, both in principle and in practice.

²² A second caveat is also necessary, lest the argument fall prey to charges of genetic essentialism at the outset. Although this Note will refer throughout to the parent’s interest in shared *genes*, it might be more accurate to describe the ultimate interest as one concerning traits critical to a particular construction of a shared identity. See *infra* notes 78-81 and accompanying text. Insofar as genetic similarity acts as a proxy for blood relationships or common ancestry, see *infra* notes 35-36 and accompanying text, “genetic affinity” may be the means by which parents derive a sense of familial identity. Insofar as genes play some role in determining behavior, in addition to or in reinforcement of social factors, genetic affinity may be one of the qualities that distinguish social parenthood from biological parenthood.

²³ The author takes no position as to whether or not parents have a legitimate interest in obtaining eugenic results for their children, and that issue is not discussed here.

No court has decided a suit alleging frustration of genetic affinity. Consequently, when considering the rights and remedies that would be applicable to such a case, one must look to other areas of the law for an appropriate analogy. Part II considers one such analogy: wrongful pregnancy.²⁴ Although still controversial in some respects, wrongful pregnancy cases share many of the central difficulties of an action for frustrated genetic affinity, particularly the subjective nature of the injury and consequent uncertainty of damages. More importantly, both types of action involve an invasion of subjective individual preferences regarding family formation and reproductive autonomy. After a survey of wrongful pregnancy decisions, Part II.A offers two conclusions. First, the proper measure of damages in a wrongful pregnancy case should be determined by the personal interests the plaintiff sought to protect by avoiding pregnancy in the first place. Thus, a jury should consider the extent to which the birth of a child interferes with those interests, along with any countervailing benefit that the parent derives from having that child.²⁵ Second, this counterbalancing of the parent's subjective injury is similarly helpful to ascertaining the scope of damages in a claim of frustrated genetic affinity.

The remaining sections of Part II apply the reasoning of the wrongful pregnancy caselaw to frustrated genetic affinity actions. These sections examine possible damage awards and address potential doctrinal and practical obstacles to the award of monetary damages.

I

THE PARENTAL INTEREST IN GENETIC AFFINITY

In many cases, the decision to use reproductive technology may be motivated largely by a desire to have children with whom one shares symbolic heritable traits that identify parent and child as members of the same familial, ethnic, or cultural group. Which traits are invested with symbolic value depends upon the heritable aspects of themselves or their culture that parents find most significant in constructing their own identity. Some parents may want children who combine both of their genetic traits and therefore represent the physical manifestation of the parents' emotional bond. Others may want children who share their national or ethnic ancestry, perhaps out of pride in that ancestry, a desire to share with their children a defining element of their own lives, or even a sense that lacking particular at-

²⁴ In a wrongful pregnancy action, plaintiffs assert that the negligence of a medical provider (typically in a sterilization procedure or an abortion) resulted in the birth of an unplanned child. See *infra* note 127 and accompanying text.

²⁵ See *infra* text accompanying notes 153-55.

tributes, the children will be unable to participate in their parents' cultural lives. Still others simply may desire to mimic the experience of traditional procreation, comparing their own experiences to the dominant pattern in which parents and children are linked by observable shared traits. As parents make explicit choices whether and how to reproduce, relying on the possibilities created by developments in reproductive technology, new interests and expectations arise. Simultaneously, misapplication of the new technologies has the power to disrupt these new interests, as well as long-settled expectations.²⁶ The importance of this desire for affinity, and of the decisions that it influences, counsels in favor of legal recognition of the affinity interest, or, stated more narrowly, in favor of legal recognition of the injury suffered when that interest is frustrated.²⁷

²⁶ See Shultz, *supra* note 13, at 298-99 (noting that technological innovation turns "what once were 'questions of fate' into 'matters of choice'" (quoting *In re Farrell*, 529 A.2d 404, 406 (N.J. 1987))). Roscoe Pound described the relationship between technological development, expansion of interests, and the scope of legal rights:

"A man's rights multiply as his opportunities and capacities develop. . . . The more civilized the nation, the richer he is in rights" The idea here is that interests,—that is, demands of the individual,—increase with increasing civilization, and hence the pressure upon the law to meet these interests increases the scope and character of legal rights.

Roscoe Pound, *Interests of Personality*, 28 *Harv. L. Rev.* 343, 343 n.2 (1915) (quoting Luigi Miraglia, *Comparative Legal Philosophy* 324 (John Lisle trans., 1912)).

²⁷ This Note does not consider in depth the constitutional arguments for recognition of the affinity interest. Arguably, the Constitution mandates that users of assisted reproduction be permitted to exercise control over the ethnicity or other heritable traits of their children. John A. Robertson has argued that the ability to control such traits may be a material factor in the decision to reproduce, and that the selection of offspring characteristics thus falls within the constitutional protection of reproductive autonomy. See Robertson, *supra* note 20, at 914 (arguing that married couples have fundamental right to engage in coital reproduction, that nonfertile couples have same interest in reproduction, and that any laws prohibiting access to reproductive technology would thus be subject to compelling state interest test); John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 *B.U. L. Rev.* 421, 424-25 (1996) (maintaining that "the main support for a right to engage in prebirth selection rests on the close connection between the expected characteristics of offspring and the decision whether or not to reproduce"); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 *Va. L. Rev.* 405, 430 (1983) (arguing that parents have right "genetically to manipulate egg, sperm, or embryo to provide a child with a certain genetic makeup"). But see Vicki G. Norton, *Unnatural Selection: Nontherapeutic Preimplantation Genetic Screening and Proposed Regulation*, 41 *UCLA L. Rev.* 1581, 1624-29 (1994) (reasoning that denying infertile couples access to IVF would have same effect as mandatory sterilization, and would therefore be unconstitutional, but denial of access to technology permitting selection of genetic traits would be permitted under Constitution).

In actions for wrongful pregnancy, a number of courts and individual judges have noted the constitutional right to limit or control procreation as weighing in favor of recognition of the cause of action and award of damages. See, e.g., *Boone v. Mullendore*, 416 So. 2d 718, 725 (Ala. 1982) (Faulkner, J., concurring specially); *Ochs v. Borrelli*, 445 A.2d 883, 885 (Conn. 1982) (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), and *Roe v.*

Extending legal protection to the affinity interest, however, implicates potentially conflicting interests as well. After exploring the nature of the affinity interest, this section examines and rejects four potential objections to legal recognition of the affinity interest: that it is impermissibly discriminatory; that it places undue emphasis on genetic information; that infertile parents who have a healthy baby do not suffer any real injury; and that a lawsuit predicated on such legal interest would cause unacceptable psychological harm to the child.

A. *The Case for Recognition of a Parental Interest in Genetic Affinity*

Infertile individuals and couples who decide to raise children have an alternative to assisted reproduction, of course: They can adopt.²⁸ For many individuals, however, adoption is not an adequate

Wade, 410 U.S. 113, 153 (1972)); Cockrum v. Baumgartner, 447 N.E.2d 385, 392 (Ill. 1983) (Clark, J., dissenting); Nanke v. Napier, 346 N.W.2d 520, 523-24 (Iowa 1984) (Wolle, J., dissenting); Troppe v. Scarf, 187 N.W.2d 511, 517 (Mich. Ct. App. 1971); Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973) (Cadena, J., dissenting). As this Note contends in Part II.A, pregnancy-related and affinity-motivated reproductive decisions implicate similar subjective interests and merit similar treatment.

Additionally, it may be possible to assert a constitutional right to determine the genetic traits of one's children premised not upon the right to reproductive autonomy, but rather upon the First Amendment right of association—to determine the nature of intimate personal relationships. This proposition finds support in the language of *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), a case in which plaintiffs challenged sex discrimination by the Jaycees:

[T]he Bill of Rights . . . must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . [C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty. The personal affiliations that exemplify these considerations . . . are those that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.

Id. at 618-19 (emphasis added) (citations omitted).

²⁸ Gay and lesbian couples may not always have the option of adopting, due to state law prohibitions, or as a result of laws or policies favoring married couples. See Charles J. Butler, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate over Same-Sex Marriage*, 73 N.Y.U. L. Rev. 841, 869-70 & nn.159-64 (1998) (describing legal and practical difficulties encountered by gays and lesbians seeking to adopt). Similar obstacles may arise when gays and lesbians attempt to use assisted reproduction.

substitute for creating children of their own.²⁹ The choice to undergo the invasive³⁰ and expensive³¹ medical procedures associated with

Also relevant to the decision whether or not to adopt is the centrality of pregnancy to some women's understanding of motherhood. That is, some women may rule out adoption, not because they desire a *genetic* link to the child, but because they desire the experience of pregnancy and perhaps the *biological* connection associated with childbirth. See, e.g., Dateline NBC: Ready Made, New Jersey Couple Has Triplets Through Embryo Adoption (NBC television broadcast, Sept. 14, 1998) [hereinafter Dateline] (quoting woman who used "adopted" embryos as saying "[T]hey're very much related to me at this point. My blood is coursing through their little veins and—and they're very much mine. Biologically they're not mine but maternally, I mean, they're mine. They're ours, I should say."). Consequently, the emphasis on shared genetic traits—the only biological connection males can share with their children—may reflect masculine more than feminine interests. See, e.g., Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. Cal. L. Rev. 623, 628 (1991) (noting "genetic narcissism" attributed more frequently to men than to women (citing Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* 243 (1989)); Ikemoto, *supra* note 12, at 1026 (noting that from feminist view, "the preference for the genetic link, rather than that formed by pregnancy and childbirth, is perfectly consistent with a male-centered perspective").

²⁹ Despite the frequency of adoptions—127,000 children were adopted in 1992—a substantial percentage of the population regards adoption as a less fulfilling experience than having children with whom one shares a biological connection. See Tamar Lewin, *U.S. Is Divided on Adoption, Survey of Attitudes Asserts*, N.Y. Times, Nov. 9, 1997, at 16. The first broad national survey of attitudes toward adoption in the United States, published in 1997, found that half of all respondents believed that adoption is "better than being childless, but . . . not quite as good as having one's own child." *Id.* Seventeen percent of those surveyed believed that even adoptive parents "get less satisfaction out of raising an adopted child," and 23% said that "sometimes it is harder to love an adopted child." *Id.*

The point of these findings is not to demonstrate that adoption is in fact a less rewarding form of parenting for those who choose it, and these data certainly do not support such a conclusion. Rather, the survey reveals perceptions of adoption that corroborate the tremendous personal value that many people place on the biological connection between parent and child. See, e.g., Andrews & Douglass, *supra* note 28, at 627 (observing that adopted child can fulfill many of reasons for having children, but that "our society still favors genetic and biological relatedness over social relatedness"); Hill, *supra* note 15, at 389 ("While adoption may satisfy one's desire to provide nurturance for a child, adoption cannot satisfy the yearning to create the child and to watch as a version of oneself unfolds and develops.").

³⁰ In order to induce the ovaries to produce a large number of eggs, the woman undergoes a series of hormone and drug injections, causing the ovaries to swell to the size of grapefruits. See Gina Kolata, *Clinics Selling Embryos Made for 'Adoption'*, N.Y. Times, Nov. 23, 1997, at 1. In rare cases, the ovaries may become overstimulated, causing fluid retention and, still more infrequently, kidney failure. See *id.*

³¹ Estimates for the cost of various medical procedures vary, but there is no doubt that they are inevitably expensive. See, e.g., Northridge Center for Reproductive Medicine, Fees (visited Mar. 16, 1999) <<http://www.northridgeivf.com/fees.html>> (listing price of IVF per cycle at \$4,000, IVF/GIFT combination per cycle at \$5,800, and egg donation at \$7,800 per cycle, not including optional procedures such as freezing of embryos (\$400) and sex selection (\$240)); Pacific Fertility Medical Centers, Addressing the Issue of Cost Containment (visited Mar. 16, 1999) <<http://www.pfmc.com/public/aicc.htm>> (describing IVF "Refund Plan" in which IVF prices are listed as ranging from \$13,400 to \$17,950 per cycle, but guaranteeing refund of certain expenses if procedures are unsuccessful); see also Andrews & Douglass, *supra* note 28, at 635 (stating that average cost to couple for infertility diagno-

ART instead demonstrates a deeply felt longing for a child of *one's own*.³² Ethicist Leon Kass has described this wish as

a couple's desire to embody, out of the conjugal union of their separate bodies, a child who is flesh of their separate flesh made one. This archaic language may sound quaint, but . . . this is precisely what is being celebrated by most people who rejoice at the birth of Louise Brown, whether they would articulate it this way or not.³³

Although Kass's description of "one's own" implies a narrow meaning of one's own genetic material,³⁴ that expression can also carry a broader meaning. Kass's "archaic" language also suggests an older concept with a more established legal pedigree—consanguinity. Consanguinity is defined as "kinship; blood relationship; the connection or relation between persons descended from the same stock or common ancestor."³⁵ As at least one court has observed, the modern equivalent of consanguinity is "shared DNA or genetics."³⁶ Because "shared genes" now occupy a role similar to "shared blood" in defining social relations, the desire for children of one's own may be partially satisfied by having children with whom one shares significant heritable traits.

The significance of those traits may derive from any one or more of several socially meaningful genetic connections. One of these, alluded to above, is a couple's desire to have children who are the literal

sis and IVF is \$22,217); Ikemoto, *supra* note 12, at 1030 (citing estimates of IVF charges from \$6,233 to \$8,000, and cost per delivery as high as \$211,940).

An understanding of the low success rates associated with the procedures informs their variable and high costs. See CDC Report, *supra* note 2, at 12 fig.7 (describing live birth rate per retrieval of eggs in 1996 as 25.9% for IVF; 28.7% for GIFT; and 30.3% for ZIFT); *id.* at 13 fig.9 (reporting 1996 overall live birth rate per cycle at about 27%); see also John D. Arras & Bonnie Steinbock, *Ethical Issues in Modern Medicine* 424 (4th ed. 1995) ("All of these techniques have discouragingly low 'take-home baby' rates. Even the best clinics treating the least-impaired couples report success rates only in the mid-30-percent range.").

³² See Andrews & Douglass, *supra* note 28, at 626-27 (stating that many infertile couples desire "a child with a genetic or biological link to them," and describing motives for that desire); Hill, *supra* note 15, at 389 ("It is beyond dispute that an important aspect of parenthood is the experience of creating another in one's 'own likeness.'"); see also Robertson, *supra* note 20, at 928 (asserting that couples use assisted reproduction to mimic coitally conceived family as closely as possible); *id.* at 929 (stating that "the intention of the parties will be, in almost all cases, to replicate the rearing relations of the coitally conceived model of the family").

³³ Leon R. Kass, "Making Babies" Revisited, 54 *Pub. Interest* 44 (1979), reprinted in Arras & Steinbock, *supra* note 31, at 430 (emphasis omitted).

³⁴ See Leon R. Kass, *The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans*, 32 *Val. U. L. Rev.* 679, 692 (1998) ("Flesh of their flesh, the child is the parents' own commingled being externalized and given a separate and persisting existence.").

³⁵ *Black's Law Dictionary* 375 (6th ed. 1990).

³⁶ *Belsito v. Clark*, 644 N.E.2d 760, 762-63 (Ohio Ct. C.P. 1994).

physical manifestation of the parental union.³⁷ Yet another motivation may be to have children who share a common ancestry with the parents (even if the children will not be related in the traditional sense), particularly where that shared ancestry is of deep cultural significance.³⁸ A third, related instance in which shared genetic traits may be especially important to parents arises where physical traits are essential to cultural identity.³⁹ Finally, the desire to have children with whom one shares seemingly superficial qualities of physical appearance, temperament, and interests⁴⁰ may reflect a desire to simulate, as closely as possible, the “normal” experience of being a parent.⁴¹

Thus, the majority of infertile individuals and couples who use ART⁴² reproduce by substituting technological *processes*—IVF, ZIFT, GIFT, etc.—for coital intercourse, thereby seeking to achieve the result they might have had were they not infertile.⁴³ A minority reproduce by substituting *reproductive material*—donor eggs and sperm—but still aim to achieve the result they might otherwise have had.⁴⁴

³⁷ See *infra* notes 45-53 and accompanying text.

³⁸ See *infra* notes 54-59 and accompanying text.

³⁹ See *infra* notes 60-64 and accompanying text.

⁴⁰ Of course, “nurture” as well as “nature” may play a role in determining behavior. This particular debate need not (and cannot) be resolved here. At this stage, the nature-nurture debate is one of degree, not kind, and both sides recognize that the interaction between genes and environment may be complex and mutually reinforcing. See Robert Plomin et al., *Behavioral Genetics* 203-04 (3d ed. 1997) (noting that genetically influenced characteristics, such as personality, “can affect how people select, modify, construct or perceive their environments”); Edward O. Wilson, *Consilience: The Unity of Knowledge* 142-43 (1998) (making similar observation). In any event, causal relationships between particular genes and particular behaviors have been documented, and more will likely come to light as research continues. See *id.* at 155 (citing examples of gene mutations affecting complex behaviors including dyslexia, aggressive behavior, and tendencies toward impulsiveness, curiosity, and capriciousness).

