UNPACKING EMOTIONAL DISTRESS: SEXUAL EXPLOITATION, REPRODUCTIVE HARM, AND FUNDAMENTAL RIGHTS

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INTRODUCTION

Simple as they may seem, the two sections treating negligent infliction of emotional distress in the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* mark a significant juncture in tort law. The recognition of recovery for stand-alone emotional distress is proof that the ground has shifted from earlier times when the tort was approached with extreme skepticism. As I see it, sections 46 and 47 reframe the central question in this area from *whether* to provide compensation for negligently inflicted emotional distress to *when* to provide such compensation. In this fast-developing area of law, the most crucial task for courts is to identify those particular contexts in which genuine emotional distress suffered by victims is so compelling that it deserves recognition in law. This Article focuses on two such special contexts: cases involving sexual exploitation and cases involving reproductive injury.[1]

As the *Restatement (Third)* documents, courts have repeatedly confronted sexual and reproductive issues in emotional-distress cases,[2] even if they rarely see the larger picture or reflect on their social significance. In this Article, I make an argument for prioritizing plaintiffs' interests in sexual integrity and reproduction as interests worthy of heightened protection through the imposition of a duty of due care under the tort of negligent infliction of emotional distress. As yet, the new sections in the *Restatement (Third)* do not explicitly take this step, but they are certainly

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1. Although this Article does not address bystander cases involving harm to intimate family members, the topic also fits within my proposed framework for prioritizing claims involving fundamental rights and interests. For a discussion of bystander claims using this framework, see MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER AND TORT LAW (forthcoming 2010).

2. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 reporters' note cmt. c (Tentative Draft No. 5, 2007).

flexible enough to encourage courts to do so.

The stakes associated with identifying these special contexts are high, particularly for women. The dichotomy that tort law has traditionally drawn between physical harm and emotional harm is not simply a system of classification of contrasting interests, but a hierarchy of values that privileges physical injury over emotional and relational harm.[3] Although the special restrictions governing emotional harm are stated in gender-neutral terms, as they operate in social context, they have a significant gender impact. Simply stated, restrictions on recovery for emotional harm tend to place women at a disadvantage because important and recurring injuries in women's lives are more often classified as lower-ranked emotional or relational harms. To be clear, the gender dynamic in these cases is not that of favoring individual female plaintiffs over individual male plaintiffs. Rather, the gender disadvantage flows from disfavoring the types of claims that female plaintiffs are likely to bring, placing them—and any male plaintiffs bringing similar claims—at a structural disadvantage. Thus, I approach negligent-infliction claims arising from sexual exploitation and reproductive injury as gender-related claims, even though tort doctrine is formally gender-neutral.

I mentioned that courts and commentators do not often notice that negligent-infliction cases center on these gender-inflected issues. Instead, the sexual exploitation dimension of the cases—and to a lesser degree, the reproductive dimension—is most prominent in claims brought for intentional infliction of emotional distress. In deciding which conduct should be regarded as "extreme and outrageous," courts are routinely called upon to judge the conduct of sexual harassers, stalkers, and abusive defendants who intentionally cause their victims to miscarry or suffer other forms of reproductive harm. It is striking that in the commentary to section 45 of the *Restatement (Third)*, governing the intentional-infliction tort, ten out of the thirteen illustrations deal with misconduct implicating sexual or reproductive behavior, ranging from a stepfather who sexually abuses his stepdaughter, to the inappropriate touching of a preschooler, to a police officer who stalks a woman with whom he is obsessed.[4] These illustrations track the contours of the contemporary intentional-infliction tort, which to a large degree has become identified with discrimination and harassment as well as abuse and exploitation in intimate

3. Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 490 (1998); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 814 (1990).

4. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 cmt. b, illus. 3; cmt. c, illus. 4–5; cmt. h, illus. 6–9; cmt. i, illus. 10–11; cmt. *l*, illus. 13 (Tentative Draft No. 5, 2007).

relationships.[5]

I see an important continuity in many negligent-infliction cases and detect a similar preoccupation with sexual exploitation and reproductive issues. At the outset, let me note that I am not here referring to negligent-infliction cases arising out of threatened physical harm—the near-miss cases or the "fear of" disease and exposure cases, now covered under section 46(a).[6] In this genre of cases, which is still quite closely tied to the risk of physical injury,[7] there is no gender dimension or disparate gender impact.

Instead, I am concentrating on those cases that fall under section 46(b).[8] This controversial slice of negligent-infliction cases involves distress arising from damaged and abusive human relationships and most resembles the kinds of deeply personal interests at stake in intentional-infliction cases. To borrow terminology from constitutional law, these are the cases that implicate fundamental rights of sexual autonomy, reproductive choice, and intimate family relationships. They typically are saturated with gender and implicate gender roles, sexual integrity, and personal identity.

To give just a flavor of the case law, many of these negligent-infliction cases involve allegations of sexual exploitation, in and outside the workplace. Take, for example, a notable Texas case in which the plaintiff's boyfriend, with the aid of his pals, cooked up a scheme to secretly videotape the teenage couple having sex and then showed the tape to others on several occasions;[9] or the case involving a psychologist who had sex with his patient "under the guise of therapy";[10] or the claim against a mental-health facility for failing to prevent an employee from having sex with and impregnating a mentally ill patient;[11] or the scores of cases against employers for failing to prevent sexual harassment of their employees.[12]

A large number of this genre of negligent-infliction cases also involve claims arising in the reproductive context. There are

5. *See generally* Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007).

6. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. h (Tentative Draft No. 5, 2007).

7. *See* DAN B. DOBBS & PAUL T. HAYDEN, TEACHER'S MANUAL TO ACCOMPANY TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 752 (5th ed. 2005) (Teacher's Manual) (arguing that the zone-of-danger rule is really a physical-risk rule).

8. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46(b) (Tentative Draft No. 5, 2007).

9. Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993).

