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# DOES THE CLAIM FOR LOSS OF GENETIC AFFINITY HAVE ANY PLACE IN UNITED STATES JURISPRUDENCE?

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## ABSTRACT

*Assisted reproduction technologies (ART) and in vitro fertilization (IVF) have changed the lives of many infertile couples, same-sex couples, and single parents by choice who previously could not have biological children of their own. However, as ART has become more common, so have errors during the IVF process. Unfortunately, tort law in the United States has failed to keep pace with the rapid development of technology. As a result, many victims of IVF mix-ups, in which the wrong sperm, eggs, or embryos are used during the procedure, are left without a legal remedy. The Singapore case of *ACB v. Thomson Medical Pte Ltd and Others* offers a novel solution to this problem: awarding damages for “the loss of genetic affinity.” While this Article recognizes the pressing need for the expansion of tort law to accommodate IVF-related harms, it is the first scholarly article to evaluate in detail the substantial public policy arguments not to allow such a claim. A claim for the loss of genetic affinity could cause psychiatric harm to the child and risks perpetuating the misguided view that nonbiologically related families are less valuable. Further, enshrining genetic relatedness as a social value worthy of legal protection could inadvertently contribute to eugenicist or racist attitudes. Finally, overemphasizing the importance of genetics could influence the decisions of courts in other IVF-related cases. This Article proposes an alternative claim which stresses the importance of reproductive autonomy rather than genetic relatedness: a claim for the disruption of reproductive plans.*

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## I. INTRODUCTION

When Louise Brown—the world’s first “test-tube baby”—was conceived via in vitro fertilization (IVF) in 1978, she gave hope to millions of infertile couples who were previously unable to have children of their own.<sup>1</sup> Today, assisted reproductive technologies (ART) are routinely used by infertile couples, same-sex couples, or single parents by choice to have children that are genetically related to them.<sup>2</sup> In 2016, approximately 1.7 percent of all infants born in the United States were conceived using ART.<sup>3</sup> However, medical negligence may result in errors during the IVF process. One such error is a gamete or embryo mix-up in which eggs, sperm, or embryos are misdirected, resulting in a child with a different genetic makeup than expected. Since current tort law is unequipped to deal with IVF-related injury, parents who have suffered significant damage from such an injury are left without a legal remedy.

In a world first, the Singapore Court of Appeal in the case of *ACB v. Thomson Medical Pte Ltd and Others* dealt with the problem of IVF mix-ups by awarding damages for the “loss of genetic affinity.”<sup>4</sup> This Article

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1. Denise Grady, *Lesley Brown, Mother of World’s First ‘Test-Tube Baby,’ Dies at 64*, N.Y. TIMES (June 23, 2012), <https://www.nytimes.com/2012/06/24/health/lesley-brown-mother-of-first-test-tube-baby-dies-at-64.html>.

2. Mary Bowerman, Ashley May & Sean Rossman, *Should the Definition of Infertility Be More Inclusive?*, USA TODAY (Apr. 24, 2017), <https://www.usatoday.com/story/news/nation-now/2017/04/22/same-sex-couples-covered-infertility-insurance/100644092/>.

3. *ART Success Rates*, CDC, <https://www.cdc.gov/art/artdata/index.html> (last updated May 16, 2018).

4. *ACB v. Thomson Med. Pte Ltd and Others* [2017] SGCA 20, ¶ 24 (Sing.).

discusses whether a claim for a loss of genetic affinity has any place in U.S. jurisprudence. While this Article argues that a new category of injury to accommodate IVF-related harms is badly needed, it also explores public policy reasons not to allow claims for a loss of genetic affinity and proposes an alternative claim for the disruption of reproductive plans.

## II. BACKGROUND

### A. IVF and IVF Mix-Ups

The first step of IVF involves treating a woman with hormone therapy to produce multiple eggs at once.<sup>5</sup> These eggs are then retrieved using a surgical procedure; following which, the harvested eggs are mixed with sperm in a laboratory to create embryos.<sup>6</sup> Typically, the procedures involve the eggs and sperm of the intended parents; however, donated gametes or embryos may also be used.<sup>7</sup> After being allowed to develop for a few days, the embryo is then transferred back to the intended mother's uterus or a surrogate's uterus.<sup>8</sup>

This physical disjunction, in which fertilization of genetic material takes place outside a woman's body, creates a risk of error by medical providers.<sup>9</sup> While many different types of errors may occur during IVF, this Article focuses on mix-ups—in which either the correct egg is fertilized with the wrong sperm (or vice versa) before implantation or the wrong embryo is implanted into the mother. Such errors frustrate the parents' wishes to have a child that is genetically related to them or, if the wrong donor gametes or embryo is used, a child with certain desired and selected traits.<sup>10</sup>

### B. Insufficiency of Tort Law to Deal with IVF

Many tortious claims regarding IVF mix-ups are presently unsuccessful because tort law cannot accommodate the unique injury caused to parents

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5. JUDITH DAAR, *REPRODUCTIVE TECHNOLOGIES AND THE LAW* 36 (2d ed. 2013).

6. *Id.*

7. *Id.*; see Deborah L. Forman, *Exploring the Boundaries of Families Created with Known Sperm Providers: Who's In and Who's Out?*, 19 U. PA. J.L. & SOC. CHANGE 41, 64 (2016).

8. DAAR, *supra* note 5, at 36.

9. Fred Norton, *Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages*, 74 N.Y.U. L. REV. 793, 795 (1999).

10. *Id.* at 795–96.

in the IVF context.<sup>11</sup> Parents are forced to fit their claims into existing childbirth-related tortious claims, such as wrongful life, wrongful birth, or wrongful pregnancy.<sup>12</sup> These claims typically revolve around failed pregnancy testing, counseling, sterilization procedures, or contraception and thus do not translate well to the IVF context.<sup>13</sup> Additionally, some of these claims have been rejected in their intended context and are thus unlikely to be accepted when applied to IVF.<sup>14</sup>

In wrongful life claims, the claim is usually asserted by a child suffering from birth defects with which the physician negligently allowed the child to be born.<sup>15</sup> The claim is that the physician negligently allowed the child to be born at all, and thus, a claim can be made for the suffering the child must undergo as a result.<sup>16</sup> Most courts reject this claim altogether, as they are unwilling to say life itself is harm or compensation can be measured for the harm of living as compared to never having lived at all.<sup>17</sup> An example in the IVF context is *Johnson v. Superior Court*, in which a child was born as a result of an IVF clinic's failure to disclose that the sperm they sold to her parents came from a donor with a history of genetic kidney disease.<sup>18</sup> The court characterized the claim as one for wrongful life and held it was impossible to balance the harm caused by the plaintiff's negligence to the child's physical, emotional, and psychological well-being with the fact that the child's very existence was brought about by this same negligence.<sup>19</sup> The court thus decided it would be impossible to reach "a reasoned, nonarbitrary award of general damage."<sup>20</sup> This claim is therefore not a helpful option for parents harmed by IVF mix-ups.

In wrongful birth claims, the parents claim that but for the defendant's negligence in testing or counseling, the mother would have terminated a

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11. Joshua Kleinfeld, Comment, *Tort Law and In Vitro Fertilization: The Need for Legal Recognition of "Procreative Injury"*, 115 YALE L.J. 237, 237 (2005).

12. See 2 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 369, at 484-90 (2d ed. 2011).

13. *Id.* at 489 nn.26-30 (citations omitted).

14. *Id.* at 484-90.

15. *Id.*

16. *Id.*

17. See, e.g., *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (N.J. 1967).

18. *Johnson v. Superior Court*, 124 Cal. Rptr. 2d 650, 654 (Ct. App. 2002).

19. *Id.* at 664-65.

20. *Id.*

pregnancy to avoid the birth of a child with serious genetic defects.<sup>21</sup> The claim does not seek recovery for the genetic defect itself but for the loss of the choice to terminate the pregnancy and the damages that flow from that loss.<sup>22</sup> Some states do not allow claims for wrongful birth; for example, in *Zelt v. Xytex Corp.*, the court dismissed a lawsuit accusing a sperm bank of misrepresenting the medical and social history of a donor because Georgia courts are unwilling to characterize disability as a legal injury.<sup>23</sup> Moreover, while several states allow compensatory damages for expenses related to the care and treatment of the child,<sup>24</sup> such damages are unlikely to apply to IVF mix-up cases in which a healthy child is born since wrongful birth claims revolve around negligently undetected congenital or hereditary disorders.