⁴¹ See *infra* notes 71-75 and accompanying text.

⁴² See CDC Report, *supra* note 2, at 6 fig.1 (showing that 8% of 64,036 ART cycles carried out in 1996 used donated eggs or embryos). Because the eggs of older women are less likely to implant and more likely to miscarry if they do, older women using ART are more likely to use donor eggs. See *id.* at 22 fig.17 (showing that over 70% of all ART cycles involving women over age 46 used donor eggs).

⁴³ See Robertson, *supra* note 20, at 928, 929 (arguing that in almost all cases, users of ART seek to imitate results of coital reproduction); cf. Peter Singer, *Creating Embryos*, in *Ethical Issues at the Outset of Life* 43 (William B. Weil & Martin Benjamin eds., 1987), reprinted in Arras & Steinbock, *supra* note 31, at 436 (noting that in one sense, IVF can be seen as “no more revolutionary than a microsurgical operation to remove [a] blockage in the [fallopian] tubes”).

⁴⁴ See, e.g., Mara Brill & Susan Levin, *Psychologic Counseling and Screening for Egg Donation*, in *Family Building Through Egg and Sperm Donation* 76, 86 (Machelle M. Seibel & Susan L. Crockin eds., 1996) (describing how couples seek donors with specific personal traits, sometimes like couple, sometimes not); see also *infra* note 74 (same).

A few anecdotes demonstrate how the desire for genetic affinity influences the reproductive choices and reproductive expectations of infertile persons. Betty and Michael Higgins, an interracial, infertile couple, sought the assistance of a fertility clinic.⁴⁵ As Betty described their feelings: "We wanted to have children together. . . . We wanted to both be biological parents of the children. And that was what our goal was."⁴⁶ Betty and Michael underwent IVF at a local fertility clinic, and Betty gave birth to twins, a boy and a girl.⁴⁷ Soon after, the Higgins learned that the babies' blood type was incompatible with their own, and a fertility clinic doctor suggested that they had been given the wrong embryos.⁴⁸ Despite warnings that confirming these suspicions might lead to losing the children, Michael insisted on DNA testing: "I felt what a joke. What a terrible, terrible joke. My name-sake, and it might not be mine."⁴⁹

The DNA test revealed that while Betty was the mother of the twins, Michael was not the father.⁵⁰ Overwhelmed by a sense that he had been "cheated,"⁵¹ Michael, who is African American, felt no biological connection to the two children, who appear white.⁵² Ultimately that disappointment, along with the conflict between Betty's devotion to the children and Michael's alienation from them, broke apart the Higgins' marriage.⁵³

Fears of switched sperm or eggs prompted one Brooklyn fertility clinic to introduce a program of *hashgacha*, or kosher certification.⁵⁴ Common in Israel, the practice requires that eggs and sperm be kept in a locked incubator to which only the rabbi and his assistant have keys.⁵⁵ Lineage, or *yichus*, plays an important cultural role in the Or-

⁴⁵ See Davis, *supra* note 18, at B1 (reporting Higgins' story); 20/20: A Miracle Gone Wrong (ABC television broadcast, May 23, 1997) [hereinafter 20/20] (same). Michael already had two daughters from a previous marriage, but Betty wanted children of her own. See *id.*

⁴⁶ 20/20, *supra* note 45.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ *Id.*

⁵⁰ See *id.*

⁵¹ *Id.*

⁵² See *id.* ("We have two children. I can't tell them I'm their father. There's nothing biological about them that is a part of me."); Fla. Suit Highlights In Vitro Industry's Controversies, USA Today, Nov. 15, 1996, at 3A (identifying ethnicity of each parent and describing children).

⁵³ See 20/20, *supra* note 45 (reporting that Betty and Michael Higgins had separated); Davis, *supra* note 18 (same).

⁵⁴ See Adam Dickter, Kosher Conception, Jewish Wk., July 11, 1997, at 10 (describing rabbinic supervision of fertilization procedures).

⁵⁵ See *id.*

thodox Jewish community.⁵⁶ Jewish laws about lineage may also add social and religious overtones to the personal tragedy encountered by parents like Betty and Michael Higgins. For example, the child of a married Jewish woman and a Jewish man who is not her husband is considered *mamzer*; *mamzerut* is a particular kind of illegitimacy with profound social consequences in the Orthodox Jewish community.⁵⁷ Doubts about the paternity of the male child of a high priest might prevent that child from performing priestly blessings.⁵⁸ The careful supervision of reproductive technology in Orthodox Jewish communities emphasizes not only familial identity but a shared cultural and ethnic identity as well.⁵⁹

Yet another example of the link between genetic traits and cultural identity arises in the deaf community.⁶⁰ Like Orthodox Jews concerned with the preservation of their cultural identity, many deaf people see deafness as a shared culture with its own language and customs. M. J. Bienvenu, a deaf political activist, expresses that very sentiment: "When I communicate in [American Sign Language], my native language, I am living my culture."⁶¹ Because deafness is seen as an attribute necessary to participation in that culture, some deaf

⁵⁶ See *id.* (explaining that some authorities discourage egg and sperm donation altogether). Most Jewish authorities agree that when a woman is impregnated with the sperm of a man other than her husband, the child is still considered Jewish and is marriageable. See *id.* According to Dr. Mordechai Halperin, director of the Schlesinger Institute for Medical Halachic Research at Shaare Zedek Hospital in Jerusalem, prevailing halachic opinion holds that the woman who bears the child and gives birth is the mother, even if the egg comes from another woman. Fatherhood, however, is always determined by genetics. See Carl Schrag, Yours, Mine and Ours, *Jerusalem Post Mag.*, July 1, 1994, at 10.

⁵⁷ See Haim Shapiro, Hadassah Insemination Lab Winning Rabbis' OK, *Jerusalem Post*, July 17, 1991, at 2.

⁵⁸ See Dickter, *supra* note 54, at 10.

⁵⁹ The desire for children who share one's ethnic identity is by no means limited to Jewish parents. In the context of embryo adoption, where infertile parents choose from preexisting, frozen embryos, many individuals express ethnic preferences. See Dateline, *supra* note 28 (quoting Dr. Mark Sauer of Columbia-Presbyterian Medical Center: "[M]any of our couples . . . will not ask, but demand a Jewish donor. . . . [I]t's not different for Asian-based nationals. I mean, Japanese want Japanese donors, not Chinese, not Korean.").

⁶⁰ Deafness is inherited in about 30% of all cases. See Andrew Solomon, *Defiantly Deaf*, *N.Y. Times*, § 6 (Magazine), Aug. 28, 1994, at 40. Even fertile deaf parents who carry genes for deafness are not assured that their children will also share the trait. Consequently, a combination of ART and preimplantation screening of embryos may be used to select the desired trait. This method of genetic selection already exists, but is normally used to *avoid* implanting embryos with certain traits, like Tay-Sachs disease. See Norton, *supra* note 27, at 1582-98 (describing techniques and availability of screening embryos for particular traits before implantation in mother); John A. Robertson, *Ethical and Legal Issues in Preimplantation Genetic Screening*, 57 *Fertility & Sterility* 1, 1-3 (1992) (same).

⁶¹ Solomon, *supra* note 60, at 40. The sense of deafness as culture is so emphatic that some deaf activists have attacked attempts to treat deaf children with cochlear implants as genocidal. See Edward Dolnick, *Deafness as Culture*, *Atlantic Monthly*, Sept. 1993, at 37,

parents prefer their children to be deaf.⁶² As one commentator observed:

[It is] likely that deaf parents feel that a deaf child would fit into their family better, especially if the parents themselves are "deaf of deaf" or if they already have one or more deaf children. Or perhaps the parents feel that [d]eafness . . . is an asset—tough at times but worthwhile in the end—like belonging to a racial or religious minority.⁶³

Understanding their own deafness as cultural, some fertile and infertile deaf parents might use ART, in conjunction with the screening of embryos before implantation, to ensure that their children share a defining experience of their lives.⁶⁴

In other cases, the desired genetic affinity may involve shared ancestry or physical appearance. Kathy Butler had an adult son from her first marriage, but when she remarried, she and her husband Gary "wanted a baby of their own."⁶⁵ Encountering fertility problems, and too old for adoption agencies in the United States,⁶⁶ they sought help at Columbia-Presbyterian Medical Center in Manhattan.⁶⁷ Embryos created with donated eggs failed to survive, but the Butlers' doctor informed them that the fertility clinic had on hand frozen embryos that could be "adopted."⁶⁸ The Butlers, both of Irish descent, hoped to find an embryo created from donors with Irish backgrounds, "or at

43 (citing criticism of cochlear implants as "child abuse" and "pathological"); Solomon, *supra* note 60, at 40 (describing such resistance).

⁶² See Dolnick, *supra* note 61, at 38 ("So strong is the feeling of cultural solidarity that many deaf parents cheer on discovering that their baby is deaf.").

⁶³ Dena S. Davis, Genetic Dilemmas and the Child's Right to an Open Future, *Hastings Center Rep.* Mar-Apr. 1997, at 7, 8 (describing potential use of genetic selection of embryos to affirmatively select those carrying trait for congenital deafness); see also Dolnick, *supra* note 61, at 38 (quoting Roslyn Rosen, then-president of National Association of the Deaf, as saying that she prefers deafness to being able to hear, and as likening deafness to ethnic identity).

⁶⁴ See Lois Shepherd, Protecting Parents' Freedom to Have Children with Genetic Differences, 1995 U. Ill. L. Rev. 761, 767 (arguing for "a right to familial attachment," which "would permit parents to conceive and bear children with their given genetic identity, different or not, without state scrutiny or intrusion").

⁶⁵ Kolata, *supra* note 30, at 1.

⁶⁶ See Dateline, *supra* note 28 (stating that Kathy Butler was 47 when couple turned to assisted reproduction).

⁶⁷ See Kolata, *supra* note 30, at 1.

⁶⁸ Such "premade human embryos" typically are created after another infertile couple decides against the procedure at the last minute and the donor, having already undergone a sequence of drug and hormone treatments, agrees to donate her eggs to the clinic. See *id.* Because the freezing of eggs has only very recently become possible, and remains difficult, see Gina Kolata, Successful Births Reported with Frozen Human Eggs, *N.Y. Times*, Oct. 17, 1997 at A1, doctors immediately fertilize the donated eggs with an assortment of commercially available sperm and then freeze the embryos. Consequently, the clinic has available a veritable catalog of embryos with identifiable coloring, ethnicity, and national

least light hair and light eyes.”⁶⁹ As the clinic had only embryos created from a brown-haired, brown-eyed Italian woman, however, the Butlers were unable to obtain embryos with those characteristics, and ultimately used embryos created from the Italian mother and a father of Russian, Romanian, and Hungarian descent.⁷⁰

Although the Butlers ultimately sacrificed the opportunity for greater genetic affinity in order to maximize their chances of having children, the availability of embryos with traits matching those of the parents will not always be so limited.⁷¹ As the practice of assisted reproduction becomes more widespread, the number of frozen embryos available should also grow.⁷² Moreover, prospective parents already have the ability to select among egg and sperm donors on the basis of ancestry or other heritable traits,⁷³ and may be expected to

ancestry. Prospective parents may then choose an embryo with the traits they desire, rather than solicit and screen an egg or sperm donor. See Kolata, *supra* note 30, at 1.

⁶⁹ Kolata, *supra* note 30, at 1 (quoting Kathy Butler).

⁷⁰ See *id.* Although Kathy Butler is half Welsh, she and her husband decided not to use embryos created from the sperm of a man with Welsh background. See *id.* Only two such embryos were available, and the Butlers opted to maximize their chances of a successful pregnancy by using the five available embryos from the Russian-Romanian-Hungarian father. See *id.*

⁷¹ See *id.* (“Some embryos are custom made by doctors.”). Financial considerations may also play a role—embryo adoption at Columbia-Presbyterian costs \$2,750, whereas an attempted pregnancy with specifically chosen egg and sperm donors may cost as much as \$16,500. See *id.*

⁷² Because most embryos produced in assisted reproduction do not survive, more are created than doctors may ultimately use. See Ruth Hubbard & Elijah Wald, *Exploding the Gene Myth* 113 (1997) (describing how, in IVF, “at least a half-dozen eggs are fertilized, of which only a few are usually implanted”). Parents who have had a successful pregnancy without using all of the eggs may store them frozen indefinitely, destroy them, or put them up for adoption. Already, the number of frozen embryos in storage is sufficiently large to generate concern, as well as practical problems. In August 1996, British fertility clinics incinerated approximately 3,300 embryos pursuant to the Human Fertilization and Embryology Act, which required that frozen embryos be destroyed after five years unless the parents instructed otherwise. See Youssef M. Ibrahim, *Ethical Furor Erupts in Britain: Should Embryos Be Destroyed?*, *N.Y. Times*, Aug. 1, 1996, at A1. British authorities declined offers to adopt the embryos, saying that it would be “legally and ethically wrong” for others to adopt embryos without permission of the genetic parents. See Glenda Cooper, *Today: The End for 3,000 Frozen Embryos*, *Independent* (London), Aug. 1, 1996, at 1 (quoting spokeswoman from Human Fertility and Embryology Authority).

⁷³ See Andrews & Douglass, *supra* note 28, at 663-64. Egg donors are categorized by physical characteristics such as weight, height, eye and hair color, and national origin. See *id.* at 664; see also Lisa Belkin, *Pregnant with Complications*, *N.Y. Times*, Oct. 26, 1997, § 6 (Magazine), at 34 (describing egg donor agency’s screening of applicant donors through form “requesting information on everything from their paternal grandfather’s eye color to whether their aunts or uncles ever suffered a heart attack or stroke,” and stating that applicants also provided photographs displayed in binders and ordered by coloring— “light hair, dark hair, non-Caucasian”). Sperm donors are similarly classified. See, e.g., Cryogenic Laboratories, Inc., *Semen Donor Catalog* (visited Oct. 16, 1998) <<http://www.cryolab.com/donor/seldonor.htm>> (listing semen donors and providing chart with

use that ability to mimic the natural biological result as much as possible. One prospective father, for example, expressed a desire that the egg donor be able to use a computer, as his wife was a computer programmer.⁷⁴ The level of personal detail included in anonymous catalogs of sperm donors goes far beyond that necessary to choose superlative traits, as might be expected if parents were trying to engineer genetically superior children. Rather, the inclusion of details such as coloring, build, ethnicity, religious practice, education, profession, hobbies, and personality profiles⁷⁵ readily allows parents to select donors like themselves, so that they still may be able to have children like themselves.

The techniques employed in ART—hyperstimulation of the ovaries to produce multiple eggs at once, harvesting of eggs, and freezing of eggs, sperm, and embryos⁷⁶—permit the creation of standing inventories of reproductive material. Sperm banks, fertility clinics, and egg brokers can and do maintain catalogs of donors, classified by ethnicity, physical appearance, and distinguishing traits, and parents are able to discriminate amongst donors on the basis of that information.⁷⁷

The preceding anecdotes demonstrate the personal and cultural significance of genetic or biological connections with one's offspring. By using their own genetic material, or by selecting donors with traits

each donor's ethnicity, maternal and paternal ethnic ancestry, blood type, hair color and texture, eye color, complexion color, height, weight, bone size, education, occupation, interests, and hobbies, with links to "Donor Profiles" that demonstrate personality traits, character, and religious practice).

In the context of adoption, the desire for physical similarity between parents and children has been criticized as the "look-alike urge." See, e.g., R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 *Yale L.J.* 875, 888 n.44 (1998). Banks notes that policies of matching adoptive parents and children on the basis of race are vestiges of the theory of "'complete substitution' . . . in which adoptions are made to mimic biological parent-child relationships as much as possible." *Id.* at 878 n.8 (quoting Leslie Harris et al., *Family Law* 1185 (1996)).

⁷⁴ Brill and Levin describe that prospective father:

When egg donation first became available, couples were so grateful that they expressed few expectations. Simple hopes such as wanting the donor to be a nice person were all that patients asked for. As the procedure [of egg donation] has become more popular and commonplace, couples' expectations have changed dramatically. . . .

During one couple's consultation the man stated his desire that the donor have a curriculum vitae and listed the features and characteristics that he wanted on it. They included high intelligence, attractive physical appearance, high energy, and the ability to use a computer (his wife was a computer programmer). . . . He had not totally given up the genetic connection to his wife.

Brill & Levin, *supra* note 44, at 86.

⁷⁵ See *supra* note 73 (describing catalogs of egg and sperm donors).

⁷⁶ See Robertson, *supra* note 6, at 9; Seibel & Crockin, *supra* note 44, at 3-5.