10. Corgan v. Muehling, 574 N.E.2d 602, 603 (Ill. 1991).

11. Doe v. Senechal, 845 N.E.2d 418 (Mass. App. Ct. 2006).

12. *See, e.g.*, Burns v. Mayer, 175 F. Supp. 2d 1259 (D. Nev. 2001); Mukaida v. Hawaii, 159 F. Supp. 2d 1211 (D. Haw. 2001); Knox v. Combined Ins. Co. of Am., 542 A.2d 363 (Me. 1988).

negligent-infliction claims by women who suffer emotional distress resulting from stillbirths, miscarriages, and sterilizations caused by physician negligence;[13] there are claims by couples who sue fertility clinics for losing the sperm of a man about to undergo chemotherapy,[14] or for negligently mixing up sperm so that a child is conceived from a source other than the designated donor.[15] Numerous claims also arise shortly after a child is born: cases involving a newborn who is abducted from the hospital or who is switched at birth with another infant.[16] A poignant recent case involved the negligence of a hospital employee who brought a one-day-old baby to a mother for breastfeeding, failed to see that the mother was heavily sedated, and left the two alone.[17] The infant was tragically smothered to death when the mother fell asleep on top of him.[18] In this category of negligent-infliction/reproductive-harm cases also belong claims of "wrongful birth," which are typically brought against physicians who negligently fail to advise their patients about the risks of giving birth to a child with serious disabilities.[19]

I. *RESTATEMENT (THIRD)* SECTION 46(b)

As I describe these cases, it is evident that tort law has come a long way from the day when recovery was permitted only for mishandling corpses and negligently transmitting death telegrams, the old precursors of liability for this strand of negligence law.[20] As the *Restatement (Third)* recognizes, there is presently a need to articulate more general rules of liability that bring together the

13. *See* Robinson v. Cutchin, 140 F. Supp. 2d 488 (D. Md. 2001) (sterilization); Oswald v. LeGrand, 453 N.W.2d 634 (Iowa 1990) (miscarriage); Broadnax v. Gonzalez, 809 N.E.2d 645 (N.Y. 2004) (stillbirth).

14. *See* Baskette v. Atlanta Ctr. for Reprod. Med., LLC, 648 S.E.2d 100 (Ga. Ct. App. 2007).

15. *See* Andrews v. Keltz, 838 N.Y.S.2d. 363 (Sup. Ct. 2007); Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67 (Utah 1998). For a discussion of the mix-up cases, see Leslie Bender, *"To Err is Human" ART Mix-ups: A Labor-Based, Relational Proposal*, 9 J. GENDER RACE & JUST. 443 (2006).

16. *See, e.g.*, Johnson v. Jam. Hosp., 467 N.E.2d 502 (N.Y. 1984) (infant abducted from hospital); Larsen v. Banner Health Sys., 81 P.3d 196 (Wyo. 2003) (infant switched at birth).

17. *See* Garcia v. Lawrence Hosp., 773 N.Y.S.2d 59 (App. Div. 2004).

18. *Id.*

19. *See, e.g.*, Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557 (Ga. 1990); Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988); Smith v. Cote, 513 A.2d 341 (N.H. 1986); Berman v. Allan, 404 A.2d 8 (N.J. 1979); Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985).

20. *See, e.g.*, Christensen v. Superior Court, 820 P.2d 181 (Cal. 1991) (negligent handling of decedent's remains); Young v. W. Union Tel. Co., 107 N.C. 370, 11 S.E. 1044 (1890) (negligent failure to deliver death telegram); Whitehair v. Highland Memory Gardens, Inc., 327 S.E.2d 438 (W. Va. 1985) (mishandling of dead bodies).

disparate strands of negligent-infliction cases decided in the last few decades. Section 46(b) of the *Restatement (Third)* purports to synthesize and deal with these cases by authorizing liability if the conduct producing the distress "occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance."[21] The section thus anticipates a prioritizing of contexts and types of cases. Significantly, however, the *Restatement (Third)* does not express an opinion as to which specific activities, undertakings, or relationships give rise to liability, providing only that they be of a kind likely to produce serious emotional injury.[22] The crucial work of identifying specific contexts is left to future courts.

Although at first blush section 46(b) may seem noncommittal, and for that reason inconsequential, I regard it as the most important subsection relating to the negligent-infliction tort. The *Restatement (Third)*'s emphasis on the concrete relational context in which the tort is committed and away from basing recovery solely on the categorization of the injury (or some other arbitrary conceptual line) marks an important development, especially if it influences the development of future case law.

The way I look at it, section 46(b) clears away a lot of debris. It rejects the "physical manifestation" requirement that has been imposed by many courts,[23] that stepchild of the old impact rule that required proof of physicality of the injury, even in cases in which it was clear that the plaintiff's emotional distress was severe and was not unreasonable under the circumstances.[24] In this respect, section 46(b) finally severs the link between recovery for emotional distress resulting from negligence in relationships and very dissimilar conduct that produces a threat of physical harm. Section 46(b) also performs a service by rejecting the highly abstract and confusing "independent duty" requirement that some courts have used as they scrambled for a doctrinal peg from which to hang recovery.[25]

The key unresolved question is how courts will go about specifying the classes of activities, undertakings, or relationships

21. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46(b) (Tentative Draft No. 5, 2007).

22. *See id.* § 46 cmt. f.

23. *See, e.g.*, Culpepper v. Pearl St. Bldg., Inc., 877 P.2d 877, 880 n.3 (Colo. 1994) (recovering for negligent infliction of emotional distress requires the plaintiff to suffer "serious physical manifestations or mental illness"); *accord* Reynolds v. Highland Manor, Inc., 954 P.2d 11, 13 (Kan. Ct. App. 1998); O'Donnell v. HCA Health Servs., 883 A.2d 319, 324 (N.H. 2005); Reilly v. United States, 547 A.2d 894, 895 (R.I. 1988) (citing D'Ambra v. United States, 338 A.2d 524, 531 (R.I. 1975)).

24. *See, e.g.*, *Reilly*, 547 A.2d at 895 (citing *D'Ambra*, 338 A.2d at 531).