In contrast, wrongful pregnancy (or wrongful conception) claims typically assert that but for a physician's negligence, the mother would never even have conceived at all—for example, when a physician was negligent in giving genetic advice, performing sterilizing procedures, or dispensing contraceptives.<sup>25</sup> Wrongful conception may thus be pursued as an alternative claim in states that reject wrongful birth.<sup>26</sup> Since wrongful conception claims do not necessarily involve unhealthy babies, they are a better fit for IVF mix-up cases.<sup>27</sup> However, wrongful pregnancy claimants usually assert that they never wanted a child at all,<sup>28</sup> while claimants in IVF mix-up cases were actively trying for a child but ended up with a child with the wrong genetic traits.<sup>29</sup> Further, since courts do not grant the costs of rearing a healthy child as damages,<sup>30</sup> damages would likely be limited.<sup>31</sup>

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21. 2 DOBBS, HAYDEN & BUBLICK, *supra* note 12, § 369, at 486.

22. *See id.* at 486 n.11 (citing *Burns v. Hanson*, 734 A.2d 964 (Conn. 1999)).

23. *Zelt v. Xytex Corp.*, No 1:17-CV-4851-TWT, 2018 WL 1014627, at \*1, \*3 (N.D. Ga. Feb. 22, 2018).

24. *See, e.g.*, *Becker v. Schwartz*, 386 N.E.2d 807, 814 (N.Y. 1978).

25. 2 DOBBS, HAYDEN & BUBLICK, *supra* note 12, § 369, at 489.

26. *Id.* at 490; *see, e.g.*, *Etkind v. Suarez*, 519 S.E.2d 210, 213 (Ga. 1999).

27. *See* 2 DOBBS, HAYDEN & BUBLICK, *supra* note 12, § 369, at 489.

28. *Id.* at 490.

29. *ACB v. Thomson Med. Pte Ltd and Others* [2017] SGCA 20, ¶¶ 134–35 (Sing.).

30. *See, e.g.*, *Cockrum v. Baumgartner*, 447 N.E.2d 385, 389 (Ill. 1983) (agreeing with most jurisdictions that costs of rearing a healthy child cannot be recovered as damages).

31. Courts may grant damages for expenses of the unsuccessful sterilization procedure, pain and suffering from the resulting pregnancy, delivery costs, lost wages, and loss of consortium due to negligence. *See, e.g.*, *Weintraub v. Brown*, 470 N.Y.S.2d 634 (App. Div. 1983).

Another avenue sought by IVF mix-up claimants is damages for emotional harm due to the negligently committed error.<sup>32</sup> However, tort law typically forbids recovery for negligently inflicted emotional distress absent physical injury.<sup>33</sup> In most IVF mix-up cases, although the claimants may suffer from significant emotional harm, there is no physical injury.<sup>34</sup> Attempts to argue that the IVF procedure itself constitutes physical injury have typically been rejected, as the plaintiffs consented to the surgery and the surgery would have occurred regardless of the negligence.<sup>35</sup> Further, courts have denied recovery based on public policy arguments, reasoning that a healthy child can never constitute an injury.<sup>36</sup> For example, in *Andrews v. Keltz*, the defendants negligently used the sperm of a stranger instead of the intended father for the IVF procedure.<sup>37</sup> The New York Supreme Court noted that previous case law held the birth of a healthy but unwanted child does not constitute an injury<sup>38</sup> and even parents of a child with a serious disease cannot recover for emotional injury from the child's birth.<sup>39</sup> The court, therefore, held that the plaintiffs in this case could not recover for mental distress arising from having a healthy child who is not Mr. Andrews's biological offspring.<sup>40</sup>

Thus, tort law at present is insufficient to cope with the advances in assisted reproduction technology. Existing childbirth-related torts are unable to accurately characterize the injuries caused to parents when IVF mix-ups occur, as they typically revolve around the birth of a disabled or unplanned child and preclude the birth of children with different genetics or traits than those selected.<sup>41</sup> Claims for emotional distress are also usually not

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32. Kleinfeld, *supra* note 11, at 240.

33. *Id.*

34. *See, e.g.*, Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67, 72 (Utah 1998) (“[M]uch of the ‘emotional distress’ which we endure . . . is not compensable.”).

35. *See, e.g.*, Doe v. Irvine Sci. Sales Co., 7 F. Supp. 2d 737, 741 (E.D. Va. 1998); Creed v. United Hosp., 600 N.Y.S.2d 151, 151–53 (App. Div. 1993).

36. *See, e.g.*, Andrews v. Keltz, 838 N.Y.S.2d 363, 367 (Sup. Ct. 2007).

37. *Id.* at 365.

38. *Id.* at 367.

39. *Id.* at 369; Paretta v. Med. Offices for Human Reprod., 760 N.Y.S.2d 639, 646 (Sup. Ct. 2003) (“[T]here can be no recovery for the emotional distress a parent may experience as a result of having a child with a genetic disease.”).

40. *Andrews*, 838 N.Y.S.2d at 369.

41. *See id.* at 368–69.

applicable when there is no physical harm and the child is healthy.<sup>42</sup> Thus, a new tortious claim is needed to cater to IVF mix-up victims.<sup>43</sup>

C. *The Loss of Genetic Affinity in ACB v. Thomson Medical Pte Ltd and Others*

In the case of *ACB*, a couple sought to conceive a child through IVF at Thomson Medical Pte Ltd using their own sperm and eggs.<sup>44</sup> The IVF procedure was successful, and the couple had a daughter.<sup>45</sup> However, upon the child's birth, it was discovered that the wrong sperm had been used to fertilize the mother's ovum because the child had a different ethnic appearance from both parents.<sup>46</sup> The mother then sued the doctors and clinic for negligence, claiming as damages the upkeep costs she would incur in raising the baby.<sup>47</sup>

Singapore's apex court, the Court of Appeal, noted that IVF cases do not fall within the existing categories of wrongful birth, wrongful life, or wrongful pregnancy.<sup>48</sup> Instead, it characterized the claim as one for "wrongful fertili[z]ation."<sup>49</sup> The court then rejected the mother's claim for upkeep costs for two reasons.<sup>50</sup> First, as the obligation to maintain one's child lies at the heart of parenthood, it should not be recognized as actionable damage.<sup>51</sup> Second, to recognize the upkeep claim would be inconsistent with the nature of the parent-child relationship, as it would place parents in a position where their interests as litigants would conflict with their duties as parents.<sup>52</sup>

However, the court created a new category of injury: the loss of genetic affinity.<sup>53</sup> This claim was first proposed by Fred Norton in an obscure law review article in 1999.<sup>54</sup> The court noted that the respondent's negligence

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42. *See id.* at 368.

43. Kleinfeld, *supra* note 11, at 237–38.

44. *ACB v. Thomson Med. Pte Ltd and Others* [2017] SGCA 20, ¶ 6 (Sing.).

45. *Id.* ¶ 44.

46. *Id.* ¶ 8.

47. *Id.* ¶ 3.

48. *Id.* ¶ 30.

49. *See id.* ¶¶ 32–36.

50. *Id.* ¶ 101.

51. *Id.*

52. *Id.*

53. *Id.* ¶ 24.

54. Norton, *supra* note 9, at 810.

disrupted the appellant's reproductive plans and that the appellant's desire to have a child biologically related to her and her husband is "a basic human impulse" and "its loss is keenly and deeply felt."<sup>55</sup> The court also acknowledged that those who choose to undergo IVF are motivated by the desire to experience, "as far as it is possible, the ordinary experience and incidents of parenthood."<sup>56</sup> The court thus held that the appellant's interest in maintaining "the integrity of her reproductive plans," that is, preserving "an intergenerational genetic link" between her, her husband, and her child, is one the law should recognize and protect.<sup>57</sup>

### III. BENEFITS OF ALLOWING LOSS OF GENETIC AFFINITY CLAIMS

The benefit of allowing a claim for a loss of genetic affinity is that it accurately pinpoints the harm suffered by the parents in *ACB*, which is not correctly represented by existing tortious claims.<sup>58</sup> To illustrate this point, IVF mix-ups can be considered in two categories: first, where the gametes from the intended parents should have been used but a stranger's gametes were used instead (as in *ACB*);<sup>59</sup> second, where either one or both gametes were selected by the parents from potential donors but the wrong donor gametes or embryos were used.<sup>60</sup> In both scenarios, the couples have suffered a loss. They both entered into a transaction with the IVF clinic with reasonable expectations about what would be the result: in the first scenario, that the child would be genetically related to them, and in the second, that the child would be conceived with the chosen donor gametes or embryo.