⁷⁷ See *supra* note 73.

similar to those they possess, prospective parents seek an experience of reproduction and family as much as possible like that of conventional reproduction and family.

This meaningful connection is the same whether it comes from actual genetic affinity—having a child who is the product of one's own genetic and reproductive material—or from constructed genetic affinity—having a child who shares valued heritable traits through the use of donor gametes. Although, for the sake of convenience, this Note uses the terms “actual” and “constructed,” the dichotomy suggested by the language is misleading. Recognition of the fact that affinity may be constructed in some instances compels the conclusion that affinity is constructed in every instance.⁷⁸ Biological experience—that children resemble their parents in mind, body, and temperament—is highly determinative of the social construct: which traits are necessary to a sense of affinity, and which mutual characteristics distinguish a “family” from other social groups, such as church choirs and hockey teams.

Because the biological experience of family is so widely shared, it leads to a widely shared social construction of what family is, and what makes it meaningful.⁷⁹ So constructed, the experience of having a family is of tremendous social consequence. Participation in a differently constructed social unit—a “family” that does not share identifiable traits—may be rewarding, but may not provide the normative experience many people seek and value.⁸⁰ Put more concretely, so long as the vast majority of people reproduce coitally, they will bear children who look and act like them,⁸¹ and so long as those parents and children find enjoyment and fulfillment in their shared qualities, that construction of family will persist, and that experience of family will be sought.

The decision to use reproductive technology necessarily involves numerous other decisions, all of which implicate the importance of affinity in some way: whether to use reproductive technology at all, or

⁷⁸ Since affinity is simply a sense of connectedness derived from some commonality, it is just as much “constructed” when shared genetic *material* is invested with symbolic meaning as when shared genetic *traits* are so invested.

⁷⁹ See Hill, *supra* note 15, at 390 (stating that “it is only natural that our sublime and complex feelings regarding this issue reflect precisely the sentiment that law should preserve as a family unit that which nature has rendered genetically similar”).

⁸⁰ See *id.* at 389 (describing how family formation through adoption may not satisfy same desires as family formation through use of reproductive technology); cf. Katherine Dunn, *Geek Love* (1989) (fictional tale describing family of genetically mutated carnival freaks whose sense of familial identity is derived from their shared experience of abnormality and their common biological origins).

⁸¹ See *supra* note 40 (describing “nature versus nurture” debate and limits of its relevance to interest in genetic affinity).

to adopt; whether or not to use donated eggs, sperm, or embryos; what traits to seek in donors; and what traits to sacrifice when the ideal donor is unavailable. How parents answer these questions indicates the extent to which the desire for affinity is a primary motivation.⁸² Parents who make affinity-motivated choices in search of a family experience that comports with the widely shared construction of that experience suffer real injury when those choices are frustrated by the fraud or negligence of others.

B. Potential Objections to Recognition of Genetic Interests

This section considers several of the more challenging objections to recognizing parental interests in genetic affinity: whether genetic preferences are simply a form of illegitimate discrimination; whether genes should have such importance; whether loss of genetic affinity through the birth of a healthy child may be considered an injury; and whether possible harm to children from the litigation process outweighs the interest of parents in bringing suit over such an injury.

1. Illegitimacy of Discrimination

Even if parents have a legitimate interest in having children with whom they share significant traits, the particular *kinds* of traits an affinity-motivated parent might desire—ethnicity, ancestry, physical appearance—are the very characteristics which contemporary American society has explicitly determined to be illegitimate grounds for discriminating among persons. One might argue that the affinity interest, as described, is simply xenophobia writ small. This apparent contradiction can be reconciled only by recognizing that private, individual decisions about kinship and reproduction are qualitatively different from the kinds of decisions made in education, employment, and political life, in which discrimination on such bases is meritless.⁸³

⁸² For example, the Butlers, described *supra* notes 65-71 and accompanying text, demonstrated some interest in having the same ancestry as their child but ultimately chose donated embryos with slightly different backgrounds in order to maximize their chances of having a child. See *id.* A contrary decision would have demonstrated a stronger interest in affinity. Just how parents resolve such conflicts will provide the best possible evidence of the extent to which they are injured by the loss of genetic affinity, and these decisions should be considered carefully by the factfinder in determining the amount of damages. See *infra* notes 205-07 and accompanying text; cf. *Hartke v. McKelway*, 707 F.2d 1544, 1555 (D.C. Cir. 1983) (reasoning, in wrongful pregnancy case, that parents' motivations for choosing to avoid having children provide "best available evidence of the extent to which the birth of the child has in fact been an injury to them").

⁸³ See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 619-21 (1984) (distinguishing between personal decisions made in context of family and decisions made by nonselective public organizations); Elizabeth Bartholet, *Correspondence, Private Race Preferences in Family Formation*, 107 Yale L.J. 2351, 2353 & n.11 (1998) (arguing that value of auton-

Discrimination on the basis of genetic traits may be justified in part by examining the role of the trait in the decisionmaking process. Usually, discrimination on the basis of gender or ethnicity is impermissible because it is invidious—"arbitrary, irrational and not reasonably related to a legitimate purpose."⁸⁴ Wrongful discrimination is objectionable either because it is motivated by animus toward holders of a particular trait, or because through prejudicial ignorance, the trait is erroneously treated as a proxy for some other quality. One must therefore ask what purpose is served by preferring one genetic combination over another. Affinity-motivated choices should tend to emphasize symbolic traits, which derive significance from the prominent role they play in social and personal identity.⁸⁵ Such decisions therefore are not driven by animus toward any group, but rather celebrate identifying characteristics which, when shared among persons, reinforce a sense of group identity. The traits are not proxies for any quality, save membership in the group. Thus, it appears possible to distinguish between impermissible discrimination in the public sphere, and discrimination in offspring characteristics.

2. *Do Genes Really Matter?*

A second objection to legal recognition of an interest in genetic affinity challenges the functional significance of genetic information.

omy counsels against allowing state to prohibit race-conscious choices in adoption or procreation); cf. 42 U.S.C. § 3603(b)(2) (1994) (exempting from Fair Housing Act's antidiscrimination provisions dwellings for fewer than four families where owner lives in building).

An examination of how concerns about discrimination play out in the adoption context may be instructive. Parental race preferences in adoption have been the subject of considerable controversy. See Banks, *supra* note 73, at 877-78 & nn.2-5 (describing role of race in adoption as "an intensely and widely debated topic during the past decade," and citing writings of legal scholars, social scientists, journalists, and politicians).

Much of the criticism leveled at race-conscious decisionmaking by prospective adoptive parents has focused on two elements: the rights and interests of the child, see, e.g., Chip Chiles, *A Hand to Rock the Cradle: Transracial Adoption, the Multiethnic Placement Act, and a Proposal for the Arkansas General Assembly*, 49 Ark. L. Rev. 501, 521 (1996) (arguing that in Federal Multiethnic Placement Act, "consideration of race in child placement decisions fosters an illegitimate governmental encroachment on the child's liberty interest in defining his own racial identity"), and the role of state action in the adoption process, see, e.g., Banks, *supra* note 73, at 885 (arguing that "facilitative accommodation"—classification of potential adoptees by race so that adoptive parents can discriminate on basis of race—is unconstitutional only when applied by public agencies, though bad policy regardless). Arguably these two elements are of diminished importance in trait selection through assisted reproductive technology.

⁸⁴ Black's Law Dictionary 826 (6th ed. 1990).

⁸⁵ See, e.g., *supra* notes 54-59 and accompanying text (describing cultural and social significance of ancestry for some Orthodox Jews, as well as members of other ethnic groups); *supra* notes 60-64 and accompanying text (describing cultural significance of deafness).

If genes do not actually determine desired traits, the argument runs, affinity-motivated arguments rest on faulty premises—similar genes do not guarantee similar traits. This argument can be broken down into two aspects: (1) that the biological importance of genes in determining traits has been exaggerated greatly; and (2) that the social importance of heredity derives from outdated and illegitimate prejudices about class and race identity.⁸⁶ Responses to these objections follow.

One might object that the social significance of genetic information vastly exceeds its biological import.⁸⁷ Although, in popular opinion, genes play a substantial—if not deterministic—role in creating the identity of a person,⁸⁸ many scientists believe that this perception is exaggerated.⁸⁹ Complex interactions of multiple genes, along with equally complex environmental factors, are responsible for the development of each person.⁹⁰ Furthermore, assumptions about genetic heredity may be pseudoscientific proxies for generally discredited beliefs about the role of class or ethnicity with respect to inherited traits.⁹¹ Consequently, the preference for a particular set of genes may be predicated on the same kind of suspect assumptions that incorrectly and improperly equate certain physiological traits—for example, skin color—with stereotyped, socially constructed categories.

⁸⁶ See *supra* text accompanying notes 22-23.

⁸⁷ See, e.g., Hubbard & Wald, *supra* note 72, at 68-107 (criticizing general tendency to attribute causal relationships between individual genes and specific traits, diseases, or behaviors); Sandra Blakeslee, *Some Biologists Ask 'Are Genes Everything?'*, N.Y. Times, Sept. 2, 1997, at C1 (reporting that some biologists have begun to challenge "genocentric" views as promoting social acceptance of genetic determinism).

⁸⁸ See Dorothy Nelkin & M. Susan Lindee, *The DNA Mystique: The Gene as a Cultural Icon* 2 (1995) (claiming that "the images and narratives of the gene in popular culture reflect and convey a message [of] genetic essentialism" and that "DNA in popular culture functions, in many respects, as a secular equivalent of the Christian soul").

⁸⁹ See, e.g., Hubbard & Wald, *supra* note 72, at 72-107 (challenging genetic basis for tendencies toward disease or behavior). But see, e.g., Denise Grady, *Bool Two Studies Uncover Genetic Bases of Fear*, in *Mice*, N.Y. Times, Oct. 28, 1997, at F4 (describing study of 1,300 mice suggesting that mice carry heritable trait that influences susceptibility to fear).

⁹⁰ See Hubbard & Wald, *supra* note 72, at 36 (stating that "genetic conditions involve a largely unpredictable interplay of many factors and processes"); *id.* at 75 ("All biological traits . . . involve many genes and processes that take place in and outside the organism."); Wilson, *supra* note 40, at 141 (noting that there is no gene for playing piano well, but rather "a large ensemble of genes whose effects enhance manual dexterity, creativity, emotive expression, focus, attention span, and control of pitch, rhythm, and timbre").

⁹¹ See, e.g., Nelkin & Lindee, *supra* note 88, at 19-37 (describing early eugenics movement in United States and its tendency to substitute genetic explanations for race and class stereotypes); *id.* at 102-26 (describing contemporary attempts to explain gender, race, and sexual preference by appealing to genetic causes); cf. *United States v. Virginia*, 518 U.S. 515, 536 n.9 (1996) (describing discredited views of nineteenth-century medical practitioners opposing equal educational opportunity for women on ground that education would interfere with development of female reproductive organs).

Questions about the degree to which genetic factors genuinely influence personal traits, and the extent to which genetically driven characteristics are impervious to environmental factors, remain the subject of controversy.⁹² If desired characteristics are not genetically determined or influenced, but rather are socialized, that fact would undermine both the legitimacy and the weight of an interest in particular genes.

However, even the critics of genetic determinism concede that genes do play some role in personal identity, albeit a complex and frequently misunderstood role.⁹³ The parental interest in affinity, being largely a sense of shared identity through symbolic common traits (ancestry, appearance, etc.), will emphasize aesthetic rather than functional preferences.⁹⁴

This is not to say that the distinction between aesthetic and functional can always be drawn neatly—in many cases, traits that have an aesthetic value to the parent may also be desirable for the practical advantages they confer upon the child.⁹⁵

⁹² See *supra* note 40 (describing “nature versus nurture” debate).

⁹³ See, e.g., Hubbard & Wald, *supra* note 72, at 77 (acknowledging evidence of genetic role in type 1 diabetes); *id.* at 84-85 (acknowledging that genes, along with other factors, are involved in development of cancer).

⁹⁴ The criticism remains that the social significance of genes is undeserved and unhealthy, assuming a diminished biological role for genetic information. A trait valued for its symbolic meaning cannot properly be challenged for its lack of functional significance, but genes as symbols remain vulnerable to charges of xenophobia, racial reductionism, and classism. The debate over the appropriate significance of genes will not be resolved in this footnote. For a start, though, one should consider (1) whether self-identifying traits can only be recognized in opposition to other-identifying traits, (2) whether the preference for one trait necessarily expresses a denigration of alternative traits, and (3) whether, if the second question is answered affirmatively, the denigration of alternative traits requires the denigration of *individuals* possessing those traits.

Moreover, if parents seek particular genes for what they represent, rather than what they do, the suggestion that genes play a diminished functional role is simply irrelevant. The corollary in legal usage is a contract entered into for an aesthetic purpose, such as a contract to have one's portrait painted. In such cases, satisfaction of the contract is subject to the other party's good faith acceptance, not the usual reasonableness standard. See *Morin Bldg. Prods. Co. v. Baystone Constr., Inc.*, 717 F.2d 413, 415, 417 (7th Cir. 1983) (holding that satisfaction clause of construction contract should be construed to require reasonable rejection since aluminum siding of factory appeared to have functional, rather than artistic, purpose). The law recognizes that individual subjective preferences—with respect to portraits, literary and dramatic works, personal services, etc.—cannot be expected to correspond to an objective standard of rationality. See, e.g., *Schuyler v. Pantages*, 201 P. 137, 137-38 (Cal. Dist. Ct. App. 1921) (performance of vaudeville act subject to good faith rejection); *Gibson v. Cranage*, 39 Mich. 49 (1878) (painting of portrait subject to good faith rejection); *Crawford v. Mail & Express Pub. Co.*, 57 N.E. 616, 617 (N.Y. 1900) (writing of articles for newspaper subject to good faith rejection).

⁹⁵ Traits establish affinity predominantly by defining parent and child as members of the same social group. Since identification with some social groups confers economic and status advantages in a discriminatory culture, it may be difficult to distinguish affinity-moti-

One may still doubt that every genetic choice made by a prospective parent is animated solely by a longing to have a child in his or her own image. For example, the practice of advertising for egg donors in the campus newspapers of prestigious universities suggests that many parents look for donors of high intelligence.⁹⁶ While the expense of reproductive technology often requires that its users be relatively affluent, which in turn suggests that many users will be well educated,⁹⁷ it seems highly unlikely that so many are graduates of the top schools where donors are sought. When parents attempt, through genetic selection, to impart to a child characteristics they themselves lack, they seek to further eugenic, not affinity, interests and a different analysis may be necessary.⁹⁸ As narrowly defined here, the interest in genetic affinity concerns parents' desire to share personally significant genetic traits with their children, not an interest in acquiring for their children valued traits which the parents personally lack.⁹⁹

vated trait selection from selection directed toward conferring social advantage. See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709, 1711-13 (1993) (describing how ability to "pass" as white has allowed some African Americans to escape economic effects of racism); *id.* at 1731-37 (explaining how whiteness has classical attributes of property); *id.* at 1742 (describing social status advantages of whiteness).

⁹⁶ See Joseph Berger, *Yale Gene Pool Seen as Route to Better Baby*, N.Y. Times, Jan. 10, 1999, at 19 (describing advertisements placed in campus newspapers at Ivy League schools specifying that donors attend those schools and have minimum S.A.T. scores); see also Advertisement, *As an Egg Donor, You Can Give the Gift of Life*, Commentator (N.Y.U. School of Law), Sept. 24, 1998, at 7. But see Berger, *supra*, (stating that "some prospective recipients are not satisfied with" registries of donors because they "want donors from the same Ivy League schools they've attended").

⁹⁷ See Andrews & Douglass, *supra* note 28, at 663 (observing that socioeconomic demographics of gamete and embryo donation are same as demographics for IVF users); *id.* at 646 (describing IVF users as highly educated and of middle to upper economic status).

⁹⁸ See *supra* text accompanying notes 21-23; *supra* note 86. One might imagine a lawsuit in which parents claim that an egg or sperm donor misrepresented her or his educational background, and that the parents relied on that misrepresentation. In such case, however, the asserted injury would probably be eugenic, not affinity-related: The parents expected to raise the offspring of a person with demonstrated intelligence, with the hope that the child would share that intelligence. The affinity interest could only be implicated where the donor was selected for a trait *shared* by at least one of the parents.