25. *See, e.g.*, Clomon v. Monroe City Sch. Bd., 572 So. 2d 571, 575 (La. 1990); Boyles v. Kerr, 855 S.W.2d 593, 594 (Tex. 1993).

that trigger a duty of care under section 46(b). In the past, some courts have limited recovery solely to cases in which the plaintiff and the defendant were in a preexisting contractual relationship.[26] These courts essentially treated this strand of negligent infliction as an appendage to contract law, providing recovery only in that special subset of contracts in which emotional distress was highly predictable, given the delicate nature of the contractual undertaking. In some of these cases, moreover, it has been stated that the contract supplies the "independent duty" towards the plaintiff that justifies protection against emotional distress.[27]

The contract limitation does capture many of the cases I described above—particularly those involving interference with reproduction—which frequently occur in the context of the doctor/patient relationship. It also potentially permits employees who claim that their employers have negligently failed to protect them from sexual harassment to sue for negligent infliction of emotional distress.

However, envisioning the tort as an expansion of contract rights suggests that the primary interest at stake is bolstering and enforcing the parties' voluntary agreement—that is, the general interest in private ordering protected by contract. By foregrounding contract in this way, the exclusive source of the duty for the negligent-infliction tort becomes private undertakings, rather than social or constitutional norms or public policy. In my view, this conceptualization of the tort misses a key dimension of so many of the cases—their clear link to intimate human relationships and personal interests unrelated to contract. A critical feature of this strand of negligent-infliction cases is that the defendant's conduct often damages a plaintiff's well-being in noncommercial contexts central to her identity as a woman, mother, or family member. Additionally, women's control over their sexuality and their decisions about bearing and nurturing children are often at stake.

II. SEXUAL EXPLOITATION CASES

Two contrasting sexual exploitation cases demonstrate why courts should reject the contract and independent-duty limitations on liability and should explicitly prioritize the plaintiff's interest in sexual autonomy as triggering a duty of due care under section 46(b). The first case is *Boyles v. Kerr*, the previously mentioned 1993 Texas Supreme Court case involving the boyfriend who, along with his friends, surreptitiously videotaped the teenage plaintiff having sex with him.[28] Before the taping, the friends set the stage for the video by taping "themselves making crude comments and

26. *See, e.g.*, Chizmar v. Mackie, 896 P.2d 196, 203 (Alaska 1995); Larsen v. Banner Health Sys., 81 P.3d 196, 203 (Wyo. 2003).

27. *See, e.g.*, *Larsen*, 81 P.3d at 202–03.

28. *Boyles*, 855 S.W.2d 593.

jokes about the activity that was to follow."[29] After the taping, the boyfriend took possession of the video and showed it to ten other people, purportedly even benefitting financially from one viewing. The video was eventually widely gossiped about at the college campuses the plaintiff and her then ex-boyfriend attended. The plaintiff found out about the tape four months after the event, when she discovered that she was becoming known as the "porno queen" among her classmates.[30]

The woman sued her ex-boyfriend and the others involved in the scheme, asserting a variety of legal theories.[31] The trial focused, however, primarily on the claim for negligent infliction of emotional distress, the theory that most readily reached the behavior of all of the defendants and would presumably have allowed the plaintiff to tap into the homeowners' insurance policies of the defendants' parents, which covered negligence, but not intentional injury.[32] The plaintiff was successful in the lower courts: she secured a jury verdict of $1,000,000 for compensatory and punitive damages for negligent infliction of emotional distress, which the appellate court affirmed.[33]

Boyles was a rare case in which gender bubbled up to the surface and stimulated a debate about the gender dimension of the negligent-infliction tort. By the time the case reached the Texas Supreme Court, it had garnered considerable attention from women's organizations, who submitted amicus briefs to the court supporting the verdict and urging the court to recognize the claim for negligent infliction in sexual abuse and exploitation cases. Amici stressed that denying recovery in a case such as *Boyles* would send a message to sexual abuse victims that they were "second class citizens" and argued that "[i]t defies logic to have a system of justice that will compensate the victim of a car wreck but that will refuse to compensate the recipients of the most devastating of emotional injuries."[34]

The impassioned arguments, however, did not persuade the majority of the court, which overturned the jury verdict and

29. *Id.* at 594.

30. *Id.*

31. *Id.* As injury, the plaintiff alleged that the events significantly interfered with her ability to study and caused her severe emotional suffering and humiliation, culminating in a diagnosis of post-traumatic stress disorder. *Id*. at 611 (Doggett, J., dissenting on reh'g).

32. Torts plaintiffs often "underlitigate" their cases, asserting only negligence claims because of the basic exclusion for intentional harm in standard liability policies. *See* Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1722–23 (1997).

33. *Boyles*, 855 S.W.2d at 594–95.

34. *Id.* at 610 (Doggett, J., dissenting on reh'g) (quoting Brief for Women's Advocacy Project as Amicus Curiae Urging Rehearing at ii–iii, *Boyles*, 855 S.W.2d 593 (No. D-0963)).

declared that absent a finding of an independent duty, there could be no recovery for negligent infliction of emotional distress in Texas.[35] Tellingly, the court did not consider the special relationship between intimate sexual partners sufficient to create a duty. In a concurring opinion, Justice Alberto Gonzalez flatly declared that "[t]his case has nothing to do with gender-based discrimination or an assault on women's rights."[36]

The strong dissents in *Boyles* regarded the outcome in the case as an injustice to "the women of Texas" and chided the majority for treating what happened to the plaintiff as if it were "a mere trifle or any other distress associated with daily existence."[37] In response to the assertion that the case should have been litigated solely as an intentional tort, Justice Doggett noted that in many cases, severe emotional distress may be caused by an actor who does not desire to inflict severe emotional distress and who may be oblivious to the fact that such distress is substantially certain to result from his actions.[38] In *Twyman v. Twyman*, the companion case to *Boyles*, for example, Justice Spector—the lone female justice on the Texas Supreme Court—speculated that the boyfriend may have videotaped the sexual intercourse with the plaintiff "not for the purpose of injuring her, but rather for the purpose of amusing himself and his friends."[39] She was of the view that "[b]rutish behavior that causes severe injury, even though unintentionally, should not be trivialized."[40]