However, the failure to receive a child *genetically related* to its parents, compared to a child that would merely have *different traits than expected*, is perceived to be a greater loss. This is due to the significant social value assigned to genetic relatedness between parent and child.<sup>61</sup> Many believe the loss of an intergenerational genetic tie is one that cannot be characterized simply by a loss of reasonable expectations.<sup>62</sup> Parents often deeply value having a shared biological identity with their children, which they hope to

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55. *ACB*, SGCA 20, ¶ 127.

56. *Id.* ¶ 129.

57. *Id.* ¶ 135.

58. See Norton, *supra* note 9, at 798.

59. See *ACB*, SGCA 20, ¶ 10.

60. See Kleinfeld, *supra* note 11, at 239–40.

61. See Norton, *supra* note 9, at 809.

62. *Id.* at 815.

observe in their children's physical appearance and personality.<sup>63</sup> Genetic affinity also goes beyond similarity in visible physical characteristics; parents may wish to have children genetically related to both of them so the child represents a "physical manifestation of the parents' emotional bond."<sup>64</sup> Pursuing genetic affinity through IVF also allows parents to replicate the experience of traditional procreation as closely as possible,<sup>65</sup> which may be important to parents due to the social stigma associated with infertility.<sup>66</sup> Finally, some parents may also wish to pass on inherited traits that identify parent and child as members of the same group,<sup>67</sup> perhaps due to pride in their ancestry and a desire for their children to participate in their cultural lives.<sup>68</sup>

By accurately characterizing the harm suffered in *ACB*, a claim for the loss of genetic affinity ensures tort law is able to fulfill its ideals of corrective justice and personal accountability for harmful conduct in this rapidly growing field.<sup>69</sup> As pointed out by the court in *ACB*, couples often pursue IVF (an expensive and invasive procedure) out of a strong desire to have children that are genetically related to them.<sup>70</sup> The court also held that when these plans are thwarted due to professional negligence, couples should be compensated for their loss.<sup>71</sup> Since tort law is an important means by which private parties pursue reparation for their injuries, the law must evolve to accommodate innovations in technology and the novel injuries they breed.

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63. See Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347, 366–67 (2008).

64. Norton, *supra* note 9, at 798; see also LEON R. KASS, *LIFE, LIBERTY AND THE DEFENSE OF DIGNITY: THE CHALLENGE FOR BIOETHICS* 96 (2002) ("[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. . . . [T]his is precisely what is being celebrated by most people who rejoice at the birth of Louise Brown . . .").

65. Norton, *supra* note 9, at 799.

66. See, e.g., Linda M. Whiteford & Lois Gonzalez, *Stigma: The Hidden Burden of Infertility*, 40 SOC. SCI. & MED. 27 (1995).

67. See KAJA FINKLER, *EXPERIENCING THE NEW GENETICS: FAMILY AND KINSHIP ON THE MEDICAL FRONTIER* 10 (2000) ("DNA binds a person's past and future into a single family narrative . . . connecting people to their ancestors and reinforcing continuity with them.").

68. Norton, *supra* note 9, at 799.

69. See 1 DOBBS, HAYDEN & BUBLICK, *supra* note 12, § 11, at 19–20.

70. *ACB v. Thomson Med. Pte Ltd and Others* [2017] SGCA 20, ¶ 129 (Sing.).

71. *Id.*

In addition, tort law also plays an important regulatory role through the deterrence of harmful conduct.<sup>72</sup> The risk of liability for heavy damages incentivizes medical professionals to take due care to prevent mix-ups, such as by implementing institute-wide policies.<sup>73</sup> Not recognizing a claim for egregious breaches of medical professionals' duty of care would prevent tort law from playing this role in the field of assisted reproduction, which in the United States is unregulated by federal legislation.

#### IV. SHOULD LOSS OF GENETIC AFFINITY CLAIMS BE ALLOWED ON PUBLIC POLICY GROUNDS?

##### A. *Psychological Harm to the Child*

Despite the benefits of allowing a claim for a loss of genetic affinity, it is also important to consider public policy reasons not to allow such a claim. One such concern is that in arguing for a loss of genetic affinity, parents are essentially claiming the lack of a genetic match with their child is a harm that demands and deserves a remedy.<sup>74</sup> This could result in psychological harm to the child, who may feel unwanted and unloved.<sup>75</sup>

This echoes the concern many courts have had in wrongful pregnancy claims. For example, the Illinois Supreme Court was concerned that permitting recovery would require parents to give testimony regarding the harm they have suffered as a result of being forced to raise the child, holding that parents would have to "demonstrate not only that they did not want the child but . . . that the child remains an uncherished, unwanted burden so as to minimize the offset to which the defendant is entitled."<sup>76</sup> Similarly, the D.C. Court of Appeals observed that parents "will be strongly tempted to denigrate the child's value to the extent possible in order to obtain as large a recovery as possible."<sup>77</sup> To protect children from realizing they were unwanted by their parents, the Supreme Court of Ohio held, "Recovery should be denied to protect the mental and emotional health of the child."<sup>78</sup> While these concerns also apply in wrongful birth cases, they are rarely

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72. 1 DOBBS, HAYDEN & BUBLICK, *supra* note 12, § 14, at 29.

73. *See id.*

74. *See Andrews v. Keltz*, 838 N.Y.S.2d 363, 368–69 (Sup. Ct. 2007).

75. *See id.* at 369.

76. *Cockrum v. Baumgartner*, 447 N.E. 2d 385, 390 (Ill. 1983).

77. *Flowers v. District of Columbia*, 478 A.2d 1073, 1076 (D.C. 1984).

78. *Johnson v. Univ. Hosps. of Cleveland*, 540 N.E.2d 1370, 1376 (Ohio 1988).

discussed by courts and usually do not preclude damages.<sup>79</sup> However, this could be because wrongful birth claims typically involve some form of genetic defect, and courts may consider claimants to suffer greater emotional and financial harm from having a disabled child compared to a healthy child.<sup>80</sup> Thus, the benefits of compensating parents for the unintended birth of a disabled child could be deemed to outweigh the potential psychological harm to the child.

Granted, it is possible to differentiate wrongful pregnancy from a loss of genetic affinity. In wrongful pregnancy claims, couples usually act specifically to avoid pregnancy and are thus claiming the child's conception was unwanted.<sup>81</sup> Conversely, in loss of genetic affinity cases, the couple wished to bear a child but desired a child that was genetically their own.<sup>82</sup> However, even if the couple is not arguing the child was unwanted, they are still arguing their child is "deficient" for not being genetically related to them.<sup>83</sup> It is highly conceivable that the same concerns that the child would be psychologically and emotionally harmed prevail.

### *B. The Risk of Over-Prioritizing Genetic Ties*

Although the Singapore court was careful to declare that its judgment should not be perceived as laying out a "prescriptive definition of what family should be" or to "denigrate adoption,"<sup>84</sup> the fact remains that recognizing a claim for the loss of genetic affinity may implicitly signal that biological ties are, in the eyes of the law and society, valued over other parental bonds. Norton, in describing the social value of genetic affinity, argues the commonplace nature of a biologically linked family has led to a

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79. See 2 DOBBS, HAYDEN & BUBLICK, *supra* note 12, § 369, at 488.

80. See, e.g., *Curlender v. Bio-Sci. Labs.*, 165 Cal. Rptr. 477, 486 (Ct. App. 1980) ("Surely there is a world of difference between an unwanted healthy child who is illegitimate . . . and the severely deformed infant plaintiff . . . [T]he result of that negligence is palpable injury, involving not only pecuniary loss but untold anguish on the part of all concerned . . .").