⁹⁹ Moreover, technology allowing affinity-motivated decisions already exists and is (sometimes crudely) in use, whereas positive eugenics remains largely speculative. Germline cell therapy (manipulation of genes while the embryo's cells are still undifferentiated, such that the fully formed embryo and all its progeny will pass on any trait so acquired), perhaps the most explicitly eugenic technology, currently is subject to a *de facto* moratorium "because it is unclear both how to do it and for what conditions it might be appropriate." See Sherman Elias & George J. Annas, *Somatic and Germline Gene Therapy* (excerpted from *Gene Mapping: Using Law and Ethics as Guides* (1992)), reprinted in Arras & Steinbock, *supra* note 31, at 488, 494. Human cloning has not yet been banned in the United States (though there is such a ban in Britain, see Judy Mann, *The Brave New World of Cloning*, Wash. Post, Feb. 28, 1997, at E3), but President Clinton has forbidden federal funding of human cloning research, see Rick Weiss, *Clinton Forbids Funding of*

What matters in an action alleging loss of genetic affinity is that genes have a tremendous social significance that causes individuals to place a high value on particular genetic traits. Since the interest in affinity is not functional but subjective and aesthetic, the biological role of the gene should play little or no role in the assessment of whether or not a dissatisfied plaintiff has suffered legal injury.

3. *The Chimera of Injury*

One might be tempted to argue that is unseemly for someone afflicted with infertility and actively seeking to have a child to claim that the birth of a healthy baby is a compensable harm. This objection is premised, however, on a privileged view of reproduction in which the physical health of the baby is the only substantial variable.¹⁰⁰ As the stories in Part I.A demonstrate, the destruction of the genetic tie between parent and child can have profound consequences that have nothing to do with the child's health.

As some of the wrongful pregnancy cases discussed below demonstrate,¹⁰¹ the birth of a healthy child *can* be an injury, because the decision to have a child implicates a complex hierarchy of subjective preferences. In a wrongful pregnancy case, for example, the plaintiff may want a child in an abstract sense, but not at a particular time, not with a particular partner, or not under particular circumstances.¹⁰² The widespread use of birth control,¹⁰³ the availability of sterilization procedures, and the recognition of constitutional rights to contraception¹⁰⁴ and abortion¹⁰⁵ all provide substantial evidence that,

Human Clone Studies, Wash. Post, Mar. 5, 1997, at A10, and the FDA has asserted that its approval would be a prerequisite to any human cloning procedure, see Rick Weiss, *Human Clone Research Will Be Regulated*, Wash. Post, Jan. 20, 1998, at A1.

¹⁰⁰ Cf. Note, *When Love Is Not Enough: Toward a Unified Wrongful Adoption Tort*, 105 Harv. L. Rev. 1761, 1777 (1992) (arguing that "society should not force adopting parents to assume risks greater than those faced by their biological counterparts").

¹⁰¹ See *infra* Part II.A. Most courts deciding wrongful pregnancy claims have been reluctant to describe the birth of a healthy child as an injury. See, e.g., *Boone v. Mullendore*, 416 So. 2d 718, 722-23 (Ala. 1982); *Fulton-DeKalb Hosp. Auth. v. Graves*, 314 S.E.2d 653, 655-56 (Ga. 1984); *Cockrum v. Baumgartner*, 447 N.E.2d 385, 388 (Ill. 1983); *infra* note 128 (citing cases).

¹⁰² Cf. *Troppi v. Scarf*, 187 N.W.2d 511, 518-19 (Mich. 1971) (contrasting extent of injury caused by unplanned pregnancy of unwed female college student with that of newlywed on extended honeymoon); *Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603, 609 (N.M. 1991) (emphasizing financial nature of injury).

¹⁰³ See J. C. Abma et al., *Fertility, Family Planning, and Women's Health: New Data from the 1995 National Survey of Family Growth 19 (1997)* (visited Jan. 31, 1999) <http://www.cdc.gov/nchswww/datawh/statab/pubd/2319_41.htm> (showing that approximately 64% of U.S. women used some form of contraception in 1995).

¹⁰⁴ See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹⁰⁵ See *Roe v. Wade*, 410 U.S. 113 (1973).

for many persons at many times, the birth of a child is not welcomed.¹⁰⁶ Even when the parents welcome the child into their lives, it may be necessary for them to sacrifice other interests to do so.

What these wrongful pregnancy claims illustrate is that whether or not the parent sees the birth of a healthy child as beneficial or harmful turns on that parent's subjective preferences and particular circumstances. The same is true in a case of denied genetic affinity. The scope and depth of subjective preferences for a genetic connection to the child have been outlined above.¹⁰⁷ The parents may suffer other kinds of injury as well. For example, because a woman's age is commonly the most important factor affecting the chances of a live birth when her own eggs are used, the delay associated with the pregnancy, and the passage of time before the mistake is detected, can substantially reduce the chances of ever having a child of one's own.¹⁰⁸ The parents also may have incurred substantial financial expenses,¹⁰⁹ physical pain, and invasive medical procedures,¹¹⁰ all of which they might have chosen to avoid had they anticipated the results of their sacrifices.

4. *Detrimental Effect on Child*

A fourth objection to recognition of a legal interest in genetic affinity expresses concern that recognition of a cause of action for frustration of genetic affinity could have negative psychological effects on the child. A great many courts denying damage awards for child-rearing expenses in wrongful pregnancy actions emphasized the potential emotional harm to the child resulting from the litigation itself.¹¹¹ The rhetoric of these decisions is particularly harsh, accusing parents of standing up in court to assert that the child is not worth the

¹⁰⁶ The court in *Emerson v. Magendantz*, 689 A.2d 409 (R.I. 1997), explained: The extensive use of contraception and sterilization and the performance of numerous abortions each year show that, in some instances, large numbers of people do not accept parenthood as a net positive circumstance. We agree with those courts that have rejected the theory that the birth of a child is for all parents at all times a net benefit.

Id. at 421; see also *Cockrum*, 477 N.E.2d at 393 (Clark, J., dissenting) (noting widespread use of contraception as evidence that not having a child is considered valuable).

¹⁰⁷ See *supra* notes 37-75 and accompanying text.

¹⁰⁸ See CDC Report, *supra* note 2, at 15 fig.10 (showing that live birth rates declined steadily for women over age 34, with success rate of zero for women aged 47 years and over).

¹⁰⁹ See *supra* note 31 (listing typical prices for ART procedures).

¹¹⁰ See *supra* note 30.

¹¹¹ See, e.g., *Boone v. Mullendore*, 416 So. 2d 718, 721, 722-23 (Ala. 1982); *Wilbur v. Kerr*, 628 S.W.2d 568, 571 (Ark. 1982); *Flowers v. District of Columbia*, 478 A.2d 1073, 1076 (D.C. 1984); *Cockrum*, 477 N.E.2d at 388; *McKernan v. Aasheim*, 687 P.2d 850, 855-56 (Wash. 1984) (en banc).

cost of raising, and predicting that the child will feel like an "emotional bastard"¹¹² if such actions are permitted. When a parent claims that the infant with whom one shares no genetic tie is less desirable, and therefore less valuable, than one who bears his or her own genes, the potential for emotional harm to the child is undeniable.

Acknowledging the potential for harm, however, does not necessarily mean that actions alleging loss of genetic affinity cannot or should not be permitted. First, while a special solicitude toward children, and caution regarding the consequences of such litigation, is undeniably appropriate, there is no reason to believe that denial of relief to plaintiff parents will ultimately prevent the child from learning the circumstances of his or her birth.¹¹³ Parents employing reproductive technology or even adoption already face that difficult question in the absence of medical malpractice.¹¹⁴ Obviously, a sharply contested lawsuit, in which the parents aver that their child is not the one they wanted, is not the context in which a child should discover the nature of his or her parentage. One solution to this particular concern would permit parents to maintain actions anonymously or pseudonymously.¹¹⁵

¹¹² *Wilbur*, 628 S.W.2d at 571; see also *Boone*, 416 So. 2d at 722-23 (citing *Wilbur* and using "emotional bastard" language); *McKernan*, 687 P.2d at 855-56 (same). Courts have voiced similar policy concerns in the context of contractual surrogate motherhood. See, e.g., *In the Matter of Baby M*, 537 A.2d 1227, 1250 (N.J. 1988) ("The long-term effects of surrogacy contracts are not known, but feared—the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money . . .").

¹¹³ Denial of childrearing damages cannot be expected to prevent wrongful pregnancy or frustration of genetic affinity suits, since plaintiffs still stand to recover the economic costs of the procedure, a substantial sum in the ART context. See *supra* note 31 (citing price lists and estimates of ultimate costs to parents).

¹¹⁴ See S. Norman Sherry & Mollie Sherry, *Explaining Gamete Donation to Children*, in Seibel & Crockin, *supra* note 44, at 274-76 (noting "reluctance to explain to children their genetic origins"); see also Sheryl Gay Stolberg, *Quandary on Donor Eggs: What to Tell the Children*, N.Y. Times, Jan. 18, 1998, at 1. In the end, the appropriate concern is whether and how the child learns of his or her origins, a responsibility entirely in the hands of the parents. See, e.g., *Emerson v. Magendantz*, 689 A.2d 409, 422 (R.I. 1997) (Bourcier, J., concurring in part and dissenting in part) ("In any event, it is for the parents, not the courts, to decide whether a lawsuit would adversely affect the child and should not be maintained." (quoting *Burke v. Rivo*, 551 N.E.2d 1, 5 (Mass. 1990))).

¹¹⁵ In wrongful pregnancy cases, some courts defending the award of damages for childrearing expenses noted the possibility of anonymous actions, and some such actions have in fact proceeded. See, e.g., *P. v. Portadin*, 432 A.2d 556 (N.J. Super. Ct. App. Div. 1981); *James G. v. Caserta*, 332 S.E.2d 872, 874 n.1 (W. Va. 1985). In the *Cecil Jacobson* case, plaintiffs were permitted to proceed pseudonymously. See *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993).

Second, it is inaccurate to describe the child as simply "unwanted."¹¹⁶ In many cases, the parents emphatically will want to keep the child, despite the frustration of their desire for a genetic relationship. If one is serious in recognizing the legitimacy of subjective preferences in reproductive decisionmaking, one must realize that those preferences will not necessarily disappear upon the birth of a child. Finally, as a matter of trial strategy, it is unlikely that many juries (or judges) would be especially sympathetic to a parent who attempted to maximize a damage award by denigrating his or her own child.

C. *Recapitulation*

Many infertile individuals wish to have children with whom they share physical, psychological, and cultural attributes, either by using their own genetic material or by selecting donors who possess such traits. This desire reflects a widely held construction of "family" in which shared heritable attributes are a core element. Hoping to achieve that experience of family, such individuals make financial, physical, and emotional commitments, and forego other means of having children. Frustration of the affinity interest denies parents a sense of connection to their children that they value and have sought out, a result that the law should recognize as an injury and seek to redress.

II DAMAGES

Despite a number of well-publicized incidents involving the misappropriation of genetic material, and the ensuing litigation, no court has confronted directly the validity of the interests implicated in the frustration of genetic affinity. The absence of caselaw may be attributed to a decided tendency toward settlement,¹¹⁷ motivated by the in-

¹¹⁶ See *Boone*, 416 So. 2d at 728 (Jones and Shores, JJ., concurring specially) (stating that child in wrongful pregnancy suit is "unexpected" or "unanticipated," not unwanted); *Jackson v. Anderson*, 230 So. 2d 503, 503 (Fla. Dist. Ct. App. 1970) (arguing in wrongful pregnancy suit that "child is not to be thought of as unwanted or unloved, but as unplanned").

¹¹⁷ Of the more than one hundred lawsuits arising from the alleged misappropriation of embryos at UC-Irvine, over 70 have been settled by the University of California. See Kelleher, *supra* note 16 (reporting that 74 of 106 lawsuits brought against UC-Irvine have been settled). Three other cases settled for a total of \$1.07 million in February of 1998. See Michelle Nicolosi & Susan Kelleher, *Test Finds Genetic Mother of Boy Born in Egg Swap*, Orange County Reg., Feb. 20, 1998, at A1, available in 1998 WL 2614213; see also *Notable Settlement*, Nat'l L.J., Aug. 25, 1997, at A11 (reporting that 50 Irvine plaintiffs settled, resolving claims for \$10 million total and leaving 28 cases pending). The lawsuits arising from Dr. Cecil Jacobson's substitution of his own sperm for that represented as being from anonymous donors or husbands of patients also apparently settled. See *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 826 F. Supp. 155, 162 (E.D. Va. 1993) (holding that insurer was

terest of all the parties in avoiding publicity, along with the novelty and uncertainty of the legal issues.

One of the first and most obvious problems with damages calculations concerns valuation—how does one measure, in monetary terms, the loss suffered by parents whose child does not share particular genetic traits? A precise answer to this question would go far beyond the scope of this Note, as a passing reference to the wrongful death literature illustrates.¹¹⁸ A somewhat simpler, threshold question is whether or not damages may be expressed with the degree of certainty required by contract and tort law. This Note argues that although valuation is difficult in a case alleging loss of genetic affinity, the difficulty is no greater than in any other case alleging intangible harms. Drawing on cases discussing damages for wrongful pregnancy, this Part proposes several principles to guide a factfinder in determining damages for loss of genetic affinity.

Part II.A describes the cause of action for wrongful pregnancy and summarizes the damages rules adopted by various state courts. Part II.B builds on that caselaw, applying its principles to an action for frustration of genetic affinity. Part II.C then examines special doctrinal and practical obstacles to the application of traditional common law principles to the problems of reproductive technology.

A. *Wrongful Pregnancy*

Because valuation presents such difficult problems, it is helpful to consider, at least in passing, several regimes for allocating damages. The simplest and most direct of these would be to require that contracts for reproductive services include a provision for liquidated dam-

obligated to defend Jacobson against tort suits arising from his provision of professional services). The New York case alleging a sperm mix-up, *Skolnick v. Idant Laboratories*, settled for \$400,000. See *Sperm Mix-Up Lawsuit Is Settled*, N.Y. Times, Aug. 1, 1991, at B4.

¹¹⁸ See, e.g., Robert J. Aalberts & Melvin W. Harju, Utilizing Net Income as the Basis for Calculating Damages for Lost Earnings in Personal Injury and Wrongful Death Actions: A Case for Creating Consistency and Fairness in Louisiana, 51 La. L. Rev. 943 (1991); Mark Geistfeld, Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries, 83 Cal. L. Rev. 773 (1995); Eric J. Guerin, Pandora's Damages and the Undoing of Tort Reform: An Argument Against the Recovery of Hedonic Damages Under Michigan's Wrongful Death Act, 1992 Det. C.L. Rev. 77; Thomas R. Ireland & James D. Rodgers, Hedonic Damages in Wrongful Death/Survival Actions: Equitable Compensation or Optimal Life Protection?, J. Legal Econ., Dec. 1993, at 43; Andrew Jay McClurg, It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases, 66 Notre Dame L. Rev. 57 (1990); Douglas L. Price, Hedonic Damages: To Value a Life or Not to Value a Life?, 95 W. Va. L. Rev. 1055 (1993); Jennifer H. Arlen, Note, An Economic Analysis of Tort Damages for Wrongful Death, 60 N.Y.U. L. Rev. 1113 (1985); Erin Ann O'Hara, Note, Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away with Murder?, 78 Geo. L.J. 1637 (1990).

ages.¹¹⁹ Liquidated damage clauses are typically employed in commercial contracts where the parties anticipate that damages will be uncertain in the event of breach.¹²⁰ While this solution offers the virtue of clarity, it has three substantial faults. First, negotiation of the clause in this context threatens the medical provider with sizable transaction and signaling costs.¹²¹ Second, prospective parents will not have the information necessary to determine the likelihood of mistake, and therefore will be unable to bargain effectively. Third, even assuming perfect information, cognitive limitations on the ability to assess risks¹²² make it highly unlikely that the parties will arrive, *ex ante*, at an adequate level of compensation.¹²³

A second approach for allocating damages also might apply contract principles, reasoning that where damages are difficult to ascertain, specific performance of the contract is an appropriate remedy.¹²⁴ This solution also has its faults: In the span of time from breach to performance, the chance of a successful pregnancy may decline, as the

¹¹⁹ Cf. Robertson, *supra* note 20, at 918 (asking whether liquidated damages might be appropriate compensation for misappropriation of eggs, sperm, or embryos); John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 Va. L. Rev. 437, 460 n.61 (1990) (suggesting that practical solution to valuation of negligently lost or destroyed embryos would be for couple and clinic or storage bank to agree on liquidated damages "based on the cost of creating the embryo plus a percentage for emotional damages").

¹²⁰ See Roy Ryden Anderson, *Liquidated Damages Under the Uniform Commercial Code*, 41 Sw. L.J. 1083, 1083 (1988). For a liquidated damage clause to be enforceable, the loss occasioned by breach must be difficult or impossible to estimate, the parties must intend to assess damages and not impose a penalty, and the stipulated sum must be a reasonable assessment of the anticipated loss at the time of contracting. See Jeffrey B. Coopersmith, *Comment, Refocusing Liquidated Damages Law for Real Estate Contracts: Returning to the Historical Roots of the Penalty Doctrine*, 39 Emory L.J. 267, 271 (1990) (asserting that many jurisdictions have adopted this tripartite test).