Justice Spector's dissent was notable for its take on the gender dimension of the negligent-infliction tort. She emphasized that the claim of negligent infliction of emotional distress was of special significance to women because "the overwhelming majority of emotional distress claims have arisen from harmful conduct by men, rather than women."[41] While recognizing that both men and women could have an interest in recovery for emotional distress, she expressed concern that, historically, "men have had a disproportionate interest in downplaying such claims."[42] For Spector, the court's rejection of the negligent-infliction claim represented "a step backward" in the law's response to the sexual mistreatment of women and was "especially troubling" given the high incidence of sexual harassment and domestic violence

35. *Id.* at 594 (majority opinion).
36. *Id*. at 604 (Gonzalez, J., concurring on reh'g).
37. *Id*. at 610 (Doggett, J., dissenting on reh'g); *id.* at 618 (Doggett, J., dissenting).
38. *Id.* at 616 (Doggett, J., dissenting).
39. Twyman v. Twyman, 855 S.W.2d 619, 644 (Tex. 1993) (Spector, J., dissenting).
40. *Id.*
41. *Id*. at 642.
42. *Id.*

throughout the country.[43]

Boyles is a striking example of how tort law can miss the mark when it lumps together all negligent-infliction cases without regard to context. Rather than battle over whether there is a contract or an independent duty upon which to base tort liability, I would argue that cases such as *Boyles* should be resolved more concretely by focusing on whether the defendant's conduct could be expected to jeopardize the plaintiff's interest in sexual integrity and autonomy. Because it was clear in *Boyles* that secretly videotaping the parties and distributing the tape would reasonably be expected to (and did) seriously erode plaintiff's control over her sexuality, a duty of due care should have been triggered. Interestingly, all of the members of the Texas Supreme Court seemed to regard the case as one of unacceptable sexual exploitation, yet they disagreed as to whether there was a duty of due care owed by the defendants.[44] Focusing more directly on the interest at stake would have had the advantage of delimiting the scope of the negligent-infliction claim without downplaying the seriousness of the injury.

Perhaps most importantly, it is not enough to say that plaintiff might have succeeded if only she had pursued a claim for intentional infliction of emotional distress or intentional invasion of privacy. Aside from the issue of availability of insurance, it is far from clear that the conduct of all of the defendants in *Boyles* would be classified as outrageous, particularly under the high threshold of proof Texas courts have applied in intentional-infliction cases.[45] Moreover, placing a high priority on the plaintiff's interest in sexual integrity and autonomy would mean that this interest would be regarded as so important that it should be protected against negligent as well as intentional interference.

Not all courts have been as reluctant to provide protection to sexual exploitation victims through the negligent-infliction tort. In 1991 the Supreme Court of Illinois allowed a negligent-infliction claim based on sexual exploitation to proceed to trial in *Corgan v. Mueling*, a case involving an unregistered psychiatrist who had sex with a patient "under the guise of therapy."[46] After ending the professional relationship, the former patient sued the therapist, alleging both intentional and negligent infliction of emotional distress. The patient claimed that the sexual encounters were shameful and humiliating to her and forced her to undergo more extensive counseling and psychotherapeutic care.[47] Perhaps because

43. *Id.* at 643.

44. Boyles v. Kerr, 855 S.W.2d 593, 594, 602 (Tex. 1993); *id.* at 616 (Doggett, J., dissenting).

45. *See* Mae C. Quinn, Note, *The Garden Path of* Boyles v. Kerr *and* Twyman v. Twyman*: An Outrageous Response to Victims of Sexual Misconduct*, 4 TEX. J. WOMEN & L. 247, 248 (1995).

46. Corgan v. Muehling, 574 N.E.2d 602, 603 (Ill. 1991).

47. *Id.* at 603–04.

it was easy to think about this case as an instance of professional malpractice, the allegations in the plaintiff's complaint focused on the particular ways in which the therapist had failed to take due care, mentioning his negligence in treating female patients when "he was incapable of maintaining appropriate professional objectivity," his allowing the relationship with the plaintiff "to become a vehicle for the 'resolution of his own psychosexual infirmities,'" and his failure to consult with other psychologists when "he realized that his relationship with plaintiff was adverse to her psychological well-being."[48]

In ruling for the plaintiff, the majority of the court dispensed with the need to demonstrate a "physical manifestation" of injury and held that the therapist/patient relationship gave rise to a duty of due care.[49] The majority opinion discussed public policy, highlighting the risks and harms of sexual exploitation and citing recent legislation in the state and an article in a feminist journal analyzing the exploitation of female patients.[50] In sharp contrast to the Texas court, the Illinois court was not concerned that the case might also have been framed and litigated as an intentional-tort case. For the Illinois court, the extra measure of protection to an abuse victim afforded by a negligence claim was regarded as an appropriate legal response, given the gravity of the injury and the relationship of the parties.[51]

It is important to note that the *Corgan* decision was not unanimous and drew a stinging dissent from a member of the court who had a very different idea of what constituted sexual exploitation and what the proper legal response should be in such cases. The dissent would have disallowed the claim, characterizing the case as one of "mutually agreeable sexual intercourse" and concluding that the moment the sexual relationship began, the treatment by definition ended.[52] Because the plaintiff was not "a minor . . . mentally retarded or . . . under any other legal disability," the dissenting justice refused to regard her submission to sexual intercourse as sexual exploitation or sexual abuse.[53] In the mind of the dissenting justice, negligence liability should always be tied to physical injury. He opined that this was not a proper negligence case because "[t]here [was] no allegation that the parties fell off a bed or injured any part of the plaintiff's anatomy."[54]

On display in *Boyles* and *Corgan* are two very different stances

48. *Id.* at 603 (citing plaintiff's complaint).
49. *Id.* at 605–06.
50. *Id.* at 607 (citing 740 ILL. COMP. STAT. ANN. 140/1 (West 1989); Denise Leboeuf, Note, *Psychiatric Malpractice: Exploitation of Women Patients*, 11 HARV. WOMEN'S L.J. 83 (1988)).
51. *Id.* at 606.
52. *Id.* at 611 (Heiple, J., dissenting).
53. *Id.*
54. *Id.* at 611–12.