81. See *Wrongful Pregnancy*, JRANK.ORG, [law.jrank.org/pages/11417/wrongful-pregnancy.html](http://law.jrank.org/pages/11417/wrongful-pregnancy.html) (last visited Oct. 1, 2018) (discussing failing to perform sterilization or abortion correctly, which results in birth of a healthy but *unwanted* child).

82. See generally Ellen Trachman, *The Hottest New Legal Theory: 'Loss of Genetic Affinity'*, ABOVE THE LAW (Apr. 26, 2017), <https://abovethelaw.com/2017/04/the-hottest-new-legal-theory-loss-of-genetic-affinity/> (discussing parents' use of IVF resulting in a procedural mishap and a very different child than themselves).

83. *Id.*

84. *ACB v. Thomson Med. Pte Ltd and Others* [2017] SGCA 20, ¶ 129 (Sing.).

generally accepted “social construction of what family is, and what makes it meaningful.”<sup>85</sup> He thus contends that while having a nongenetically related family may be rewarding, it fails to provide the normative experience many people desire and value.<sup>86</sup> Yet Norton’s view is entirely incompatible with families in the modern United States. Many families in the United States are created without a genetic tie between parent and child through adoption or the use of donor gametes and embryos.<sup>87</sup> Allowing a claim for the loss of genetic affinity could perpetuate Norton’s view that such families are less “meaningful” than biological families, potentially cementing the lower status of nongenetically related families in the eyes of society.<sup>88</sup>

Despite social perceptions to the contrary, research shows the absence of a genetic connection between parents and children does not have an adverse effect on parent–child relationships or increase the risk of the child suffering from psychological problems.<sup>89</sup> Thus, families formed through reproductive donation cannot be presumed to be at risk for parenting or child-adjustment problems.<sup>90</sup> This supports the claim that families need not be biologically related to be meaningful or functional and suggests the value of genetic relations exists largely in the eyes of society.

Part of the reason the loss of genetic affinity is so keenly suffered by parents could be because society greatly misunderstands the role genetics plays in personality, traits, and family ties. While there is an indisputable correlation between genes and our physical traits, the strength of this correlation may vary. For example, while carriers of the Huntington’s gene will always suffer from the disease, the presence of the BRCA1 gene, which is associated with breast cancer, does not always predict that the individual will ever develop breast cancer.<sup>91</sup> Similarly, many facets of human behavior

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85. Norton, *supra* note 9, at 809.

86. *Id.*

87. See FINKLER, *supra* note 67, at 117–18; DOROTHY NELKIN & M. SUSAN LINDEE, *THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON* 58–60 (1995).

88. Norton, *supra* note 9, at 809.

89. Susan Golombok, *Families Created by Reproductive Donation: Issues and Research*, 7 *CHILD DEV. PERSP.* 61, 63 (2013).

90. *Id.*

91. Ethics Comm. of the Am. Soc’y for Reprod. Med., *Use of Preimplantation Genetic Diagnosis for Serious Adult Onset Conditions: A Committee Opinion*, 100 *FERTILITY & STERILITY* 54, 54–55 (2013).

could be heritable, but the link between the genetic basis and the expressed trait may be tenuous.<sup>92</sup>

Despite this, a culture of genetic essentialism exists, which is the belief that our DNA is the most important constituent of who we are as human beings. Although the public has rather limited knowledge regarding genetics,<sup>93</sup> studies show that people often readily offer genetic explanations to explain people's behaviors.<sup>94</sup> Many people also believe that traits with a genetic basis are immutable.<sup>95</sup> For example, in one study, participants were told that the ability to identify plants varied according to gender. One group of participants were showed a fictitious newspaper article with a genetic reason for the difference, while a second group was provided a sociocultural explanation for the difference.<sup>96</sup> Those who read a genetic explanation were more likely to believe the trait was immutable than those in the group given the sociocultural explanation.<sup>97</sup>

A genetic-essentialist approach thus overvalues genetics, while discounting the important role of other factors, such as the environment, microbiome, and epigenetics, in determining personality, interpersonal relationships, and even physical traits. Nelkin and Lindee observe that the gene has become the equivalent of the soul, "assum[ing] a nearly spiritual importance as a powerful and scared object through which human life and fate can be explained and understood," and consequently, the gene is seen as "an almost supernatural entity that has the power to define identity, determine human affairs, dictate human relationships, and explain social problems."<sup>98</sup> With direct-to-consumer genetic-testing companies claiming DNA sequencing can do everything from helping to develop a stronger sense

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92. Erik Turkheimer, *Heritability and Biological Explanation*, 105 PSYCHOL. REV. 782, 782 (1998).

93. Lanie et al., *Exploring the Public Understanding of Basic Genetic Concepts*, 13 J. GENETIC COUNS. 305, 313 (2004).

94. See Roxanne L. Parrot et al., *Development and Validation of Tools to Assess Genetic Discrimination and Genetically Based Racism*, 97 J. NAT'L MED. ASS'N 980, 981 (2005); Sara Shostak et al., *The Politics of the Gene: Social Status and Beliefs About Genetics for Individual Outcomes*, 72 SOC. PSYCHOL. Q. 77, 89 (2009).

95. See Victoria Brescoll & Marianne LaFrance, *The Correlates and Consequences of Newspaper Reports of Research on Sex Differences*, 15 PSYCHOL. SCI. 515, 520 (2004).

96. *Id.* at 518.

97. *Id.* at 519.

98. NELKIN & LINDEE, *supra* note 87, at 57, 193.

of self<sup>99</sup> to predicting what kind of wine an individual prefers,<sup>100</sup> genetic essentialism is likely to become even more prevalent in society. As people's understanding of genetics influences the way they live their lives,<sup>101</sup> these beliefs result in the strong emphasis placed by society on intergenerational genetic relatedness.

Even more worrying is the possibility that the social importance of genetic affinity comes not just from ignorance but also from outdated and illegitimate beliefs about genetic correlations between class, racial identity, and undesirable traits. In the early twentieth century, the U.S. eugenics movement capitalized on the then-emerging field of genetics to give scientific credence to harmful race and class stereotypes.<sup>102</sup> Recent events have shown that eugenics is not just a relic of history but continues to persist in the United States—the most obvious example being the recent rally by white supremacists and nationalists in Charlottesville, Virginia.<sup>103</sup> Similar to their predecessors, neo-Nazis have adopted genetics to their cause; for example, news reports describe white supremacists using direct-to-consumer genetic tests to confirm their European heritage<sup>104</sup> and adopting milk as a symbol of white racial superiority, as most nonwhite ethnicities are genetically predisposed to lactose intolerance.<sup>105</sup> A tortious claim that puts the importance of genetics front and center could thus inadvertently serve to bolster these deeply troubling views.

While the “science” behind eugenics has largely been discredited and most Americans do not identify with white supremacy or neo-Nazism, genes

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99. *Stories*, 23ANDME, <https://www.23andme.com/stories/> (last visited Oct. 1, 2018).

100. *VINOME*, <https://www.vinome.com/> (last visited Oct. 1, 2018).

101. Ilan Dar-Nimrod & Steven J. Heine, *Genetic Essentialism: On the Deceptive Determinism of DNA*, 137 *PSYCHOL. BULL.* 800, 801 (2011).

102. NELKIN & LINDEE, *supra* note 87, at 19–37.

103. See Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, *WASH. POST* (Aug. 14, 2017) <https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/>.

104. Anna Almendrala & Ryan Grenoble, *White Supremacists Are Using Genetic Ancestry Tests for a Creepy Purpose*, *HUFFPOST* (Aug. 17, 2017), [https://www.huffpost.com/entry/white-supremacists-are-using-genetic-ancestry-tests-for-a-creepy-purpose\\_n\\_59961087e4b0a2608a6b1e44](https://www.huffpost.com/entry/white-supremacists-are-using-genetic-ancestry-tests-for-a-creepy-purpose_n_59961087e4b0a2608a6b1e44).

105. Andrea Freeman, *Milk, a Symbol of Neo-Nazi Hate*, *CONVERSATION* (Aug. 30, 2017), <http://theconversation.com/milk-a-symbol-of-neo-nazi-hate-83292>.

continue to play an important role in stereotyping.<sup>106</sup> Studies have shown that a strong belief in genetic determinism, such as the idea that the fate of individuals lies in their genes, positively correlates with negative stereotyping of racial and other social groups.<sup>107</sup> Thus, even if someone does not expressly hold pro-eugenics views, it is possible a preference for genetic affinity with one's child rests on the flawed belief that the genes of others may be less than desirable—particularly if they come from different racial or social groups.