¹²¹ A standardized sum in a form contract would fail the requirement that the amount of damages be a reasonable assessment of the potential loss since the scope of that loss will vary with the subjective preferences of individual parents. Case-by-case negotiation imposes transaction costs, but perhaps more importantly, threatens disproportionately to emphasize low risks. This signaling effect may cause users of reproductive technology to demand excessively large damage clauses.

¹²² See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan. L. Rev. 211, 213-25 (1995) (arguing that limits on human capacity to assess risk result in systematic underestimation of potential losses).

¹²³ See *id.* at 225-36 (assessing liquidated damages provisions in light of cognitive limitations); *id.* at 234-36 (arguing that given cognitive limits, courts should closely scrutinize liquidated damage clauses to see if actual losses are disproportionate to stipulated sum). But see *id.* at 236 (adding that liquidated damages provision should be enforceable if it would permit plaintiff to recover losses that otherwise would be unrecoverable in contract due to unforeseeability or uncertainty).

¹²⁴ In a contract for medical services, the breach of trust attendant to a breach of contract might preclude going back to the same clinic or hospital for specific performance, but substitute performance by another clinic could serve as the remedy.

age of the woman providing the eggs is often a critical factor.¹²⁵ Moreover, performance under the original contract fails to address the fact that, much like the plaintiffs in an action for wrongful pregnancy, the parents find themselves in a familial relationship other than that for which they explicitly had planned.

The difficulties with these approaches suggest that contract principles alone may be inadequate to the task of ascertaining the appropriate damages for a loss of genetic affinity.¹²⁶ Consequently, it may be helpful to examine a roughly analogous body of caselaw that raises and addresses many of the same issues—claims of wrongful pregnancy.

The action of wrongful pregnancy arises when a child is conceived because of the negligent performance of a contraceptive device, sterilization procedure, or abortion, with the ultimate result being the birth of a healthy child.¹²⁷ Wrongful pregnancy cases provide a particularly helpful analogy to a claim of loss of genetic affinity. In both instances, the parents have a healthy child, but claim to have suffered an injury nonetheless; and the nature of that injury rests entirely upon the subjective preferences of the plaintiffs, rather than a generally recognized harm. In their analyses of the injury and of the appropriate measure of damages for wrongful pregnancy, courts have wrestled with many of the issues that they likely would face in an action alleging loss of genetic affinity: whether or not the birth of a healthy child can ever be an injury;¹²⁸ whether or not the potential for emotional harm to the

¹²⁵ See *supra* note 108 and accompanying text.

¹²⁶ See Joseph P. Tomain, *Contract Compensation in Nonmarket Transactions*, 46 U. Pitt. L. Rev. 867, 912-16 (1985) (observing that most traditional contract remedies are ineffective where breach causes nonpecuniary injuries, and that consequently, only expectation damages offer meaningful compensation).

¹²⁷ See Michael A. Mogill, *Misconceptions of the Law: Providing Full Recovery for the Birth of the Unplanned Child*, 1996 Utah L. Rev. 827, 829-30 (defining wrongful pregnancy); see also *Garrison v. Foy*, 486 N.E.2d 5, 7 (Ind. Ct. App. 1985) (same).

¹²⁸ See, e.g., *Boone v. Mullendore*, 416 So. 2d 718, 721-22 (Ala. 1982) (ruling that birth of healthy child alone cannot be injury because benefit must exceed economic loss); *University of Ariz. Health Sciences Ctr. v. Superior Court*, 667 P.2d 1294, 1298 (Ariz. 1983) (en banc) (finding that it is "unrealistic" to assume that in all cases "the benefits which the parents will receive from having a normal, healthy child outweigh any loss which the parents might incur in rearing and educating that child"); *Fulton-DeKalb Hosp. Auth. v. Graves*, 314 S.E.2d 653, 655-56 (Ga. 1984) ("[A] parent cannot be said to have suffered an injury in the birth of a child."); *Cockrum v. Baumgartner*, 447 N.E.2d 385, 389 (Ill. 1983) (rejecting proposition that "human life and the state of parenthood are compensable losses"); *Burke v. Rivo*, 551 N.E.2d 1, 4 (Mass. 1990) ("We agree with those courts that have rejected the theory that the birth of a child is for all parents at all times a net benefit."); *Girdley v. Coats*, 825 S.W.2d 295, 298 (Mo. 1992) (en banc) (concluding that parents of healthy child cannot recover damages for expense of raising and educating that child); *Szekeres v. Robinson*, 715 P.2d 1076, 1078-79 & n.2 (Nev. 1986) (concluding that birth of healthy child cannot be moral wrong and thus cannot be tortious, but may constitute ac-

child should preclude recognizing the claim;¹²⁹ whether or not constitutional rights to privacy are implicated by the claim;¹³⁰ what elements of consequent damage should be compensable;¹³¹ whether the measure of damages is too speculative to put to a jury;¹³² whether a plaintiff should be required to mitigate damages through adoption or abortion;¹³³ and whether the intangible benefits of parenthood should be set off against the plaintiff's damages.¹³⁴ Because the reproductive

tionable breach of contract); *Emerson v. Magendantz*, 689 A.2d 409, 421 (R.I. 1997) (Bourcier, J., concurring in part and dissenting in part) (quoting opinion in *Burke* and adopting that court's reasoning); *McKernan v. Aasheim*, 687 P.2d 850, 854 (Wash. 1984) (en banc) ("[W]e cannot agree that the benefits of parenthood always outweigh the costs of rearing a child."); see also *supra* Part I.B.3 (arguing that birth of healthy child can be injury, depending upon circumstances of parent).

¹²⁹ See, e.g., *Hartke v. McKelway*, 707 F.2d 1544, 1552 n.8 (D.C. Cir. 1983) ("We are not convinced that the effect on the child will be significantly detrimental in every case, or even in most cases . . ."); *Boone*, 416 So. 2d at 722-23 (expressing concern over risk of harm to child); *M.A. v. United States*, 951 P.2d 851, 855-56 (Alaska 1998) (same); *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300 (same); *Wilbur v. Kerr*, 628 S.W.2d 568, 571 (Ark. 1982) (same); see also *supra* Part I.B.4 (arguing that potential harm to child can be decreased and should not preclude action).

¹³⁰ See, e.g., *Ochs v. Borrelli*, 445 A.2d 883, 885 (Conn. 1982) (concluding that parental interest in controlling family size through contraception is constitutionally protected); *Fulton-DeKalb Hosp. Auth.*, 314 S.E.2d at 654 (same); *Cockrum*, 447 N.E.2d at 390 (concluding that Supreme Court decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and in *Griswold v. Connecticut*, 381 U.S. 479 (1965), were "irrelevant" to issue of whether or not plaintiff was entitled to damages for cost of raising child); *Tropi v. Scarf*, 187 N.W.2d 511, 517 (Mich. Ct. App. 1971) (reasoning that state may not denigrate constitutionally protected right to contraception by denying plaintiff legal protection afforded to like rights); see also *supra* note 27 (discussing constitutional interests implicated in right to genetic affinity).

¹³¹ See, e.g., *Boone*, 416 So. 2d at 723 (permitting recovery of damages for pregnancy-related medical expenses, pain and suffering, and loss of consortium); *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1299-1300 (permitting recovery of damages for cost of raising child to maturity, offset by benefit of child to parent); *Custodio v. Bauer*, 59 Cal. Rptr. 463, 477-78 (Ct. App. 1967) (permitting recovery of damages for some costs of raising child, but declining to determine extent of these damages).

¹³² See, e.g., *Boone*, 416 So. 2d at 722 (ruling that damages for raising child to age of maturity are too speculative to be considered); *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300 (expressing confidence that "inherent good sense of the jury" would safeguard against speculative damages); *Ochs*, 445 A.2d at 886 (reasoning that calculation of damages is no more speculative in wrongful pregnancy case than in wrongful death case); *Cockrum*, 447 N.E.2d at 388 (holding that allowing damages would "require considerable conjecture and speculation by trier of the facts"); see also *infra* Part II.D.4 (arguing that damages for loss of genetic affinity need not be overly speculative).

¹³³ See, e.g., *Boone*, 416 So. 2d at 727 (Faulkner, J., concurring specially) (quoting *Tropi v. Scarf* and concluding that mitigation requirement would be inappropriate in wrongful pregnancy action); *Ochs*, 445 A.2d at 886 n.4 (finding that plaintiff would not be required to mitigate, as abortion or adoption would be unreasonable); see also *infra* Part II.C.1 (arguing that mitigation through abortion or adoption should not be required in an action claiming loss of genetic affinity).

¹³⁴ See, e.g., *Boone*, 416 So. 2d at 722 (arguing that application of "benefit rule" for offsetting damages "would only invite speculative and ethically questionable assessments of damages"); *id.* at 726 (Faulkner, J., concurring specially) (arguing that it would be ineq-

interests involved are so similar, and because many of the same doctrinal issues arise in the two types of claims, the facts, reasoning, and rhetoric of wrongful pregnancy cases inform consideration of claims for loss of genetic affinity.

In 1967, in *Custodio v. Bauer*,¹³⁵ California became one of the first states to consider and recognize a claim of wrongful pregnancy. In that decision, which involved a failed sterilization procedure, the court of appeals considered many of the issues likely to arise in a first impression consideration of loss of genetic affinity.¹³⁶ On the issue of causation, the court ruled that Mrs. Custodio's pregnancy was a foreseeable consequence of defendants' negligence, and thus that such negligence could be a proximate cause of the Custodios' injuries.¹³⁷ Turning to public policy arguments against permitting the action to proceed, the court concluded that sterilization undergone for therapeutic reasons did not contravene public policy¹³⁸ and suggested that "personal or socio-economic" motivations for sterilization would also be acceptable.¹³⁹

Much of the *Custodio* decision, however, concerned the issue of damages. In the course of reviewing prior caselaw, the court observed that under certain circumstances, "the birth of a child may be something less than the 'blessed event' referred to in those cases."¹⁴⁰ Rejecting the view that the birth of a healthy child must always outweigh any costs it imposes on the family, the court held that the Custodios, if successful in the proof of their claim, would be entitled to the cost of the unsuccessful operation.¹⁴¹ Should Mrs. Custodio give birth, the

uitable, on principle of unjust enrichment, not to offset damages); *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1299-1300 (arguing that application of offset rule will produce most accurate verdict); *Girdley v. Coats*, 825 S.W.2d 295, 298 (Mo. 1992) (en banc) (concluding that offset of damages by benefit that parents derive from child is "neither workable nor desirable"); see also *infra* Part II.D.2 (discussing benefit offset rule and arguing that it should apply in claim of loss of genetic affinity).

¹³⁵ 59 Cal. Rptr. 463 (Ct. App. 1967).

¹³⁶ Defendant doctors had recommended that Berdella Custodio—who already had nine children—undergo a sterilization procedure to avoid pregnancy-related complications of her existing health problems. See *id.* at 463, 466. Mrs. Custodio subsequently became pregnant, and she and her husband sued, alleging medical malpractice, negligent misrepresentation, fraud, and breach of contract. See *id.* at 466. After the trial court dismissed the Custodios' suit, the court of appeals reversed, holding that the plaintiffs had stated a cause of action as to each of their claims. See *id.* at 468-72.

¹³⁷ See *id.* at 472 ("It is difficult to conceive how the very act the consequences of which the operation was designed to forestall, can be considered unforeseeable.").

¹³⁸ See *id.* at 472-73.

¹³⁹ *Id.* at 472. Moreover, the court recognized that the prevention of conception was "clothed in a cloak of constitutional protection" by virtue of the Supreme Court's decision in *Griswold*. *Id.* at 473.

¹⁴⁰ *Id.* at 475.

¹⁴¹ See *id.*

plaintiffs could be compensated for the loss felt by other family members occasioned by the mother being forced to "spread her society, comfort, care, protection and support over a larger group."¹⁴² Finally, the court concluded that the Custodios would be entitled to monetary damages for the cost of raising the child, on the ground that this sum was not to compensate for the "so-called unwanted child," but rather "to replenish the family exchequer so that the new arrival will not deprive the other members of the family of . . . their just share of the family income."¹⁴³

Since *Custodio*, the vast majority of states that have ruled on the legitimacy of wrongful pregnancy actions have recognized the claim,¹⁴⁴ but dispute continues over the proper measure of damages.¹⁴⁵ Particularly relevant are decisions in which courts have applied a benefit offset rule,¹⁴⁶ requiring that the factfinder decrease the amount of damages by the value the plaintiff parents derive from the unplanned child.¹⁴⁷ There is, however, at least one important distinc-

¹⁴² Id. at 476.

¹⁴³ Id. at 477.

¹⁴⁴ See Mogill, *supra* note 127, at 872 (noting "general consensus that parents can pursue a tort claim for negligent pregnancy").

¹⁴⁵ See *id.* *passim*. Most jurisdictions limit compensation to medical expenses, loss of income, loss of consortium, and pain and suffering associated with the pregnancy itself, but refuse to award any damages for the cost of raising the unplanned child. See *Emerson v. Magendantz*, 689 A.2d 409, 411-12 (R.I. 1997) (giving number of jurisdictions excluding all childrearing expenses from damages as 30, and citing cases); Mogill, *supra* note 127, at 848 n.124 (noting that 26 states and District of Columbia have adopted limited damages rule).

Six states allow plaintiff parents to recover for the economic cost of raising the child to maturity, but offset the award by the value, in monetary terms, of the benefit conferred by the existence of the child. See, e.g., *University of Ariz. Health Sciences Ctr. v. Superior Court*, 667 P.2d 1294, 1299-1300 (Ariz. 1983) (*en banc*); *Ochs v. Borrelli*, 445 A.2d 883, 886 (Conn. 1982); *Burke v. Rivo*, 551 N.E.2d 1, 6 (Mass. 1990); see also Mogill, *supra* note 127, at 856-57, 857 & n.154. The justification for the offset is found in section 920 of the Restatement (Second) of Torts, which provides that the award of damages should be reduced by any value that the tortfeasor has conferred upon the tort victim. One judge, dissenting from this application of the rule, has observed that section 920 comment b explains that the offset is meant to apply only to a benefit conferred to the same interest as that injured. See *Flowers v. District of Columbia*, 478 A.2d 1073, 1080 (D.C. 1984) (Ferren, J., dissenting) (citing Restatement (Second) of Torts § 920 cmt.b (1979)). Two jurisdictions grant full recovery of child-raising expenses and pregnancy-related expenses, without any offset. See *Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603, 612 (N.M. 1991) (holding that unexpected birth of child invaded plaintiff's protected interest in financial security, and that therefore costs of raising child were recoverable); *Marciniak v. Lundborg*, 450 N.W.2d 243, 248-49 (Wis. 1990) (holding that doctor who negligently performed sterilization was liable for all costs of raising resulting child, with no offsets); see also Mogill, *supra* note 127, at 866.

¹⁴⁶ See *infra* Part II.C.2 (discussing benefit rule).

¹⁴⁷ Few courts adopting the offset rule have offered any guidance on the question of how juries or judges should value the injury or the benefit. The only assistance found in the caselaw is the suggestion, usually offered in dissent to the denial of childrearing expenses, that the status of the parent, such as being a student or unmarried, and the motivation in

tion between an action for wrongful pregnancy and one alleging frustration of genetic affinity. Jurisdictions allowing full recovery of childrearing expenses in wrongful pregnancy cases, whether offset by a benefit or not, have tended to define the parental interest invaded by the defendant's negligence as fundamentally economic.¹⁴⁸ That is, the parent or parents had made a conscious decision, through sterilization or abortion, to avoid the financial burden of raising a child. Medical malpractice frustrated the legitimate expectation that the family would be free of the substantial costs of raising a child or an additional

avoiding pregnancy, are relevant to evaluating the benefit derived by the parent from the unplanned child:

We tend to agree that a factfinder should place great weight on a couple's reason for undergoing sterilization in deciding whether the subsequent birth of a child, on balance, constitutes damage to the parents. Their reason for departing from the usual view that childrearing is a positive experience is in effect a calculation of the way in which they anticipate the costs of childbirth to outweigh the benefits. That calculation, untainted by bitterness and greed, or by a sense of duty to a child the parents have brought into the world, is usually the best available evidence of the extent to which the birth of the child has in fact been an injury to them. Thus, for example, where a couple sought sterilization solely for therapeutic or eugenic reasons, there is a presumption raised that the uneventful birth of a healthy child constitutes damage to the parents only to the extent that they experienced abnormal fear of harm to the mother or of the birth of a handicapped child.