toward allegations of sexual exploitation in tort cases. The majority in *Corgan* and the dissent in *Boyles* were greatly affected by the context of the cases and used it to justify liberalizing the rules for recovery of damages under the negligent-infliction tort.[55] These judges seemed to start from an assumption that sexual exploitation was a serious societal problem and that tort law should respond to such a public-policy concern. Although they stopped short of declaring that plaintiffs should receive heighted protection in sexual exploitation cases, they were aware of the importance of their decisions to women's rights and sexual equality. In their opinions, one can discern traces of the influence of feminist theorists—such as Catharine MacKinnon—who have long argued for a transformation of legal notions of consent and a greater appreciation of the severity of the harm caused by sexual exploitation.[56]

In contrast, the majority and concurrence in *Boyles* and the dissent in *Corgan* thought it unnecessary and undesirable to expand legal protection against sexual exploitation, particularly if it meant exposing insurers to claims in such cases.[57] Significantly, the dissenter in *Corgan* clearly blamed the victim for her own suffering.[58] Although the justices in the Texas majority did not condone the defendant's behavior, they were also careful to downplay the significance of the parties' relationship and noted that the plaintiff and defendant were "not dating steadily" but "had shared several previous sexual encounters," suggesting perhaps that the plaintiff was foolish to trust a sex partner under such circumstances.[59] These judges saw no connection between recovery for emotional distress and the larger cultural issues of gender equality and preservation of women's sexual integrity.

Aside from the differing judicial attitudes toward sexual exploitation, of course, *Corgan* can be distinguished from *Boyles* because there was a preexisting contract for psychological treatment in *Corgan* that was lacking in *Boyles*. In my view, however, this difference should not be determinative and only highlights the critical issue posed by such cases: namely, whether protection in tort law from sexual exploitation should arise only when a contract exists. I would argue that the more important consideration is that in both cases the women were unjustifiably misled and exploited. The teenage plaintiff in *Boyles* had as much right to expect that her boyfriend would not tape their sexual intercourse for the amusement of others as did the patient in *Corgan* to trust that her

55. *Id.* at 606–07 (majority opinion); Boyles v. Kerr, 855 S.W.2d 593, 607 (Tex. 1993) (Doggett, J., dissenting on reh'g).

56. *See, e.g.*, CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 240–48 (2005).

57. *See Corgan*, 574 N.E.2d at 611–12 (Heiple, J., dissenting); *Boyles*, 855 S.W.2d at 600; *id.* at 605 (Gonzalez, J., concurring on reh'g).

58. *Corgan*, 574 N.E.2d at 611 (Heiple, J., dissenting).

59. *Boyles*, 855 S.W.2d at 594.

therapist would not exploit her vulnerability to his sexual advantage. Of fundamental importance is that these expectations arise from normative standards of ethical behavior and decent treatment, not from contract. Admittedly, like most cultural norms, the norm against sexual exploitation is not universally accepted and remains contested. Like the dissenting justice in *Corgan*, many people still hold to the belief that unless sexual intercourse is extracted through means of physical force or the threat of physical force, it is socially acceptable and ought not to be subject to legal sanctions. And there is no escaping the sometimes difficult question of whether a particular defendant's conduct can fairly be characterized as sexual exploitation or abuse. However, this is the terrain over which such contests should be waged, rather than deciding negligent-infliction cases on less central features, such as whether a contract exists between the parties or whether the injury manifests itself physically.

III. REPRODUCTIVE-HARM CASES

With respect to cases involving reproductive harm, where there is most often a preexisting contractual doctor/patient relationship, the tension in the case law has been whether to retain a "physical injury" or "physical manifestation" requirement.[60] In the reproductive context, this inquiry is itself related to gender because such cases often require courts to characterize the relationship between a pregnant woman and her fetus. Many courts have had a difficult time seeing and categorizing the physical and emotional connection between mother and fetus. The intertwined physical and emotional nature of the response of a woman who experiences a miscarriage or stillbirth does not fit neatly into the standard repertoire of injuries suffered by tort plaintiffs.

Only in 2004 did the Court of Appeals of New York finally decide to allow a negligent-infliction claim by a woman who suffered emotional distress at the stillbirth of her twins.[61] In this case, *Broadnax v. Gonzalez*, the woman's obstetrician had failed to diagnose and treat her for a condition (incompetent cervix) that put her pregnancy at risk.[62] Prior to this case, New York courts had clung to the "physical injury" rule and had insisted that a female plaintiff demonstrate a physical injury to herself, "distinct from that suffered by the fetus and not a normal incident of childbirth."[63]

60. *Compare* Broadnax v. Gonzalez, 809 N.E.2d 645, 647–48 (N.Y. 2004) (explaining that the logic and reasoning for requiring a showing of physical injury can no longer be defended), *with* Delgado v. Epstein, 2005 WL 3693200, at *12 (N.J. Super. Ct. App. Div. Jan. 24, 2006) (requiring a showing of physical manifestation to recover).

61. *Broadnax*, 809 N.E.2d at 649.

62. *Id.* at 647.

63. *Id.*

Despite the existence of a doctor/patient relationship—which presumably carries an expectation that the doctor will exercise reasonable care to protect both the expectant mother and her unborn child—the New York courts had looked for something more before recognizing a duty and allowing recovery for the mother's clearly foreseeable emotional distress. Importantly, New York had also disallowed wrongful-death suits in such cases, leaving parents entirely without a remedy.[64]

This restrictive New York rule failed to comprehend a woman's distinctive interest in reproduction that encompasses the period during her pregnancy in which she and the fetus are linked physically. To try to isolate a wholly separate injury to the mother—and deny recovery when it is lacking—is a dramatic example of refusing to recognize an injury because no identical harm could be suffered by a man. Plaintiffs have long argued that it should be enough to prove that medical treatment of a woman during pregnancy is the kind of activity that, if handled negligently, is highly likely to give rise to serious emotional injuries. In *Broadnax*, the Court of Appeals of New York finally agreed, acknowledging that "[b]ecause the health of the mother and fetus are linked, we will not force them into legalistic pigeonholes."[65]