It is important to consider whether a claim for loss of genetic affinity should be recognized if the value of genetic relations is mostly socially determined. Many views once strongly held by society have since been deemed harmful. For example, society once viewed homosexuality as so repugnant that some courts considered an imputation of homosexuality to be defamatory *per se*.<sup>108</sup> However, as society progressed and views toward homosexuality improved, courts began to recognize that such a presumption validated the view that homosexuality was immoral and “legitimiz[e] relegating homosexuals to second-class citizens.”<sup>109</sup> Considering the United States' troubling history with eugenics<sup>110</sup> as well as troubling current events, courts should carefully consider introducing any claim that may further entrench societal views about the importance of genetics in determining family ties and personal identity.

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106. See Amy Dockser Marcus, *Scientists Confront Ghost of Eugenics*, WALL ST. J. (Aug. 17, 2018), <https://www.wsj.com/articles/scientists-confront-the-ghost-of-eugenics-1534523929>.

107. See Brock Bastian & Nick Haslam, *Psychological Essentialism and Stereotype Endorsement*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 228, 233 (2006); Johannes Keller, *In Genes We Trust: The Biological Component of Psychological Essentialism and Its Relationship to Mechanisms of Motivated Social Cognition*, 88 J. PERSONALITY & SOC. PSYCHOL. 686, 687 (2005).

108. *Albright v. Morton*, 321 F. Supp. 2d 130, 137–38 (D. Mass. 2004).

109. *Id.* at 138.

110. See *Buck v. Bell*, 274 U.S. 200, 207 (1927). The U.S. Supreme Court held that a state statute permitting compulsory sterilization of the unfit was not unconstitutional and famously stated “three generations of imbeciles are enough.” See *id.* The case has never been expressly overturned. *But see Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (striking down a forced sterilization law requiring all persons convicted of two felonies to be sterilized).

### C. Genetic Affinity and Racial Sensitivity

It would be remiss not to discuss the racial dimension of a claim for the loss of genetic affinity. Social scientists have established that race is a social construct without biological meaning,<sup>111</sup> and the scientific community has advocated phasing out the concept of race in genetic research, noting that commonly defined racial groups are genetically heterogeneous and lack clear-cut boundaries.<sup>112</sup> Despite this, race is an important dimension of the claim for a loss of genetic affinity.<sup>113</sup> Often, the only reason an IVF mix-up is detected is because of an observable difference in physical features such as skin tone between parent and child.<sup>114</sup> The social significance of physical resemblance within families makes racial mismatch a significant portion of the “injury” claimed by victims of an IVF mix-up.<sup>115</sup> There is cause for concern that allowing such a claim would reinforce racist, anachronistic notions favoring single-race families over multiracial ones.

The Singapore court cautioned that it “completely miss[es] the point” to say the issue in *ACB* is “merely one about ‘incorrect’ / ‘undesired’ genetic mix or skin tone,”<sup>116</sup> as “the desire for genetic affinity is [a] complex and multi-faceted [one].”<sup>117</sup> However, the court also emphasized the social expectation of a child being the same race as his or her parents as a key factor in their decision to award damages.<sup>118</sup> The court observed, while being careful not to condone racism, that Singapore is not yet a postracial society and clarified that the judgment was not intended as “judicial sanction for any partiality for single-race families” but of the “complex role that physical resemblance, race, and cultural and ethnic identity” plays on “individual

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111. See FRANZ BOAS, RACE LANGUAGE AND CULTURE 15 (Univ. of Chi. Press 1982) (1940).

112. Michael Yudell et al., *Taking Race Out of Human Genetics*, 351 SCI. 564, 565 (2016).

113. Hairal Hakkim & Kevin Ho Hin Tat, *Genetic Affinity as a Novel Remedy for Wrongful Fertilisation—A Case of Assessing the Incalculable? ACB v Thomson Medical Pte Ltd and Others [2017] SGCA 20*, SING. LAW BLOG (Apr. 9, 2017, 2:38 PM), <http://www.singaporelawblog.sg/blog/article/182>.

114. See Kleinfeld, *supra* note 11, at 238 n.9; Kim Bellware, *White Woman Who Sued Sperm Bank over Black Baby Says It's Not About Race*, HUFFPOST (Oct. 2, 2014), [https://www.huffingtonpost.co.za/entry/black-sperm-law-suit\\_n\\_5922180](https://www.huffingtonpost.co.za/entry/black-sperm-law-suit_n_5922180).

115. See Bellware, *supra* note 114; Hakkim & Ho, *supra* note 113.

116. *ACB v. Thomson Med. Pte Ltd and Others [2017] SGCA 20*, ¶ 128 (Sing.).

117. *Id.*

118. See *id.* ¶¶ 133–135.

well-being.”<sup>119</sup> The court cited with approval an academic article which argued that to recognize the role of physical resemblance in familial relationships and well-being (including having to suffer racist bullying of the child and unkind questions about the wife’s fidelity) was not to approve of such attitudes but to recognize that race “as a social concept can lie at the root of real and significant harms.”<sup>120</sup>

It is hard to predict what stance U.S. courts will take on the issue of race in IVF mix-ups. One case that may be illustrative is *Harnicher v. University of Utah Medical Center*, in which a couple selected the sperm of a donor, who physically resembled the intended father, to be mixed with the intended father’s sperm.<sup>121</sup> A mix-up occurred, and the resulting infant’s biological father was a completely different donor.<sup>122</sup> The parents sued for negligent infliction of emotional distress, for which the Utah Supreme Court denied recovery.<sup>123</sup> However, the court implied in dicta that they may have been more sympathetic if the claim revolved around “racial or ethnic mismatch.”<sup>124</sup>

However, the Supreme Court case of *Palmore v. Sidoti* suggests courts could take a different route.<sup>125</sup> Anthony and Linda Sidoti were a Caucasian couple that filed for divorce.<sup>126</sup> Linda was awarded custody of their child.<sup>127</sup> A year later, Anthony sought custody of their child after Linda began cohabiting with Palmore—an African American—arguing that the child would be more vulnerable to social stigmatisation in a racially mixed household.<sup>128</sup> The Supreme Court of the United States refused to grant Anthony custody, holding that although “a child living with a [parent] of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin,” “the law cannot, directly or indirectly” give such “private biases . . . effect.”<sup>129</sup> Applying *Palmore* to the negligence context, even if

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119. *Id.* ¶ 134.

120. *Id.* ¶¶ 133, 135.

121. *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 68 (Utah 1998).

122. *Id.*

123. *Id.* at 72.

124. *Id.*

125. *Palmore v. Sidoti*, 466 U.S. 429, 429 (1984).

126. *Id.* at 430.

127. *Id.*

128. *Id.* at 430–31.

129. *Id.* at 433.

future courts are sympathetic to the harm suffered by parents due to racial mismatch, they could still decide damages should not be awarded even if the family experiences harm due to bigotry, as the law should not play a part in giving effect to racism.<sup>130</sup>

It is conceivable that a loss of genetic affinity will be claimed by parents who desired a child of the same race as them for purely racist reasons.<sup>131</sup> They may argue that while discrimination is not acceptable in public decision-making, such as decisions regarding employment, education, and housing, it is perfectly valid in private decision-making, such as decisions about kinship and reproduction.<sup>132</sup> Thus, these parents may argue the law should not bar claims in which their private choices have been thwarted. Obviously, these claims should not be entertained: if it would be contrary to public policy to give effect to private biases by considering harm caused by the racist attitudes of others, as in *Palmore*, then surely it cannot assist those who hold racist attitudes themselves.<sup>133</sup>

However, given the important role race continues to play in U.S. society, parents may understandably feel genuinely harmed by having a child of a different race without necessarily holding racist beliefs.<sup>134</sup> Parents may be distressed by the possibility of their children being victims of racist slurs or their own lack of cultural competency to raise a child of a different race.<sup>135</sup> In one such case, a white woman, Jennifer Cramblett, was accidentally inseminated with sperm from a black donor even though she had chosen a white donor.<sup>136</sup> While Cramblett loved her daughter, she was distressed by the fact that her mixed-race child would have to grow up in a “white, conservative and too racially intolerant” neighborhood and that she was unequipped to help her daughter cope with racial bias.<sup>137</sup> Although Cramblett’s claim was rejected because she sought damages for wrongful birth and her child was not born with any genetic or congenital birth

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130. *Id.*

131. See Meredith Rodriguez, *Lawsuit: Wrong Sperm Delivered to Lesbian Couple*, CHI. TRIB. (Oct. 1, 2014), <http://www.chicagotribune.com/news/local/breaking/ct-sperm-donor-lawsuit-met-20140930-story.html>.