Hartke v. McKelway, 707 F.2d 1544, 1555 (D.C. Cir. 1983). The court then articulated a motivational rule that emphasized solely economic concerns as justifying the award of damages. See *id.* at 1555; see also *Troppi v. Scarf*, 187 N.W.2d 511, 518-19 (Mich. Ct. App. 1971) (contrasting extent of injury from unplanned pregnancy of unwed female college student with extent of injury suffered by newlyweds on extended honeymoon); *Emerson*, 689 A.2d at 419 (Bourcier, J., dissenting) (contrasting benefit or injury between men and women, and between married and unmarried persons, and concluding that automatic "simple joy or blessing rule" is "neither fair nor in compliance with the age-old general tort-recovery damages rule"); *C.S. v. Nielson*, 767 P.2d 504, 517-18 (Utah 1988) (offering examples of circumstances in which wrongful pregnancy cases arise, and arguing in favor of motivational rule).

^{148.}See, e.g., *Lovelace Med. Ctr.*, 805 P.2d at 609 ("[I]t is not the birth of the child that is the harm; it is . . . the invasion of the parents' interest in the financial security of their family—an invasion clearly foreseeable . . . by the doctor as the probable consequence of his negligence in performing the procedure in question."); see also *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1301 (holding that jury must be able to consider all future costs of rearing and educating child when determining parental damages); *Flowers*, 478 A.2d at 1081 (Ferren, J., dissenting) (arguing that plaintiff in wrongful pregnancy action should be required "to demonstrate by a preponderance of the evidence that she elected sterilization solely for economic reasons"); *Jones v. Malinowski*, 473 A.2d 429, 436 (Md. 1984) ("[T]he direct, foreseeable and natural consequences of the physician's negligence has forced upon [plaintiffs] burdens which they sought and had a right to avoid by submitting to sterilization.").

These same courts have also noted that there are other potential reasons for choosing sterilization, such as concerns about the health of the mother (therapeutic reasons) and concerns that the child might inherit a disease for which the parents are carriers (eugenic reasons). See *infra* note 150 and accompanying text.

child. In this articulation of the interest, some courts have gone so far as to establish a motivational rule; thus, recovery of childrearing expenses is granted where the plaintiffs hoped to avoid pregnancy for economic reasons, but not where the reasons concerned fears for the health of the child or mother, and those fears are not realized.¹⁴⁹ By asserting that the protected interest at stake is economic security, and not the more fundamental interest in the ability to plan the size and timing of one's family, or the nature of one's relationships and obligations, these courts leave little room for the claim that the frustration of genetic affinity invades a legitimate interest.

In the wrongful pregnancy cases, the reasoning of both the courts denying childrearing expenses and most of those awarding them has suffered from an overly narrow definition of injury. Certainly, economic motivations may influence the decision to avoid parenthood, and individuals undoubtedly suffer economic consequences if that decision is thwarted. But the primary motivations for decisions about reproduction and family will be intangible and nonpecuniary, thus so will most injuries. The harm in a wrongful pregnancy case (and in a case of loss of genetic affinity) is the invasion of the individual or familial interest in reproductive autonomy. Refusal to acknowledge the significant noneconomic interests involved in these cases mischaracterizes or ignores the motivations of the parties. One might just as easily characterize nearly every tort victim's interest as one in economic security—victims of automobile accidents would have no interest in their bodily integrity, for example, but rather an economic interest in avoiding the financial burdens associated with broken limbs. To the extent that tort injuries force plaintiffs to assume costs otherwise avoided, it is true that plaintiffs have an economic interest in being compensated. It does not follow that the sole interest at stake in such cases is merely pecuniary.

Thus, meaningful recognition of the wrongful pregnancy action—and the reproductive autonomy interests at stake—requires that

¹⁴⁹ See *Hartke*, 707 F.2d at 1553-55 (acknowledging various motivations for not wanting child, but permitting recovery of childrearing expenses only where motivation was financial); *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1300 ("For example, where the parent sought sterilization in order to avoid the danger of genetic defect, the jury could easily find that the uneventful birth of a healthy, non-defective child was a blessing rather than a 'damage.'"); *Flowers*, 478 A.2d at 1081 (Ferren, J., dissenting) (arguing that plaintiff in wrongful pregnancy action should be required "to demonstrate by a preponderance of the evidence that she elected sterilization solely for economic reasons"); *Jones*, 473 A.2d at 436 (holding that "the assessment of damages associated with the healthy child's birth, if any, should focus on the specific interests of the parents that were *actually* impaired by the physician's negligence"); *Burke*, 551 N.E.2d at 6 (holding that "parents may recover the cost of rearing a normal, healthy but (at least initially) unwanted child if their reason for seeking sterilization was founded on economic or financial considerations").

courts consider the intangible, subjective factors that influence the plaintiff's choice to avoid parenthood. The reasons for not wanting children are numerous, and are not limited to the economic sphere. A person who has explicitly chosen not to have children, but has that decision thwarted by the negligence or fraud of another, has lost more than just the money that will be spent to raise a child. The very power to decide whether or not to be a parent has been denied, possibly compelling profound changes in lifestyle, education, and career. The tortfeasor has forced the victim into the very kind of human relationship that the victim had chosen *not* to enter.

Some support for this reasoning can be found in judicial opinions explicitly proposing a motivational rule: These same judges frequently have cited therapeutic reasons (fears about harm to the mother if she became pregnant) and eugenic reasons (fears that the child might inherit a disease carried by one or both of the parents).¹⁵⁰ In this context, a eugenic interest is an interest in avoiding genetic defects, not choosing traits, so one might still argue that wrongful pregnancy may be distinguished from genetic expectation on that ground. However, not all prospective parents choose sterilization or abortion upon learning that their children are at risk for inheriting a genetic disease, or for that matter, upon learning that an unborn child unquestionably *has* a given disease. Consequently, the interest in eugenic sterilization or abortion turns, to some extent, on the subjective preferences of the parents. Some would be unwilling to give birth to and raise a child with even minor abnormalities; others would feel blessed to have a child with disabilities.¹⁵¹

The argument that the birth of a child is always a net benefit, and therefore never an injury, cannot be squared with the widespread availability of contraception, sterilization, and abortion in the United States.¹⁵² Clearly, many people believe that the birth of a child is not a benefit at all times and under all circumstances, and some—those who undergo voluntary sterilization—may believe that, for them, a

¹⁵⁰ See, e.g., *Hartke*, 707 F.2d at 1553-54 (noting possibility of therapeutic or eugenic interests in seeking sterilization); *Jones*, 473 A.2d at 436 (same). This eugenic interest might be better characterized as a therapeutic interest on behalf of the child.

¹⁵¹ Moreover, some parents will *prefer* to have children whom many people would consider to be disabled, particularly when the parents themselves share the trait. See *Shepherd*, supra note 64, at 761-63 & n.2 (describing desire of deaf parents and parents with dwarfism to have children who share their respective traits).

¹⁵² See *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175 (Minn. 1977) (noting that use of birth control by millions of Americans demonstrates that "command to 'be fruitful and multiply' has not only lost contemporary significance to a growing number of potential parents but is contrary to public policies embodied in the statutes encouraging family planning"); *Emerson*, 689 A.2d at 421 (agreeing with courts that have rejected theory that birth of child is net benefit for all parents at all times).

child could never be a benefit. Courts granting childrearing expenses as damages have recognized the subjective value of becoming a parent, but unreasonably constrict the range of cognizable motivations to economic, therapeutic, or eugenic. A more appropriate understanding of the injury in a wrongful pregnancy action would allow for (1) the award of childrearing expenses as the foreseeable economic consequence of the defendant's negligence,¹⁵³ and (2) consideration of the nonpecuniary losses attendant to foregoing other choices and assuming the obligations of parenthood, both offset by any benefit actually derived from becoming a parent. In evaluating both the intangible benefit and the intangible harm, the jury should consider any and all of the plaintiff parent's motives for wishing to avoid having a child, and determine to what extent the birth of the unplanned child has frustrated legitimate interests.¹⁵⁴ Such an inquiry recognizes the subjective nature of the value of the benefit, as well as its contingency on particular circumstances.

¹⁵³ See *Boone v. Mullendore*, 416 So. 2d 718, 725, 727 (Ala. 1982) (Faulkner, J., concurring specially) (reasoning that costs of raising child are foreseeable consequence of negligent sterilization or abortion); *Flowers*, 478 A.2d at 1078 (Ferren, J., dissenting) (same); *Cockrum v. Baumgartner*, 447 N.E.2d 385, 392-93 (Ill. 1983) (Clark, J., dissenting) (same); *Schork v. Huber*, 648 S.W.2d 861, 867 (Ky. 1983) (Leibson, J., dissenting) (same); *Jones*, 473 A.2d at 435 (same); *Girdley v. Coats*, 825 S.W.2d 295, 299 (Mo. 1992) (en banc) (Turnage, Special Judge, concurring in part and dissenting in part) (same); *Terrell v. Garcia*, 496 S.W.2d 124, 128-29 (Tex. Civ. App. 1973) (Cadena, J., dissenting) (same); *McKernan v. Aasheim*, 687 P.2d 850, 854-55 (Wash. 1984) (en banc) (same).

¹⁵⁴ Judge Linn's special concurrence in *Cockrum v. Baumgartner*, a wrongful pregnancy case, nicely captures the relationship between the subjectivity of the injury and the measure of damages:

One must recognize that the reasons parents have for practicing birth control vary and any injury done to their interests as parents will be different in each case. Can it be said that parents in their twenties who merely wanted to postpone having a child will suffer the same degree of injury from a physician's negligence in causing a child to be born as will parents in their forties who already have grown children and have decided not to undergo the burden of raising any more children? Damages should be awarded based on the degree of injury that has occurred, and . . . allowing the potential benefits that the parents may derive from the parent-child relationship to be considered as one factor in determining the amount of damages will result in redressing the degree of injury that has been caused.

Cockrum v. Baumgartner, 425 N.E.2d 968, 972 (Ill. App. Ct. 1981) (Linn, J., specially concurring), rev'd, 447 N.E.2d 385 (Ill. 1983).

The opinion of the court in *Hartke v. McKelway* also suggests a broad motivational rule: "We tend to agree that a factfinder should place great weight on a couple's reason for undergoing sterilization in deciding whether the subsequent birth of a child, on balance, constitutes damage to the parents." *Hartke*, 707 F.2d at 1555. The opinion's subsequent language, however, discussed only financial, therapeutic, and eugenic concerns. See id.; see also *University of Ariz. Health Sciences Ctr.*, 667 P.2d at 1299 (permitting trier of fact to consider both pecuniary and nonpecuniary elements of damage and benefit).

A fuller understanding of the essential subjectivity of reproductive decisions, and the complex preferences and circumstances that constitute it, illuminates the connection between wrongful pregnancy and frustration of genetic affinity. Wrongful pregnancy cases show (whether courts have acknowledged it or not) that timing, existing relationships, and finances, among other circumstances, make the prospect of having children more or less attractive. Individuals who prefer not to have children under those circumstances may use contraception, sterilization, or abortion in order to secure their preferences. Likewise, individuals who prefer to share valued heritable traits with their children secure their preferences by using ART. There is no reason to treat a preference *not* to have children under certain circumstances (e.g., not to have children while in law school) differently from a preference to *have* children under certain circumstances (e.g., to have children with whom one has a certain sense of affinity).

Consequently, labeling wrongful pregnancy plaintiffs as “not wanting a baby” and genetic affinity plaintiffs as “wanting a baby” demonstrates confusion about the nature of the injury in both cases. A twenty-year-old college student may want a baby, but want even more to finish her studies. If she becomes pregnant through the actionable negligence of another, and is forced to leave school, she has suffered an injury, though the remedy for that injury may be offset by the benefit she derives from having the child. Similarly, users of ART may want any healthy baby,¹⁵⁵ but not as much as they want a child with whom they share certain genetic traits. If a fertility clinic negligently implants the wrong embryo in the uterus of the woman, she too suffers an injury, though again, there may be an offset for the benefit she receives from the child. What is important about these two cases is that neither the designation “wrongful pregnancy” nor that of “frustration of genetic affinity” conveys any information about the weight to be given to the injury or the benefit. In both cases, the remedy requires a weighing of the relative preferences of each plaintiff—how much she valued the outcome that she was denied, and how much she values the outcome forced upon her by another’s negligence.

B. Damages Principles Applied

As a medical malpractice action, a suit alleging frustration of genetic affinity could be brought in contract or in tort.¹⁵⁶ Typically,

¹⁵⁵ And then again, they may not—if a couple would have been happy with *any* healthy baby, they might have adopted a child.

¹⁵⁶ See *Custodio v. Bauer*, 59 Cal. Rptr. 463 (Ct. App. 1967) (allowing wrongful pregnancy action to proceed in contract and in tort); *Jackson v. Anderson*, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970) (same); *Pierce v. DeGracia*, 431 N.E.2d 768 (Ill. App. Ct. 1982)

medical malpractice claims are brought in tort, because tort damages encompass emotional harms such as pain and suffering, whereas contract damages normally do not.¹⁵⁷ There are at least two reasons, however, to consider contract law a more appropriate tool than tort law for understanding and assessing damages in a claim for loss of genetic affinity. First, loss of genetic affinity seems to fall into that narrow class of contract injuries in which emotional harms reasonably should be anticipated, and thus may be recovered in the event of breach.¹⁵⁸ Second, whereas tort law concerns generally applicable obligations between members of society, contract is the means by which individuals normally secure their *individual* preferences.¹⁵⁹ Since individual preferences define the interest in genetic affinity and the consequences of its loss, contract principles may lead to a better description of the injury and thus of damages. Nevertheless, contract doctrine tends to concentrate on commercial transactions in which losses are relatively easy to quantify monetarily.¹⁶⁰ Tort law, in contrast, frequently confronts the problem of valuing intangible harms in claims of wrongful death, loss of consortium, defamation, etc. The relative merits of the two approaches should not be overemphasized, however: The requirements for pleading and proving damages in contract and in tort are in many respects identical, and the distinction between contract and tort at the damages stage may be wholly artificial. The following damages analysis will rely primarily on contract doctrine, while noting different applications or results under tort law when appropriate.

1. *Economic Damages*

The less controversial damages resulting from the economic injuries are fairly easy to calculate—the actual out-of-pocket costs associ-

(same), rev'd on other grounds, 451 N.E.2d 1260 (Ill. 1983); *Wilczynski v. Goodman*, 391 N.E.2d 479 (Ill. App. 1979) (same); *Burke v. Rivo*, 551 N.E.2d 1 (Mass. 1990) (same); *Clegg v. Chase*, 391 N.Y.S.2d 966 (Sup. Ct. 1977) (same); *Zehr v. Haugen*, 871 P.2d 1006 (Or. 1994) (same); see also Richard A. Posner, *Economic Analysis of Law* 126-27, 158 (2d ed. 1977) (demonstrating that medical malpractice results in liability in both tort and contract); *Mogill*, supra note 127, at 845 n.123 (describing wrongful pregnancy actions brought as actions in contract, in warranty, and for fraud).

¹⁵⁷ For a summary of the types of contract actions in which pain and suffering damages may be recovered, see *infra* Part II.C (arguing that pain and suffering damages should be compensable in action for loss of genetic affinity).

¹⁵⁸ See *infra* notes 174-82 and accompanying text.

¹⁵⁹ Cf. *Szekeres v. Robinson*, 715 P.2d 1076, 1078-79 (Nev. 1986) (refusing to permit wrongful pregnancy action to proceed in tort on grounds that birth of healthy child cannot be legal wrong, but permitting action to proceed as breach of contract claim).

¹⁶⁰ See *Tomain*, supra note 126, at 912 ("Contracts remedies are skewed toward protecting social economic interests and consequently downplay personal interests.").

ated with the assisted reproduction procedures, any lost wages associated with the pregnancy, and the medical costs of the birth itself. More difficult is the question—much like the one posed in a wrongful pregnancy action—of whether damages should include the expense of raising the child to maturity. In the scenarios described in Part I.A, the infertile parents' desire for *a* child is not a desire for *any* child. Nevertheless, some such parents, discovering that their child is genetically unrelated to one or both of them, may reorder their desires and priorities, accepting the child they have and choosing not to continue with assisted reproduction. These parents derive satisfaction from their experiences with the unplanned child, but the same might be said of any plaintiff in a wrongful pregnancy case. Alternatively, the parents may still desire a relationship characterized by genetic affinity, and return to the fertility clinics. In these cases, the birth of the unplanned child imposes a financial burden upon the parents: They now anticipate the obligation of caring for the genetically related child whom they hope to have in the future, plus the expenses of raising the unrelated child. Regardless of how the parents respond to the unforeseen presence of an unrelated child in their family, they are entitled to recover for the financial harm associated with the invasion of their interests.