Interestingly, some courts that have historically been reluctant to allow claims for stand-alone emotional harm have been impelled by the reproductive context of the claim to make an exception to the denial of recovery. A 1990 decision by the Iowa Supreme Court is a good example of judicial extension of the negligent-infliction claim to protect a plaintiff's reproductive interests without stating so in precise terms. In *Oswald v. LeGrand*,[66] a woman five months pregnant was horribly mistreated by nurses and doctors at the emergency room of Mercy Hospital in Dubuque. Despite the woman's extensive bleeding and cramping, the nurses chided her for coming into the hospital, one even telling her that if she miscarried, it would not be a baby but rather a "big blob of blood."[67] One of the doctors charged with treating the plaintiff was so eager to go on vacation that he left the plaintiff in the hospital corridor, "hysterical and insisting she was about to deliver," minutes before she actually began delivering the baby in the hallway.[68] After the delivery, the nurses and a doctor declared that the baby was stillborn and left the infant on an instrument tray for nearly one half hour. Remarkably, it was the baby's father who discovered that the infant was still alive when the infant returned his grasp to her finger. After twelve

64. *See, e.g.*, Endresz v. Friedberg, 248 N.E.2d 901, 906–07 (N.Y. 1969).
65. *Broadnax*, 809 N.E.2d at 648–49.
66. 453 N.W.2d 634 (Iowa 1990).
67. *Id.* at 636.
68. *Id.* at 637.

hours in intensive care, however, the infant died.[69]

The negligent-infliction claim was crucial to this case because the couple could not prove that the hospital's mistreatment of the mother and infant somehow caused the infant's death or that the infant would have survived longer if the medical care had been otherwise. The court thus had to confront the question of whether an emotional-distress claim could lie even absent a claim of physical injury to the mother or the infant. Relying on the old cases involving false death telegraphs and mishandling of corpses, the court permitted recovery. It observed that the "life and death" context of childbirth was comparable to the old cases, presumably because both involved the "negligent performance of contractual services that carry with them deeply emotional responses in the event of breach."[70] Under the circumstances, the court believed that liability for emotional distress should also attach to the delivery of medical services.[71] The court's decision was thus quite sensitive to context, even if it stopped short of declaring that the plaintiff's interest in reproduction was a fundamental interest deserving of heightened protection.

One reason that courts in torts cases alleging reproductive harm are not quick to draw an analogy to constitutional-rights cases asserting deprivation of procreative rights may be that the latter generally involve the assertion of "negative" rights against government interference, while tort claims most often involve the assertion of "positive" rights against private defendants who fail to protect plaintiffs' interests.[72] This dilemma over duty is at the heart of a larger cultural controversy about the scope of civil rights, with progressives arguing for more expansive protection against harms inflicted by private interests, while conservatives generally aim to limit protection narrowly to abuses of official governmental power. In the real world, of course, there is often no strict separation between governmental power and private power, particularly for low-income persons who are forced to rely on the government for essential services such as medical care.

One prominent context in which constitutional claims for deprivation of reproductive rights have merged with tort-like allegations of lack of informed consent involves suits over the sterilization of poor women who qualify for Medicaid. Several high-profile lawsuits were brought in the early- and mid-1970s, often alleging violations of 42 U.S.C. § 1983, the Reconstruction-era

69. *Id.*
70. *Id.* at 639.
71. *Id.*
72. In wrongful-birth cases, however, courts have often cited to *Roe v. Wade* and have discussed a woman's constitutional right to decide whether to terminate a pregnancy. *See* Smith v. Cote, 513 A.2d 341, 343–44 (N.H. 1986) (citing Roe v. Wade, 410 U.S. 113 (1973)); Becker v. Schwartz, 386 N.E.2d 807, 815 (N.Y. 1978) (Fuchsberg, J., concurring) (citing *Roe*, 410 U.S. 113).

statute that authorizes damages claims for civil-rights violations committed under color of state law.[73] The plaintiffs in these cases were typically minority women who claimed that they had been pressured to undergo sterilization procedures by doctors who believed that they were irresponsible "welfare mothers" who already had too many children and were a burden on the public fisc. In some respects, these cases were similar to the miscarriage and stillbirth cases discussed above, in that both alleged serious, if intangible, damage to the plaintiffs' reproductive interests at the hands of negligent and often callous medical professionals. The sterilization cases, however, differed from the typical miscarriage case in that the plaintiffs in the sterilization cases also asserted that the doctors or hospitals had followed a discriminatory policy towards plaintiffs tied to their race, gender, and class.[74] Moreover, such claims were brought and classified as statutory civil-rights claims and were frequently pursued by civil-rights organizations or poverty law centers that had little strategic interest in linking their efforts to tort suits for negligent infliction of emotional distress, despite their obvious similarities.[75]

Legal scholar Dorothy Roberts has chronicled the sterilization suits and their significance for the reproductive rights of minority women.[76] Her history details that, prior to the late 1970s, the practice of performing unnecessary hysterectomies and tubal ligations on poor women without their knowledge or consent was widespread in the North as well as in the Deep South. At the time, hospitals and doctors used a variety of tactics to coerce consent from poor pregnant women, from offering tubal ligations to women while they were in labor to refusing to treat indigent patients unless they agreed to be sterilized.[77]

The extent of the sterilization abuses in some states has only recently been uncovered. Due to research by historian Johanna

73. *See* Walker v. Pierce, 560 F.2d 609, 611 (4th Cir. 1977); Cox v. Stanton, 529 F.2d 47, 49 (4th Cir. 1975); Madrigal v. Quilligan, D.C. No. CV 75-2057-JWC (C.D. Cal. 1978), *excerpted in* DOROTHY A. BROWN, CRTICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS 102–111 (2003); Relf v. Weinberger, 372 F. Supp. 1196, 1198 (D.D.C. 1974); Kevin Begos & John Railey, *Sign This or Else. . .*, WINSTON-SALEM J., Dec. 9, 2002, at A1 (reporting on the unsuccessful case of Nial Cox Ramirez) [hereinafter Begos & Railey, *Sign This*]; John Railey & Kevin Begos, *'Still Hiding,'* WINSTON-SALEM J., Dec. 9, 2002, at A1 (reporting on the unsuccessful case of Elaine Riddick Jessie) [hereinafter Railey & Begos, *Still Hiding*].