132. Norton, *supra* note 9, at 810.

133. See *Palmore*, 466 U.S. at 433.

134. See Rodriguez, *supra* note 131.

135. See *id.*

136. Bellware, *supra* note 114.

137. *Id.*

defects,<sup>138</sup> her concerns are valid considering the reality of racial tension in the United States.

Comparison can be made to transracial adoption, where despite similar concerns, studies have shown that transracial adoption is not inherently harmful to the child.<sup>139</sup> In a dissenting opinion, Chief Judge Theodore Newman stated white parents of interracial families lack the necessary “survival skills” for coping with racism.<sup>140</sup> However, evidence does not show transracial adoption is any more harmful to children or families than same-race adoption;<sup>141</sup> studies of Korean and black children adopted into white homes show most children did not encounter any long-term adjustment problems and were largely supportive of interracial adoption.<sup>142</sup> Analogizing to the IVF context, children resulting from IVF mix-ups are not inevitably harmed by being of a different race than their parents.

Regardless of the motivations of the parents, by awarding damages the court will be in effect declaring parents “injured” by the birth of children of a different race than them.<sup>143</sup> This may reinforce the racially prejudicial attitudes of some claimants and be understood as making a statement that people should have children of their own race.<sup>144</sup> Most of all, the court would be giving legal effect to the notion that it is socially acceptable for parents to treat a child as an “injury” solely because their skin color or physical attributes do not match.<sup>145</sup> Also, considering the fact that an increasing

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138. See *Cramblett v. Midwest Sperm Bank, LLC*, No. 2–16–069, 2017 WL 2800062, at \*2 (Ill. App. Ct. June 27, 2017); see also Clifford Ward, *Suit Filed over Mix-up at Downers Grove Sperm Bank Is Dismissed*, CHI. TRIB. (Sept. 3, 2015), <http://www.chicagotribune.com/suburbs/downers-grove/news/ct-dupage-sperm-bank-suit-met-0904-20150903-story.html>.

139. Rita J. Simon & Howard Altstein, *The Relevance of Race in Adoption Law and Social Practice*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 171, 194 (1997).

140. *In re* Petition of R.M.G., 454 A.2d 776, 802 (D.C. 1982) (Newman, C.J., dissenting).

141. Simon & Altstein, *supra* note 139, at 181, 183.

142. *Id.*

143. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 112 (2010).

144. *Id.*

145. *Id.*

percentage of adoptions in the United States today are interracial,<sup>146</sup> such a claim could undermine important public policies, such as promoting racial equality; could diminish the value of multiracial families in the eyes of the public; and may not be in the best interests of the child.

#### D. Implications on Determining Legal Parenthood

Allowing a claim for the loss of genetic affinity could have implications affecting other IVF-related claims, such as determining legal parenthood. In *Johnson v. Calvert*, the court held genetic relatedness, giving birth, and intent of the parent are all means of establishing a parent-child relationship.<sup>147</sup> A claim for the loss of genetic affinity could further elevate the importance of genetics to parenthood in the eyes of judges. At present, case law is split over how much stress to put on “genetic progenitors” in IVF parenthood claims, with many courts revealing a preference for genetic parents. For example, *Perry-Rogers v. Fasano* is a New York Supreme Court case regarding the visitation rights of a woman who gestated another couple’s embryo after an IVF mix-up.<sup>148</sup> The gestational mother had agreed to relinquish custody to the genetic parents, provided the genetic parents execute a written agreement granting her visitation rights.<sup>149</sup> The genetic parents later sought to void the visitation agreement entirely.<sup>150</sup> While the court clarified that it would be inappropriate to render judgment solely based on genetics,<sup>151</sup> the court held that the gestational parents lacked standing to contest their claim and had no right to ask the court to enforce the visitation agreement.<sup>152</sup> The court held that since the parents had been informed about the mix-up while the child was in utero, they simply should not have bonded with the child, as the gestational parents “cannot be permitted to purposefully act in such a way as to create a bond, and then rely upon it.”<sup>153</sup>

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146. See Nicholas Zill, *The Changing Face of Adoption in the United States*, INST. FOR FAM. STUD. (Aug. 8, 2017), <https://ifstudies.org/blog/the-changing-face-of-adoption-in-the-united-states> (“The proportion of adopted kindergarteners being raised by a mother of a different race or ethnic group rose by 50 percent between 1999 and 2011.”).

147. *Johnson v. Calvert*, 851 P.2d 776, 781–82 (Cal. 1993).

148. *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19, 22 (App. Div. 2000).

149. *Id.*

150. *Id.*

151. *Id.* at 24.

152. *Id.* at 25.

153. *Id.* at 26.

The court in *Perry-Rogers* thus seems to view familial ties as a matter of fact for genetic parents but a matter of choice for nongenetic parents. By denying the Fasanos standing, the court effectively determined that the genetic parents are the sole natural parents.<sup>154</sup> Further, by holding that the gestational mother could have simply chosen not to bond with the child upon learning it was not hers, the court seems to view the gestational mother as merely “a mechanical incubator;” when in reality, the strong attachment between mother and child, once formed, cannot easily be overcome by willpower.<sup>155</sup> Additionally, unlike a gestational carrier, Mrs. Fasano intended to gestate her own child at the time of the mistaken implantation and was thus more likely to develop an attachment to the child.<sup>156</sup> The court could have come to this conclusion due to an inclination that genetic ties are stronger than gestational ties. A claim for a loss of genetic affinity could further perpetuate such beliefs and cause courts to value the parental rights of genetic parents over the rights of other parents.<sup>157</sup>

An approach of prioritizing genetic parenthood can also have adverse consequences for couples in which only one parent has viable gametes, as the parent lacking a genetic tie to his or her child may be placed in a more vulnerable position in parenthood disputes.<sup>158</sup> For instance, in *Robert B. v. Susan B.*, Robert and his wife Denise obtained donor eggs to create embryos using Robert’s sperm, while Susan B. was a single woman seeking an embryo donation from two strangers who would relinquish their parental rights.<sup>159</sup>

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154. Leslie Bender, *Genes, Parents and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 53 (2003).

155. *Id.* at 51.

156. *Id.* at 53.

157. *But cf.* *Prato-Morrison v. Doe*, 126 Cal. Rptr. 2d 509, 509 (Ct. App. 2002). In this case, the Morrises found out there was a possibility that the Does received the Morrises’ genetic material and gave birth to the Morrises’ genetic children. *Id.* at 510. The Morrises filed a complaint against the Does, demanding blood tests from the children and seeking visitation rights. *Id.* at 510. The California Court of Appeal dismissed the case, finding it would not be in the best interests of the children to have the Morrises intrude into their lives or be subjected to blood tests. *Id.* at 511. Noting the children were almost 14 years old at the time of the appeal, the court held that “the social relationship established by the Does and their daughters” was more important to the children “than a genetic relationship with a stranger.” *Id.* at 516. The difference in outcome is likely attributed to the long-term relationship the children had formed with the Does before the potential mix-up was discovered.

158. See Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 334 (2016).

159. *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785, 786 (Ct. App. 2003).

Due to the IVF clinic's negligence, Susan was implanted with embryos intended for Robert and Denise.<sup>160</sup> During proceedings to determine the child's parenthood, Denise claimed she was an "interested person" within the meaning of section 7650 of California's Family Code.<sup>161</sup> However, the appellate court ruled that Denise lacked standing because she had no genetic or gestational connection to the child, even though she intended to parent the children resulting from the embryos.<sup>162</sup> A claim for the loss of genetic affinity could unfairly disadvantage nongenetic parents when both parents had originally intended to have and raise the child.