Determination of money damages for breach of contract can follow either the expectation rule or the reliance rule.¹⁶¹ In most states, damages for breach of contract are determined by awarding the nonbreaching party his or her expectation interest. The expectation interest is the position that the party would have been in had the breaching party performed according to the contract plus incidental and consequential losses resulting from the breach (less any costs or other losses that could have been avoided by the injured party).¹⁶² Under the expectation interest rule, a party should be equally well off whether there is performance of the contract or breach and payment of damages.¹⁶³ The alternative to the expectation rule is the reliance interest rule. Application of the reliance interest in contract damages attempts to place the nonbreaching party in the position that he or she would have been in had the contract never been made.¹⁶⁴

Thus, if a fertility clinic promises to perform certain medical procedures—for example, removal, fertilization, and reimplantation of eggs—and breaches the terms of the contract by implanting the em-

¹⁶¹ See Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 Cal. L. Rev. 1432, 1435 (1985).

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.*

bryo of another couple, the plaintiffs should be entitled to be placed in the position they would have been had the procedures been properly performed. But fertility clinics generally do not guarantee success;¹⁶⁵ rather, they agree to provide services that may not result in a successful pregnancy even when properly performed.¹⁶⁶ Because the results are indeterminate *ex ante* and the rate of success is typically less than 50%, plaintiffs proceeding in contract are in a position analogous to purchasers of tickets in a lottery that does not take place—they have contracted for a chance at a desired result, and not necessarily for the result itself. In the unusual circumstance of lotteries, some courts have refused to grant an award of damages, reasoning that there is no certainty that plaintiff would have received the benefit.¹⁶⁷

Section 348(3) of the Restatement (Second) of Contracts has been applied in the lottery circumstance, and could also apply in the present context. The Restatement provision reads:

If a breach is of a promise conditioned on a fortuitous event and it is uncertain whether the event would have occurred had there been no breach, the injured party may recover damages based on the value of the conditional right at the time of the breach.¹⁶⁸

Valuing a “conditional right” is no easy task. Should it be valued according to the expected value—by multiplying the chance of success by the value of a successful outcome—as one would do with a lottery ticket?¹⁶⁹ If so, how does one value, in monetary terms, the successful outcome? Regardless of whether the expectation interest is in a successful outcome or merely in an opportunity, it becomes necessary to

¹⁶⁵ See Mabelle M. Seibel & Susan L. Crockin, *Family Building through Egg and Sperm Donation* 50-52 (1996) (presenting examples of consent forms used in provision of therapeutic insemination, stating that there is no guarantee that these inseminations will result in pregnancy). But see Advertisement, *Infertility + IVF = A Baby or 100% Refund*, N.Y. Times, Aug. 3, 1997, at 25.

¹⁶⁶ See *supra* note 31 (describing success rates at fertility clinics).

¹⁶⁷ See, e.g., *Youst v. Longo*, 729 P.2d 728, 735 (Cal. 1987) (refusing to allow damages for alleged tortious interference in economic opportunity of competitive contest); *Phillips v. Pantages Theatre Co.*, 300 P. 1048, 1049 (Wash. 1931) (refusing to grant damages to plaintiff denied opportunity to enter final contest after winning preliminary contest, given inability to show substantial proof that she would have won had she been permitted to enter).

¹⁶⁸ Restatement (Second) of Contracts § 348(3) (1981). One example given by the Restatement is that of a person whose racehorse is denied the chance to run a race. According to the Restatement, the damages should be the probability of winning the prize, times the value of that prize. See *id.* cmt. d, illus. 5.

¹⁶⁹ The value of the lost chance under the expectation rule is not simply the market value of the chance of success. While a rule that awarded damages based on market value would have the advantage of relative certainty, it would fail to account for the fact that each party normally expects to gain by entering into a contract. The expected gain to be derived by entering into the contract, denied because of breach, is a loss under the expectation rule, and must be calculated into damages.

ascertain the value of the desired end: a child with particular heritable traits.

The primary difficulty with the usual case of lost opportunity, however, is what the term implies—that the opportunity for some result has been irretrievably lost. Such is not usually the case where a clinic or doctor breaches the agreement to perform nontherapeutic medical procedures, because the plaintiffs can go to a second provider and obtain what they originally contracted for. When it is possible to recreate the chance at an outcome, doing so may be the remedy.¹⁷⁰ Applying this rule for recovery, plaintiffs would be entitled to the cost of a second procedure, as well as all consequential expenses—again, all of the economic costs associated with the woman's pregnancy, including out-of-pocket costs, medical expenses, and lost wages. An identical result is obtained through application of the reliance rule.¹⁷¹

The analysis does not end here, however, because plaintiffs will still have an additional claim for consequential damages parallel to a wrongful pregnancy claim. This claim is that as a result of defendant's breach, plaintiffs do not have the child they wanted. The sole distinction between this case and the wrongful pregnancy case is that in the former, the parents *want* a child, whereas in the latter case, the parents have taken affirmative steps to *avoid* having a child. As noted above, however, this distinction is best understood as one turning on the relative strength of the preferences involved—a difference of degree, not kind.¹⁷²

¹⁷⁰ See, e.g., *Van Gulik v. Resource Dev. Council for Alaska, Inc.*, 695 P.2d 1071, 1074 (Alaska 1985) (holding that where lottery ticket was inadvertently left in bin, and two remaining ticket holders were permitted to split \$10,000 prize, holder of misplaced ticket was entitled to redrawing among three tickets, or \$5,000 as value of his lost chance). This rule has support in older cases as well. See, e.g., *Kansas City M. & O. Ry. Co. v. Bell*, 197 S.W. 322, 323 (Tex. Civ. App. 1917) (holding that damages should be available for loss of chance to compete, where plaintiff alleged that breaching shipper's delay caused pigs to lose weight and deprived him of first prize and that value of loss of chance to compete is jury question).

¹⁷¹ See *Sullivan v. O'Connor*, 296 N.E.2d 183, 189 n.6 (Mass. 1973) (dictum):

A few cases have considered possible recovery for breach by a physician of a promise to sterilize a patient, resulting in birth of a child to the patient and spouse. If such an action is held maintainable, the reliance and expectancy measures would, we think, tend to equate, because the promised condition was preservation of the family status quo.

(citing *Custodio v. Bauer*, 59 Cal. Rptr. 463 (Dist. Ct. App. 1967), and *Jackson v. Anderson*, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970)); see also Eric G. Andersen, *The Restoration Interest and Damages for Breach of Contract*, 53 Md. L. Rev. 1, 13 (1994) (explaining that under conventional contract law, reliance interest is lesser included remedy of expectation interest and that recovery under reliance rule may equal but not exceed recovery under expectation rule).

¹⁷² See *supra* text accompanying notes 101-07.

In the context of reproductive technology, it normally would be possible to obtain substitute performance after the breach; consequently, plaintiffs have not been denied the opportunity to contract with another clinic for the service which the breaching party failed to provide. Thus, a more appropriate formulation in this context is one based on out-of-pocket costs: Plaintiffs recover the costs incurred in reliance on the contract before the breach—lost wages while undergoing medical treatment or because of time taken off while pregnant, and medical expenses associated with the birth. Plaintiffs would not be entitled to recover the costs associated with raising the child as direct damages; however, as above, the plaintiffs will argue that the birth of a genetically unplanned or unrelated child has also imposed a consequential damage of the breach. Defendants may then argue that they have conferred a benefit—a healthy child for an infertile couple—which they are entitled to offset lest plaintiffs be unjustly enriched. Under the reliance rule, therefore, damages parallel those recoverable for a wrongful pregnancy cause of action. The rule of recovery in tort is that the plaintiff should be made whole—that is, returned to the state in which he or she would have been absent defendant's tortious conduct.¹⁷³ The reliance rule performs the same function.

2. Noneconomic Damages

Plaintiffs claiming loss of genetic affinity would have a strong claim for emotional distress damages. Normally, mental anguish is not recoverable in contract because recovery for that type of injury is not "contemplated by the parties as the 'natural and probable' result

¹⁷³ See *Troppe v. Scarf*, 187 N.W.2d 511, 521 (Mich. 1971) (holding that application of the benefit rule did not prevent recovery for expenses of rearing unwanted child and that uncertainty in net recovery did not render damages unduly speculative); *Morris v. Sanchez*, 746 P.2d 184, 190 n.1 (Okla. 1987) (Hodges, J., concurring in part and dissenting in part):

It is quite possible that an *ex contractu* claim might support many, if not all, of the same elements of damage that a tort action would yield. By the teaching of *Hadley v. Baxendale*, 9 Ex. 341, 354, 156 Eng. Rep. 145, 154 [1854], *ex contractu* recovery is allowed for those damages which "may fairly and reasonably be considered arising naturally, i.e., according to the usual course of things, from such breach of contract itself." In the circumstances of a failed sterilization, it is clearly foreseeable that (a) if the defendant-physician were negligent in the performance of a birth-prevention procedure, the plaintiff would likely become pregnant, and that (b) no patient willing to undergo surgical sterilization would be desirous of having a child. *The expense of raising the unplanned child is hence a foreseeable consequence of a failed sterilization procedure.*

See also *Zehr v. Haugen*, 871 P.2d 1006, 1012-13 (Or. 1994) (holding that claim for damages, including cost of raising child, was not too speculative in claim for breach of contract to perform tubal ligation).

of the breach.”¹⁷⁴ Some contracts, however, involve personal obligations of such a nature that breach can reasonably be expected to cause mental anguish or suffering,¹⁷⁵ for example: for child care services;¹⁷⁶ for an engagement;¹⁷⁷ for hotel lodgings;¹⁷⁸ for burial;¹⁷⁹ or for a Cesarean section.¹⁸⁰ A contract specifying that one expects the child produced through ART to be genetically one’s own or to share certain valued traits clearly involves “rights we cherish, dignities we respect, emotions recognized by all as both sacred and personal.”¹⁸¹ Because the purpose of the contract is so clearly tied to the personal reproductive interests of the parents, it is hard to imagine a contract in which emotional disturbance for breach would be a more likely result; consequently, plaintiffs should be entitled to damages for emotional distress.¹⁸²

¹⁷⁴ *Stewart v. Rudner*, 84 N.W.2d 816, 823 (Mich. 1957) (quoting *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), and explaining that in ordinary commercial contracts, damages are not recoverable for disappointment or anguish resulting from breach).

¹⁷⁵ See Restatement (Second) of Contracts § 353 (1981) (“Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.”).

¹⁷⁶ See, e.g., *Lane v. Kindercare Learning Ctrs., Inc.*, 588 N.W.2d 715, 718 (Mich. Ct. App. 1998) (holding that contract to care for child is for “mental concern and solicitude” and that mental distress damages were thus foreseeable result of breach).

¹⁷⁷ See, e.g., *Vanderpool v. Richardson*, 17 N.W. 936, 937 (Mich. 1883) (allowing damages for “circumstances of mortification” surrounding broken engagement).

¹⁷⁸ See, e.g., *Frewen v. Page*, 131 N.E. 475, 477 (Mass. 1921) (holding that guest at inn is entitled to recover for mental suffering from mistreatment by proprietor).

¹⁷⁹ See, e.g., *Fitzsimmons v. Olinger Mortuary Ass’n*, 17 P.2d 535, 536 (Colo. 1932) (“The exhibition of callousness or indifference, the offer of insult and indignity, can, of course, inflict no injury on the client, but they can visit agony akin to torture on the living.”); see also *Allinger v. Kell*, 302 N.W.2d 576, 579 (Mich. Ct. App.) (permitting plaintiffs to seek mental pain and suffering damages in contract where defendant breached obligation to notify plaintiffs before commencing autopsy on plaintiffs’ daughter), *rev’d on other grounds*, 309 N.W.2d 547 (Mich. 1981); *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949) (awarding emotional distress damages for failure to provide and lock watertight casket).

¹⁸⁰ See *Stewart v. Rudner*, 84 N.W.2d 816 (Mich. 1957) (upholding award of damages for mental anguish and suffering where parents demanded Cesarean section in belief that such procedure was only chance that their child would be born alive and where physician breached contract and child was stillborn).

¹⁸¹ *Id.* at 823. But see *Mason v. Western Pa. Hosp.*, 453 A.2d 974, 980 (Pa. 1982) (Nix, J., concurring and dissenting) (refusing to find damages for emotional distress appropriate in action claiming breach of contract to perform sterilization, reasoning that Pennsylvania had not adopted Restatement (Second) of Contracts § 353).

¹⁸² See, e.g., *Burke v. Rivo*, 551 N.E.2d 1, 4 (Mass. 1990) (awarding damages for emotional distress in action for wrongful pregnancy, and stating that court could “see no reason why the plaintiffs should not recover for emotional distress they sustained as a result of the unwanted pregnancy” and “[e]motional distress could be the probable consequence of a breach of the duty the defendant owed directly to the plaintiffs”).

C. *Obstacles to Recovery: Doctrinal and Practical*

1. *Mitigation of Damages*

Before continuing, it is necessary to dispense with the traditional contract and tort requirement that one mitigate damages. Section 350(1) of the Restatement (Second) of Contracts states that "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation."¹⁸³ The mitigation requirement also applies in tort.¹⁸⁴ In wrongful pregnancy actions, no court has ever required mitigation of damages. Some courts deciding wrongful pregnancy actions have concluded that in principle, the mitigation rule should apply to childrearing costs, and then used that conclusion to argue that such damages will not be granted at all.¹⁸⁵ The reason for this should be clear enough—the only way that a party could mitigate damages in a wrongful pregnancy action or an action for frustration of genetic affinity would be by aborting the child or by placing the child up for adoption. Courts allowing damages have invariably dispensed with the mitigation requirement on the grounds that it offends public policy, that abortion or adoption would impose an undue burden on the plaintiffs, or that the requirement would simply be unconstitutional in this context.¹⁸⁶

¹⁸³ Restatement (Second) of Contracts § 350(1) (1981).

¹⁸⁴ See Restatement (Second) of Torts § 918 (1979) ("[O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.").

¹⁸⁵ See, e.g., *Boone v. Mullendore*, 416 So. 2d 718, 723 (Ala. 1982) (noting "moral issues" involved in asking parents to choose between various methods of mitigation); *Flowers v. District of Columbia*, 478 A.2d 1073, 1077 (D.C. 1984) (noting "public policy considerations of extraordinary complexity" that would be raised if mitigation requirement applied in wrongful birth case); *Cockrum v. Baumgartner*, 477 N.E.2d 385, 391 (Ill. 1983) (same); *Girdley v. Coats*, 825 S.W.2d 295, 297-98 (Mo. 1992) (en banc) (citing *Boone*); *Kingsbury v. Smith*, 442 A.2d 1003, 1006 (N.H. 1982) (rejecting mitigation requirement); see also *University of Ariz. Health Sciences Ctr. v. Superior Court*, 667 P.2d 1294, 1303 (Ariz. 1983) (en banc) (Gordon, Vice C.J., concurring in part and dissenting in part) (noting inconsistency in majority's decision allowing damages for costs of rearing unwanted child but ignoring parents' failure to mitigate damage by seeking adoption or abortion of unwanted child).

¹⁸⁶ See, e.g., *Ochs v. Borrelli*, 445 A.2d 883, 885, 886 n.4 (Conn. 1982) (disregarding question of parents' mitigation of damages through abortion or adoption while awarding damages for cost of rearing child to majority); see also *Boone*, 416 So. 2d at 727 (Faulkner, J., concurring specially) (citing *Troppi v. Scarf*, 187 N.W.2d 511, 519 (Mich. Ct. App. 1971), for proposition that requiring parents to mitigate by putting child up for adoption would be unreasonable); *Wilbur v. Kerr*, 628 S.W.2d 568, 572 (Ark. 1982) (Dudley, J., dissenting) (criticizing majority for denying rearing costs because it would "encourage[] abortion or adoption"); *Flowers*, 478 A.2d at 1081-82 (Ferren, J., dissenting) (same); *Cockrum*, 447 N.E.2d at 392 (Clark, J., dissenting) (same); *Schork v. Huber*, 648 S.W.2d 861, 866 (Ky. 1983) (Leibson, J. dissenting) (same); *Girdley*, 825 S.W.2d at 299 (Turnage, Special Judge, concurring in part and dissenting in part) (asserting that case is about medical malpractice

The standard for determining when a party is required to mitigate damages is one of reasonableness.¹⁸⁷ Without entering the murky waters of public policy or constitutional doctrine, courts likely would waive the mitigation requirement, applying the language of the Restatements alone, in that requiring parents to abort or give up a child for adoption is an undue burden. For a number of reasons, imposing a mitigation requirement against a claim for loss of genetic affinity will be unreasonable. In at least some actions, one of the parents will be genetically related to the child; in those cases, a requirement that the plaintiffs abort or put the child up for adoption would be absurd. It is also likely that in many, if not all, such cases, the breach or tort will not be discovered until after the child has been born, perhaps even years later. Even before the time the child is born, the parents may have invested so much of themselves emotionally in this particular child that it would be impossible for them to consider the possibility of giving up the child.¹⁸⁸ Furthermore, the parents in question here are individuals who have been trying for some length of time, without success, to have children. The realization, after a successful pregnancy and birth, that they still do not have a child who is genetically their own would be devastating; to add to that tragedy by demanding that they give up the child (whom the female partner likely carried to term) would be cruel.