74. *See Walker*, 560 F.2d at 610; *Cox*, 529 F.2d at 49 n.3.

75. *See* Carlos G. Velez, *The Nonconsenting Sterilization of Mexican Women in Los Angeles*, *in* TWICE A MINORITY: MEXICAN AMERICAN WOMEN 235, 235–48 (Margarita B. Melville ed., 1980) (discussing the trial in *Madrigal v. Quilligan*).

76. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 89–98 (1997).

77. *Id.* at 91–92.

Schoen[78] and investigative reporting by journalists at the Winston-Salem Journal,[79] new details about the cases and procedures of the North Carolina Eugenics Board have surfaced. In its forty-year history—which lasted until 1974—the Board authorized the sterilization of more than 7600 persons.[80] By the late 1960s, over 60% of those sterilized were black women, compared to North Carolina's population, which was only approximately 25% black.[81] Social workers in the state adopted a policy of targeting young, unmarried black women who had given birth to a child. They threatened drastic actions, such as sending the teenage women to an orphanage or cutting off welfare funds to their entire families, including siblings and parents, if they did not submit to sterilization.[82] The revelation of the contents of the formerly sealed records of the Eugenics Board prompted the North Carolina House of Representatives in 2007 to vote to establish a commission to determine how to identify and give reparations to the victims, although no such program has yet been implemented or funded.[83]

Two notable civil-rights cases from the 1970s exemplify the radically different positions courts took toward plaintiffs' claims of deprivation of reproductive rights and assertions of injury from coerced sterilizations. One case gained considerable notoriety, probably because the doctor involved was so explicit about his policy of pressuring poor black women to undergo sterilization. In *Walker v. Pierce*,[84] Dr. Clovis Pierce, the attending obstetrician at a county hospital in South Carolina, admitted that he had a policy of refusing to treat any woman who was on Medicaid or who was otherwise unable to pay her bills if she was having a third or subsequent child

78. JOHANNA SCHOEN, CHOICE AND COERCION: BIRTH CONTROL, STERILIZATION, AND ABORTION IN PUBLIC HEALTH AND WELFARE 75–138 (Thadious M. Davis & Linda K. Kerber eds., 2005).

79. *See, e.g.*, Kevin Begos, *Lifting the Curtain on a Shameful Era*, WINSTON-SALEM J., Dec. 8, 2002, at A1 [hereinafter Begos, *Lifting the Curtain*]; Kevin Begos, *READ THIS: Records Unexpectedly Available*, WINSTON-SALEM J., Dec. 8, 2002, at A17; Begos & Railey, *Sign This*, *supra* note 73; Danielle Deaver, *Forsyth in the Forefront*, WINSTON-SALEM J., Dec. 9, 2002, at A1; John Railey, *'It Ain't Fair*,*'* WINSTON-SALEM J., Dec. 10, 2002, at A1; John Railey, *Just Carrying Out Orders*, WINSTON-SALEM J., Dec. 11, 2002, at A12; John Railey, *'Wicked Silence*,*'* WINSTON-SALEM J., Dec. 11, 2002, at A1 [hereinafter Railey, *Wicked Silence*]; John Railey & Kevin Begos, *Board Did Its Duty, Quietly*, WINSTON-SALEM J., Dec. 8, 2002, at A17; Railey & Begos, *Still Hiding*, *supra* note 73.

80. Begos, *Lifting the Curtain*, *supra* note 79.

81. Railey, *Wicked Silence*, *supra* note 79.

82. *See* Begos & Railey, *Sign This*, *supra* note 73; Railey & Begos, *Still Hiding*, *supra* note 73.

83. *See* H.R. 296, 2007 Gen. Assem. (N.C. 2007) (The bill was passed by the House, but never taken up in the North Carolina Senate. However, the Speaker of the House has authority to set up the commission.); James Romoser, *Nothing Done on Womble Initiative*, WINSTON-SALEM J., Mar. 10, 2008, at A1.

84. 560 F.2d 609 (4th Cir. 1977).

and did not agree to be sterilized.[85] As recounted by the dissenting judge, Dr. Pierce told one patient that it was his "tax money paying for" the baby and that he was "tired of . . . paying for" [86] illegitimate children. He bluntly said to the patient that if she didn't want to be sterilized, she could "find . . . another doctor."[87] Pierce was apparently unashamed of his practice and refused to sign an affidavit stating that he would not discriminate against Medicaid patients.[88]

The two black women who brought the suit in *Walker* testified that Pierce used coercive tactics to enforce his policy: he threatened to have one woman's state assistance terminated if she did not cooperate and ordered the immediate discharge from the hospital of another woman just after she gave birth upon her refusal to submit to a tubal ligation.[89] As could be expected, many women eventually gave in to the pressure, signed the requisite forms, and submitted to the sterilization procedure.[90] The evidence indicated that the policy had an overwhelming negative impact on black women. Of the eighteen welfare mothers sterilized, seventeen were black.[91]

From a torts perspective, *Walker* looks like a clear case of coerced consent in the important sense that these women did not desire to lose their capacity to have children and there was no claim that the sterilization would somehow benefit their health. Nevertheless, the majority found no civil-rights violation.[92] The court first characterized the doctor/patient relationship as "one of free choice for both parties,"[93] even though it was clear that indigent pregnant women, such as the plaintiffs, rarely had alternatives to medical care besides the county hospital. The court then disputed both the racial character and the public nature of the doctor's policy, characterizing it as a "personal economic philosophy"[94] despite the fact that most welfare children were black and that Medicaid had paid Pierce over $60,000 during the period in question.[95] For the majority of the court, the civil-rights statutes posed no obstacle to the doctor's decision to "establish and pursue the policy he ha[d] publicly and freely announced."[96] The majority indicated that the doctor had every right to maintain his "professional attitude toward the increase in offspring" and then to set on a course of action to see

85. *Id.* at 611.
86. *Id.* at 614 (Butzner, J., concurring in part and dissenting in part).
87. *Id.*
88. *Id.* at 612 (majority opinion).
89. *Id.* at 611–12.
90. *Id*. at 612 n.4.
91. *Id*.
92. *Id.* at 613.
93. *Id.* at 612.
94. *Id.* at 613.
95. *Id.* at 612 & n.4.
96. *Id.* at 613.

his views "prevail."[97] Apparently, the majority considered it reasonable for a doctor to place only subordinated women (who were poor, disproportionately minority, and receiving public assistance) to the Hobson's choice of sterilization if they desired medically necessary health care.