Nongenetic, intended parents may also be disadvantaged in embryo disputes.<sup>163</sup> For example, in the case of *Wilson v. Delgado*, the couple created cryopreserved embryos using the husband's sperm and donor eggs.<sup>164</sup> Upon divorce, the wife wished to use the embryos to have more children, but the husband argued he did not want any more children even if he was released from financial or other responsibility.<sup>165</sup> The trial court ruled in the husband's favor because he was the only party who contributed genetic material to the embryos and because the couple did not have a prior agreement as to how the embryos should be disposed in the case of divorce.<sup>166</sup> Before the Supreme Court of Georgia, the wife argued the focus on genetic connection was outdated due to modern reproductive technologies and changing family structures and genetic ties should cease to be the controlling factor in determining parenthood in assisted-reproduction cases.<sup>167</sup>

Similarly, potential consequences may exist for same-sex couples. The Supreme Court held in *Pavan v. Smith* that, due to *Obergefell v. Hodges*, statutes requiring the name of a mother's male spouse to appear on a child's birth certificate apply to married same-sex couples as well as married

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160. *Id.*

161. *Id.*

162. *Id.* at 786–89.

163. *See, e.g.*, WMAZ, *Central Ga.'s Couple's Fight over Embryos Headed to State Supreme Court*, 13WMAZ (Apr. 13, 2017), <https://www.13wmaz.com/article/news/local/central-gas-couples-fight-over-embryos-headed-to-state-supreme-court/93-431041164>.

164. *See id.*

165. SUPREME COURT OF GA., CASES DUE FOR ORAL ARGUMENT: SUMMARIES OF FACTS AND ISSUES 12 (2017).

166. *Id.*

167. *Id.* at 13.

heterosexual couples.<sup>168</sup> In some states, a similar presumption exists for nonmarried heterosexual couples, and courts have applied the presumption to unmarried same-sex couples as well.<sup>169</sup> However, this only provides nongenetic parents with a rebuttable presumption.<sup>170</sup> In the paternity context, courts have allowed the presumption to be rebutted by a genetic test proving that the mother's spouse is not the biological father of the child.<sup>171</sup> A claim for the loss of genetic affinity could strengthen the importance of genetic ties in courts' eyes—increasing the likelihood that courts would apply a similar method of rebuttal to same-sex couples. As only one party in a same-sex relationship can be genetically related to their child, homosexual couples having a child through assisted reproduction would be forced to carry out a second-parent adoption of their own child.<sup>172</sup> Recognizing a claim for the loss of genetic affinity could thus disproportionately impact homosexual parents.

Overemphasizing the importance of genetics in the law could also destabilize the role played by gamete donors. Donors could seek parentage rights or be sued for child support because of their genetic ties to the child despite a prior agreement that the donor would not be a parent.<sup>173</sup> For example, in *Bruce v. Boardwine*, Bruce was a single mother by choice and used her friend Boardwine's sperm to inseminate herself.<sup>174</sup> The court held an assisted-conception statute which stated that donors are not parents unless the donor is the husband of the gestational mother did not apply because the statute required the mother to become pregnant through "medical technology."<sup>175</sup> Boardwine was thus established as the child's legal father through paternity tests.<sup>176</sup> Although *Bruce* ultimately turned on statutory interpretation, it illustrates the danger of over-prioritizing genetics, particularly in informal arrangements without a written agreement and in which no physician is involved. This prioritization of genetics could create legal uncertainty for single parents by choice and disincentivize potential

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168. *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017).

169. *See, e.g., Partanen v. Gallagher*, 59 N.E.3d 1133, 1139 (Mass. 2016).

170. *See id.* at 1140 n.15.

171. *See* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 254 (2009).

172. *See id.* at 205.

173. *See, e.g., Bruce v. Boardwine*, 770 S.E.2d 774 (Va. Ct. App. 2015).

174. *Id.* at 775.

175. *See id.* at 777.

176. *See id.* at 777–78.

donors who do not want to be responsible for child support. This risk was acknowledged by the Supreme Court of Pennsylvania in *Ferguson v. McKiernan* when the court overturned a trial court's order for a donor to pay child support for his biological children.<sup>177</sup> The supreme court rejected the mother's argument in the interest of public policy.<sup>178</sup> The mother had argued that enforcing a contract establishing that a donor would have no parental rights would be contrary to public policy because parents should not be able to bargain away their child's right to receive support.<sup>179</sup> The court held that such a finding would prevent a woman from being able to seek sperm from a known donor while assuring him he would not be subject to child support.<sup>180</sup> This would force women to use only anonymous donors.<sup>181</sup> Given the potential benefits of using a known donor,<sup>182</sup> it would be disastrous if a claim for the loss of genetic affinity spurred courts to ignore donor agreements in favor of recognizing genetic parents as legal parents.

The risk of destabilizing the role of gamete donors is further amplified by the current trend toward reclassifying gamete donors as legal parents if they have "held out" the child as their own.<sup>183</sup> In the case of *Jason P. v. Danielle S.*, Jason donated sperm to his ex-girlfriend Danielle on the condition that he would not be the child's father.<sup>184</sup> After they began dating again, Jason formed a bond with the child and sued for custody upon breaking up with Danielle.<sup>185</sup> The court held that a sperm donor who has established a familial relationship with the child and has demonstrated a commitment to the child and the child's welfare can be found to be a presumed parent.<sup>186</sup> While courts do not rely solely on a donor's biological

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177. *Ferguson v. McKiernan*, 940 A.2d 1236, 1251 (Pa. 2007) (Eakin, J., dissenting).

178. *Id.*

179. *Id.* at 1244 (majority opinion).

180. *Id.* at 1247.

181. *Id.*

182. See Forman, *supra* note 7, at 64 (noting parents may prefer to use known donors because of "concern for the future medical and emotional needs of the child," worries about donor siblings and accidental incest, or the desire for the donor to play some role in the child's life). Further, known donors are free (anonymous sperm from a sperm bank may cost several hundred dollars), and some "may simply feel more comfortable conceiving a child with someone they know, rather than with a complete stranger." *Id.*

183. *Jason P. v. Danielle S.*, 215 Cal. Rptr. 3d 542, 563. (Ct. App. 2017).

184. *Id.* at 547-48.

185. *Id.* at 554.

186. *Id.* at 562.

connection to the child,<sup>187</sup> the donor's postbirth conduct toward the child plays a big role in the court's decision.<sup>188</sup> This trend further muddies the waters between donors and legal parents. A claim for the loss of genetic affinity could contribute to this trend, swaying judges toward converting known donors to legal parents despite the potentially destabilizing effects this could have on single parents by choice.

A claim for the loss of genetic affinity could therefore elevate the legal position of the genetic parent, even when both parents have played the same part in raising the children and providing them with love, care, and guidance or when a genetic parent did not originally intend to be a legal parent at all but only a gamete donor. Courts may even begin to prioritize genetics in cases of co-parent IVF—where one parent is the genetic mother and the other parent is the gestational mother—even though both parents have a biological tie with the child. This is an arbitrary means of determining parenthood, which does no justice to the reality of familial life in the modern United States.

#### V. QUANTIFICATION OF DAMAGES

In *ACB*, the Singapore court rejected a uniform award for all future claimants, as it would not reflect the actual loss suffered by claimants.<sup>189</sup> Instead, the court chose to award a “conventional sum,” which is tailored to the facts of each case.<sup>190</sup> The court held that the conventional sum was to be valued at 30 percent of the upkeep costs because there would otherwise “be no other criterion or standard by which to assess the quantum of damages,” but the court acknowledged that its approach was not “theoretically elegant.”<sup>191</sup>

Since this formula was used when the claimant maintained her genetic tie to the child, it can be assumed that the court considered the biological parent to be harmed by the partner's loss of genetic affinity with the child; otherwise, the mother would lack standing to claim a loss of genetic affinity.<sup>192</sup> However, it is unclear whether the court would have awarded

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187. *Id.* at 557.

188. *Id.*

189. *ACB v. Thomson Med. Pte Ltd and Others* [2017] SGCA 20, ¶ 141 (Sing.).

190. *Id.* ¶ 145.

191. *Id.* ¶¶ 148–150.