2. *Offset for the Benefit*

Whether the action is brought in tort or in contract, one potential defense is that any damages to which the plaintiff is entitled must be reduced by the benefit that the defendant has conferred upon the plaintiffs. The benefits rule, described in section 920 of the Restatement (Second) of Torts, provides that where a benefit, as well as a harm, is conferred by a tortfeasor, the benefit must be weighed against

and question of abortion or adoption is irrelevant); *Smith v. Gore*, 728 S.W.2d 738, 751-52 (Tenn. 1987) (holding that imposition of mitigation requirement in wrongful pregnancy case would infringe on constitutional rights to privacy).

¹⁸⁷ The reasonableness standard contemplates "all the facts and circumstances of each case . . . judged in the light of one viewing the situation at the time the problem was presented." *In re Kellett Aircraft Corp.*, 186 F.2d 197, 198 (3d Cir. 1950); see also *Clapham v. Yanga*, 300 N.W.2d 727, 733 (Mich. Ct. App. 1981) ("Unless a decision is between alternatives which ordinary persons would recognize as reasonable, a party is not required to mitigate damages by 'choosing' the course which would be the most efficient in minimizing damages."). The *Clapham* court held that grandparents who chose to adopt a baby born to their fourteen-year-old daughter could not be denied child-raising damages for failure to mitigate. See *id.* at 733.

¹⁸⁸ See, e.g., *Troppe*, 187 N.W.2d at 519 ("A living child almost universally gives rise to emotional and spiritual bonds which few parents can bring themselves to break.").

the elements of the claimed damage.¹⁸⁹ The contract law equivalent of this tort rule is the measure of damages, since the loss occasioned by the breach is necessarily diminished by any gain realized from the breaching party's attempt to perform. In a wrongful pregnancy action, the benefit is the emotional satisfaction the parents will derive by having a child. Some dissenters from the application of the benefits rule have noted that, in order for the rule to apply, the benefit should relate to the same interest as that harmed.¹⁹⁰ Invoking the economic interest argument critiqued above, they have suggested that the benefit is emotional and intangible, while the harm is economic. Even if that particular argument is persuasive in the wrongful pregnancy action, it has considerably less force here, where the benefit conferred and the harm alleged both concern the interest in having a child.

Some judges have gone still further, arguing that in a wrongful pregnancy case, it is illogical and inequitable to describe the birth of a child as a benefit at all.¹⁹¹ Under the facts of such actions, the benefit that the defendant seeks to apply has been expressly disavowed by the plaintiff, who has paid for a medical procedure to avoid that very "benefit." It would be inequitable, so the reasoning goes, to compel the receipt of an expressly disavowed benefit. This argument may appear less persuasive in an action based on frustrated genetic expectations, for it cannot be said that the plaintiffs sought to avoid entirely the birth of a child. Still, insofar as the actual result—the birth of a child whose genetics they did not control—was an option that they rejected, it may be argued that they have in fact disavowed the particular "benefit"—the birth of a child genetically unrelated to one or both of them. The equity argument cuts both ways, however, and some courts have reasoned that it would be inequitable for the parents to receive the benefit of their relationship with the child while the defendant is forced to bear all of the economic burden.¹⁹²

Ultimately, it must be acknowledged that just as the birth of a healthy child will not always be a blessing, that event also cannot be

¹⁸⁹ See Restatement (Second) of Torts § 920 (1979).

¹⁹⁰ See, e.g., *University of Ariz. Health Sciences Ctr*, 667 P.2d at 1303-04 (Gordon, Vice C.J., concurring in part and dissenting in part) (arguing that application of benefit rule should not be used to justify damages, since benefit is to different interest); *Flowers*, 478 A.2d at 1080 (Ferren, J., dissenting) (arguing that damage to plaintiff's financial interest is not offset by benefit to emotional interest).

¹⁹¹ See, e.g., *Kingsbury v. Smith*, 442 A.2d 1003, 1006 (N.H. 1982) ("To say that a benefit can be calculated from the total failure of the medical service or treatment giving rise to the action, based upon its failure, is an illogical extension of an otherwise sound legal proposition.").

¹⁹² See *Boone v. Mullendore*, 416 So. 2d 718, 726 (Ala. 1982) (Faulkner, J., concurring specially) (arguing that it would be inequitable, on principle of unjust enrichment, not to offset damages).

dismissed as being wholly valueless. An infertile couple seeking to have a baby with certain traits, but receiving a different baby, will often find tremendous joy in the birth and raising of that child. Nevertheless, the ability to make the most of adversity or disappointment, a quality generally considered to be virtuous and healthy,¹⁹³ should not be invoked to diminish a substantial invasion of the freedom to make decisions about reproduction and the relationship one has to one's children.¹⁹⁴ From these conflicting concerns and rationales, it seems possible to extract a rule that concedes that the birth of a child likely will be a benefit to an infertile parent (and most likely a greater benefit than the birth of a child to an individual who had sought sterilization), yet recognizes that this same benefit imposes costs on and denies opportunities to parents who had sought a certain kind of affinity with their children.

3. *Foreseeability*

In both tort and contract, damages are limited to the natural and probable consequences of the defendant's act at the time of the breach of care or contract.¹⁹⁵ The purpose of the rule in both doctrines is to avoid subjecting defendants to liability for failure to take precautions against risks of losses that could not reasonably be foreseen. In the use of assisted reproduction, the natural and foreseeable consequence of a failure to take care in the performance of medical procedures may be the birth of no child at all, rather than the birth of an unwanted child. It is reasonably foreseeable that one of the potential risks of misfeasance is the possibility of error, and that the direct consequence of erroneous substitution of gametes or embryos will be the birth of a child not genetically related to the parents.

4. *Speculative Damages*

Damages in both contract and tort must be stated with some degree of certainty, though just how much certainty is necessary is some-

¹⁹³ See Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 Va. L. Rev. 1341, 1393 (1995) (citing Amartya Sen, *Inequality Reexamined* 6-7 (1992)).

¹⁹⁴ See *id.* (noting that individuals' ability to adapt to adversity should not lead to devaluation of their freedom).

¹⁹⁵ See *Hadley v. Baxendale*, 9 Ex. 341, 354, 156 Eng. Rep. 145, 151 (1854) (holding that damages for breach of contract should be such as "may fairly and reasonably be considered either arising naturally . . . from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it"); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 43, at 280-300 (5th ed. 1984) (liability limited to foreseeable consequences); see also *Restatement (Second) of Contracts* § 351 (1981) (same).

what unclear.¹⁹⁶ The problem with damages for loss of genetic affinity, as with all intangible harms, is that there is no obvious means of translating such injuries into some monetary equivalent.¹⁹⁷ Descriptions of the injury are not quantitative but qualitative, and even the extent to which the harm can be described qualitatively is limited by the heavily subjective nature of the preferences at stake.

In cases alleging denial of genetic affinity, the danger that damages will be overly speculative is manifest. In the context of wrongful pregnancy, courts that have allowed damages, but offset them by the emotional benefit derived from the presence of the unplanned child, generally have acknowledged the difficulty of calculating the value of such a benefit, but have argued that the attempt would be no more speculative than that required in an action for wrongful death or loss of consortium.¹⁹⁸ In the genetic preference case, however, the dam-

¹⁹⁶ The contract requirement that damages be shown within reasonable certainty has lost some of its force in recent years, as some courts essentially have abandoned the rule by requiring only that the fact of the loss, as opposed to its extent, be proved with reasonable certainty. See E. Allan Farnsworth, *Contracts* 922-23 (2d ed. 1990) (describing this application of rule as "extreme view" and citing *Locke v. United States*, 283 F.2d 521 (Ct. Cl. 1960)); *Bagwell Coatings, Inc. v. Middle South Energy, Inc.*, 797 F.2d 1298, 1307-09 (5th Cir. 1986) (rejecting argument that injured party must establish total extent of damages in order to receive any recovery). The Supreme Court has apparently followed the "extreme view," having held that only the existence of damages need be proven with certainty. See *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) ("The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."); see also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969) (following *Story Parchment Co.*).

Tort law generally has been even more forgiving of uncertainty in damages calculations. See Keeton et al., *supra* note 195, § 52, at 350 ("The courts quite reasonably have been very liberal in permitting the jury to award damages where the uncertainty as to their extent arises from the nature of the wrong itself, for which the defendant, and not the plaintiff, is responsible.").

¹⁹⁷ But see Geistfeld, *supra* note 118, at 778-79 (proposing "ex-ante full compensation award" as desirable principle for measuring value of nonmonetary injury).

¹⁹⁸ A number of judges deciding wrongful pregnancy cases have made this observation, and have expressed confidence in the ability of juries to make such calculations:

These damages are at least as concrete as the measure of damages for the wrongful death of a child who has no established earning capacity. In such a case "the value of the child's life must be established by the enlightened conscience of an impartial jury as applied to the evidence in the case. . . . [T]he question of determining the amount to be awarded is almost entirely within the discretion of the jury."

Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 656 (Ga. 1984) (Gregory, J., dissenting) (alteration in original) (quoting *Collins v. McPherson*, 85 S.E.2d 552, 554-55 (Ga. Ct. App. 1954)); see also, e.g., *Boone v. Mullendore*, 416 So. 2d 718, 726 (Ala. 1982) (Faulkner, J., concurring specially) (citing *Collins*); *University of Ariz. Health Sciences Ctr. v. Superior Court*, 667 P.2d 1294, 1297, 1299-1300 (Ariz. 1983) (en banc) (same); *Ochs v. Borrelli*, 445 A.2d 883, 886 (Conn. 1982) ("We see no basis for distinguishing this case from other tort cases in which the trier of fact fixes damages for wrongful death . . . or for loss of

ages become increasingly speculative, since this type of analysis—comparison of the state of the world without defendant's negligence, fraud, or breach with the state of the world given that negligence, fraud, or breach—demands that the trier of fact not only determine the value of the emotional benefit conferred by the actual child, but do so in comparison to the benefit that allegedly would have been derived from the nonexistent child to whom the plaintiffs would have had a greater genetic tie. The additional factor of subjective preference may push the calculation of damages into sheer speculation.

This problem is not easily resolved. Any question of first impression contains some speculative component, and many novel actions will involve injuries with which the law has little experience. This legal inexperience should not be equated with ignorance, however, for the essence of the jury system lies in the application of the common experiences of the average person to determine the social value of legal wrongs.¹⁹⁹ Difficulties remain, however, in that the injury itself is both subjective in value and wholly outside the common experience. Even supporters of jury determination of intangible injuries must pause at the prospect of jurors or judges placing a value on the denial of an element of parentage which never before has been severable from the whole.

It may be impossible to eradicate the speculative component of monetary damages in an action alleging frustration of genetic affinity. The same might be said of damages for any number of nonpecuniary, emotional injuries committed to the discretion of the jury.²⁰⁰ Still, the jury need not be cast entirely adrift. As noted in the discussion of the wrongful pregnancy caselaw,²⁰¹ courts awarding damages for the cost of raising a healthy, unplanned child to the age of majority have fre-

consortium.") (citations omitted); *Cockrum v. Baumgartner*, 447 N.E.2d 385, 394 (Ill. 1983) (Clark, J., dissenting) (reasoning that damages for unwanted child are no harder to calculate than for wrongful death); *Schork v. Huber*, 648 S.W.2d 861, 867-68 (Ky. 1983) (Vance, J., dissenting) (reasoning that emotional benefits are no harder to calculate than emotional suffering); *Girdley v. Coats*, 825 S.W.2d 295, 301 (Mo. 1992) (en banc) (Turnage, Special Judge, concurring in part and dissenting in part) (stating that cost of rearing child is no more speculative than issue of damages in many tort cases); *Emerson v. Magendantz*, 689 A.2d 409, 417-18 (R.I. 1997) (Bourcier, J., concurring in part and dissenting in part) (approving allowing juries to determine damage awards); *Terrell v. Garcia*, 496 S.W.2d 124, 129 (Tex. Civ. App. 1973) (Cadena, J., dissenting) (arguing that evaluating benefit of child is no more difficult than evaluating value of loss of consortium).

¹⁹⁹ See Tomain, *supra* note 126, at 898-99 (asserting that determination of nonpecuniary contract damages by judge or jury, time-tested in tort cases, is justified under economic, moral, and political arguments).

²⁰⁰ See *supra* note 198 and accompanying text (suggesting that damages in action for loss of genetic affinity are no more speculative than other types of nonpecuniary damages, and citing cases making similar observation in context of wrongful pregnancy).

²⁰¹ See *supra* Part II.A.

quently resorted to a motivational rule emphasizing the interest of the parents in avoiding the financial burdens of raising a child.²⁰² As argued above, the characterization of the relevant injury as fundamentally economic is unreasonably narrow,²⁰³ given the wide range of interests implicated in the decision to reproduce. A motivational rule that recognizes the breadth of interests implicated in reproductive decisions, however, can give meaningful guidance to juries attempting to assess the extent of injury.²⁰⁴ For example, in the case of the Butlers, discussed above,²⁰⁵ the parents ultimately selected embryos from donors whose ancestry differed from their own, in order to maximize their chances of a successful pregnancy.²⁰⁶ Such a decision provides highly probative evidence of the value the parents place on genetic affinity relative to the value they place on having a child who does not share their identifying characteristics. Furthermore, that evidence is highly credible, the decision having been made antecedent to the events giving rise to the lawsuit.²⁰⁷

Under this scheme, a jury in a wrongful pregnancy action would consider the reasons an individual had for avoiding parenthood, be they economic, therapeutic, eugenic, emotional, or otherwise, and then attempt to evaluate the extent to which the actual birth of the child infringed upon that interest. The inquiry in an action for frustration of genetic affinity would be the same, with the jury considering the interest in genetic affinity, along with all other circumstances, including the parents' profound desire to have a child. In determining the weight to be given to the affinity interest, the jury should look to the subjective preferences of the plaintiff parents, rather than appeal to an objective reasonable person standard. A subjective standard is in keeping with the nature of the preference and the manner in which the law typically treats fundamentally aesthetic or subjectively valued injuries.²⁰⁸ Moreover, the plaintiff's efforts to have a child with whom there is a genetic connection—undergoing hormone therapy, invasive surgery, expensive fertility treatments, and ultimately, costly and un-

²⁰² See *supra* notes 147-49 and accompanying text (endorsing motivational rule in wrongful pregnancy cases).

²⁰³ See *supra* text following note 149.

²⁰⁴ See *supra* note 147.

²⁰⁵ See *supra* notes 65-71 and accompanying text.

²⁰⁶ The Butlers decided to use embryos from an Italian mother and a father of Russian, Romanian, and Hungarian descent. See *supra* note 70 and accompanying text; *supra* note 82.

²⁰⁷ Cf. *Hartke v. McKelway*, 707 F.2d 1544, 1555 (D.C. Cir. 1983) (observing, in wrongful pregnancy case, that reasons for undergoing sterilization procedure are "untainted by bitterness and greed, or by a sense of duty to a child the parents have brought into the world").

²⁰⁸ See *supra* Part I.B.2.

certain procedures like IVF and artificial insemination²⁰⁹—should provide ample evidence of the weight, depth, and sincerity of the interest in genetic affinity.

CONCLUSION

This Note has two purposes: first, to demonstrate that affinity-motivated genetic selection derives from parents' legitimate desires to have children who share their own traits; and second, that existing common law principles provide an adequate means for remedying loss of genetic affinity.

In deciding to have children, individuals act on a fundamental human desire to produce another human being with whom they will share their love and their lives. For many people, the natural biological experience of reproduction creates a baseline perception of what it means to be a parent, central elements of which include the powerful sense of affinity and shared identity that comes from holding common personal characteristics, and seeing them developed and reflected over the lifetimes of parent and child. Individuals who want to have children, but are unable to do so without reproductive technology, naturally desire the same sense of relatedness. When a person has sought, deliberately and at great sacrifice, a central element of the experience of parenthood and is denied that very experience by the fraud or negligence of another, there is a legally cognizable injury. That injury can and should be remedied under the law.

The reasoning developed in the wrongful pregnancy caselaw provides a useful analogy for thinking about damages for loss of genetic affinity. The utility of that analogy, however, is diminished by the reluctance of many courts to consider noneconomic motivations in reproductive decisionmaking. A more complete recognition of the subjective preferences implicated by such decisions illustrates the essential similarity of wrongful pregnancy and loss of genetic affinity claims. In both cases, the existence and the scope of the injury are defined by the personal preferences of the plaintiffs; consequently, only a damages rule that considers the strength of those preferences can provide a coherent remedy for the injury. A motivational rule performs this function without requiring a factfinder to engage in mere speculation or guesswork. Balancing the benefit and the loss with reference to the explicit *ex ante* preferences of the parents provides a judge or jury with a principled means of ascertaining damages.

²⁰⁹ See *supra* Part I.