192. *See id.* ¶ 150.

a higher percentage of damages if the claim had been brought by the parent who lost genetic affinity or if both parents lost genetic affinity to the child.<sup>193</sup>

As noted by the court, the use of a conventional sum, rather than a fixed award, provides future courts the flexibility to consider the varying degree of harm dealt to different claimants.<sup>194</sup> For instance, the loss of genetic affinity may be a greater loss to a woman whose last remaining eggs were fertilized with the wrong sperm and thus has no further opportunity to ever have a child genetically related to her and her partner, as compared to a woman who can undergo another IVF cycle. However, in the same vein, this methodology allows future claimants to argue for the formula to be modified based on factors that may have negative implications on public policy.<sup>195</sup> For example, defendants may claim that since part of the loss suffered is due to social judgment<sup>196</sup> from having a child of a different race, less than 30 percent<sup>197</sup> of upkeep costs should be owed where the mix-up is with someone of the same race.<sup>198</sup> Quantification of damages based on race is likely to have racist undertones.

Finally, although the court expressly states that the approach of calculating damages as a percentage of upkeep costs should not derogate from its holding that the obligations of parenthood should not be regarded by the law as loss,<sup>199</sup> the appropriateness of the court's formula is weakened by its preceding arguments about the drawbacks of awarding upkeep costs.<sup>200</sup> As Hakkim and Ho have argued, even if the claim rests on a loss of genetic affinity, parents must still determine upkeep costs through the same process of quantifying their duty to raise the child; therefore, the parents will be incentivized to emphasize how their child was a detriment to them, which the court had objected to on public policy grounds.<sup>201</sup>

Hakkim and Ho argue for a parliamentary intervention to establish a uniform award for all future cases, which would avoid the fundamental problem of parents actively proving that their child signifies a "net loss."<sup>202</sup>

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193. *See id.*

194. *Id.* ¶ 145.

195. *See id.* ¶ 150.

196. *See id.* ¶¶ 129, 131–135.

197. *See id.* ¶ 150.

198. *See id.* ¶ 134.

199. *Id.* ¶ 90.

200. *See id.* ¶ 150.

201. Hakkim & Ho, *supra* note 113.

202. *Id.*

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While such an approach would be less flexible, it would avoid the undesirable situation of parties arguing that an injury is greater or lesser due to controversial factors such as race. More flexibility can also be introduced by granting compensatory damages, such as ordering the defendants to pay for an additional IVF cycle for the claimants or to pay for counseling fees for parents who are struggling with emotional harm or who want support in raising a child of a different race.

#### VI. A CLAIM FOR DISRUPTION OF REPRODUCTIVE PLANS

Introducing the tort of a loss of genetic affinity would fill a current lacuna in the law as it correctly pinpoints the damage suffered and does not require IVF claims to be forced into claims created for entirely different purposes.<sup>203</sup> However, the claim risks perpetuating negative societal attitudes toward mixed-race families, which could have adverse implications on racial equality.<sup>204</sup> The claim may also cause the current preference for genetic relatedness to persist in society and the misunderstanding of the importance of genetic ties to persist in the law.<sup>205</sup> This could have negative effects on outcomes of other ART cases, such as parenthood claims. At the same time, these public policy concerns must be balanced with the importance of tort law's roles in corrective justice and regulation.<sup>206</sup>

Thus, this Article proposes an alternative claim for IVF mix-ups that does not stress genetic affinity: a claim for disruption of reproductive plans. Such a claim would encompass both situations when a stranger's sperm is used instead of the intended parent's sperm and when the wrong donor's sperm is used. This claim would also grant a uniform award in both of those scenarios. Although the societal value of genetic ties suggests that the former situation involves a greater loss, granting a legislatively determined uniform award in both scenarios would prevent the law from solidifying societal views valuing genetic ties over other family structures and diminishing the value of mixed-race families. Further, to determine a uniform award for the proposed claim, the legislature would have to tackle the less sensitive question of the value of reproductive autonomy instead of having to quantify the harm caused by a child who is genetically unrelated

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203. See Norton, *supra* note 9, at 810.

204. See *id.* at 810–11.

205. See *id.* at 811–12.

206. See 1 DOBBS, HAYDEN & BUBLICK, *supra* note 12, § 11, at 20–22.

to the parents. Crucially, the loss compensated here would not revolve around any perceived deficiency in the resulting child.

A claim for the disruption of reproductive plans focuses instead on the loss of autonomy suffered by plaintiffs during an IVF mix-up. U.S. jurisprudence has acknowledged the importance of the right to privacy in reproductive decisions, such as the use of contraception and abortion.<sup>207</sup> In these cases, the Supreme Court has held that individuals should be granted the autonomy to make such private decisions for themselves, free from government intervention.<sup>208</sup> Similarly, victims of IVF mix-ups lose the freedom to determine the conditions under which they procreate—mainly, who is contributing genetic material to their children.<sup>209</sup>

Since reproductive decisions have great significance on one's personal identity and welfare, there is social value in protecting an individual's right to self-determination in procreation.<sup>210</sup> It is possible that such a claim may still be pursued by plaintiffs who have racist or eugenic concerns; it could be crucial to a plaintiff's reproductive plans that the gamete donor is of a "superior" race or has Aryan features, such as blonde hair and blue eyes. However, such a decision-making process is not substantially different from choosing a marital partner based on race or appearance. Both decisions are so personal and momentous that they should be protected despite the unsavory reasoning behind them. Although society should not encourage eugenics or racism, preserving individuals' rights to make decisions about their private lives is fundamental to democratic society. Thus, in the IVF mix-up context, when an individual's reproductive plans are thwarted by another's negligence, the law should allow for compensation no matter the

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207. See, e.g., *Roe v. Wade*, 410 U.S. 113, 154 (1973) (ruling the right to privacy encompasses a woman's decision to terminate her pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (citation omitted)).

208. *Roe*, 410 U.S. at 154; *Eisenstadt*, 405 U.S. at 453.

209. Robert L. Rabin, *Dov Fox on Reproductive Negligence: A Commentary*, 117 COLUM. L. REV. ONLINE 228, 238 (2017) (quoting Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 153 (2017)).

210. John A. Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to My Critics*, 52 WASH. & LEE L. REV. 233, 236 (1995).

individual's motives.<sup>211</sup> However, by focusing the claim on the importance of preserving autonomy in reproductive decisions, rather than the loss of genetic affinity, tort law can compensate victims and deter negligence without overemphasizing the importance of genetics or race.

Finally, allowing such a claim confers social recognition on important interests implicated by the disruption of reproductive plans, such as reproductive autonomy. The claim serves to acknowledge the importance of patients' procreation decisions<sup>212</sup> and recognizes that even the birth of a healthy child may have a distressing impact when a family's procreative plans are thwarted.<sup>213</sup> Promoting such norms in the IVF arena thus vindicates the experiences of victims of IVF mix-ups, while creating norms in the healthcare industry regarding the importance of respecting patients' reproductive autonomy.

## VII. CONCLUSION

As ART becomes increasingly sophisticated, mistakes will remain inevitable. Mistakes may become even more common as ART becomes more widely accessible. It is thus important that tort law evolves together with technology, such that it can fulfill its important goals of social justice and regulation. However, mistakes involving ART bring into the foreground complex questions of family, parenthood, and personal identity. While the U.S. struggles to accept unconventional family structures and relationships, courts must be careful not to contribute to existing social stereotypes and misunderstandings regarding genetics. This Article argues the proposed claim for the disruption of reproductive plans will better balance these competing concerns compared to a claim for the loss of genetic affinity.

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211. It should be noted that the eugenics concerns may be heightened in IVF-related errors outside the mix-up context—for example, through the use of pre-implantation genetic screening to choose and implant embryos with desired traits or, speculatively, using CRISPR to edit the DNA of an embryo before implantation. While such errors could technically also trigger a claim for disruption of reproductive plans, there could be pressing public policy reasons not to allow such claims. However, they are outside the scope of this Article.

212. See Rabin, *supra* note 209, at 238.

213. See Ingrid H. Heide, *Negligence in the Creation of Healthy Babies: Negligent Infliction of Emotional Distress in Cases of Alternative Reproductive Technology Malpractice Without Physical Injury*, 9 J. MED. & L. 55, 62 (2005).