The lawsuit that had the biggest impact on public policy, however, was a class action brought by Minnie Lee and Mary Alice Relf, two black sisters from Montgomery, Alabama, who claimed that they had been involuntarily sterilized at a federally funded clinic when they were only fourteen and twelve years old.[98] Initiated by the Southern Poverty Law Center and the National Welfare Rights Organization, this class action represented over 125,000 class members consisting of poor, minor, and disabled persons who were involuntarily sterilized under federally funded programs such as Medicaid and Aid to Families with Dependent Children.[99] *Relf v. Weinberger* was brought as a challenge to regulations promulgated by the Department of Health, Education, and Welfare ("HEW") that had been drafted in response to the nationwide attention given to the experience of the Relf sisters and the consequent exposure of the widespread abuses in sterilization procedures.[100]

In an unusually strong opinion, Judge Gesell of the federal District Court for the District of Columbia found that an estimated 100,000 to 150,000 low-income persons had been sterilized annually under the federal programs and that "an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization."[101] He ruled that funding such coercive practices and tactics violated HEW's authority because it was Congress's intent that "federally assisted family planning sterilizations are permissible only with the voluntary, knowing and uncoerced consent of individuals competent to give such consent."[102] As one of the remedies for the illegal action, Judge Gesell ordered that federal recipients change their consent procedures to ensure that a patient had not been subjected to pressure by doctors or others, including giving the patient a special oral and written assurance that federal funds could not be withdrawn because of a failure to accept sterilization.[103]

Judge Gesell's order and other public-policy initiatives to end

97. *Id.*

98. Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974), *order vacated by* 565 F.2d 722 (D.C. Cir. 1977); B. Drummond Ayres Jr., *Sterilizing the Poor: Exploring Motives and Methods*, N.Y. TIMES, July 8, 1973, at § 4.

99. *Relf*, 372 F. Supp. at 1198.

100. *Id.* at 1198.

101. *Id*. at 1199.

102. *Id.* at 1201.

103. *Id.* at 1203.

sterilization abuse had a significant impact. In 1978, HEW issued new rules restricting sterilizations performed under programs receiving federal funds. The rules strengthened the requirements of informed consent, providing for consent in the preferred language of the patient and a thirty-day waiting period between the signing of the consent form and the sterilization procedure.[104] For our purposes, what is striking about these regulatory reforms is how closely they implicate issues that are at the heart of tort claims for negligent infliction of emotional distress in the reproductive context. The heightened protection against abuse afforded by the HEW regulations is predicated on the importance of the interest at stake, which justifies regulating the doctor/patient relationship. Moreover, the regulations implicitly disavow the *Walker* court's narrow view of informed consent by acknowledging that physician pressure and economic coercion can make a woman's "choice" to accept sterilization less than free and voluntary. While the ruling in *Relf* has no direct application to tort claims, its civil-rights principles could easily be absorbed to guide courts in tort cases alleging malpractice and negligent infliction of emotional distress. The take-home message of *Relf* is that medical personnel owe patients a heightened duty of care when advising and treating them on matters of reproductive choice and health, and that they should guard against conduct that undermines or injures patients' interests, whether it results in emotional or physical harm.

In her history of race and reproductive rights, Dorothy Roberts cautions that the federal regulations have not stopped sterilization abuse, citing the continued exceptionally high sterilization rates of black women.[105] However, today's cases are more likely to arise in individual, rather than class-wide settings, and in what otherwise appear to be ordinary malpractice and informed-consent suits. It is unlikely that physicians today would openly acknowledge that they had unilaterally decided to sterilize a patient because she was receiving Medicaid and had too many children. Traces of the old paternalistic and racist attitudes, however, can still be found in the medical treatment of pregnant minority women and in judicial responses to their injuries.

One troubling recent case is *Robinson v. Cutchin*,[106] a 2001 lack-of-informed consent case from Maryland involving a pregnant black woman. In that case, Glenda Robinson was treated by Dr. Cutchin in connection with the birth of her sixth child. The controversy centered on whether Robinson had given her consent to a tubal ligation in the event that she had to undergo a cesarean section. Dr. Cutchin alleged that she gave such consent, while Robinson denied it and asserted that she and her husband were planning to have a

104. ROBERTS, *supra* note 76, at 96–97.
105. *Id.* at 97.
106. 140 F. Supp. 2d 488 (D. Md. 2001).

seventh child.[107]

As it turned out, it was necessary to perform an emergency C-section for the delivery of Robinson's baby. Dr. Cutchin then performed the tubal ligation. According to Robinson, she did not discover that the sterilization had been performed until nearly two years after the birth of her child, when she learned she was incapable of conceiving.[108] Robinson's suit against Dr. Cutchin alleged several tort claims, including lack of informed consent, battery, and intentional infliction of emotional distress.[109] Because the negligence claim of lack of informed consent resulted in a settlement, the only published opinion in the case involved the intentional-tort claims for battery and intentional infliction of emotional distress.[110]

The opinion of the district court dismissing the intentional-tort claims displays skepticism toward claims of reproductive injury and casts doubt on the seriousness of plaintiff's alleged injury. Reminiscent of *Walker*'s disapproval of black women who choose to bear multiple children, the district court thought it relevant to point out that before she was married Robinson had "three prior children who were born out-of-wedlock" and that she also had three children with her current husband.[111] Assuming for the sake of argument that the tubal ligation had been performed without Robinson's consent, the court nevertheless concluded that it did not amount to a battery, defined as a harmful or offensive touching. To the court, the forced sterilization "was not harmful because it did not cause any additional physical pain, injury or illness other than that occasioned by the C-Section procedure."[112] In the court's view, the sterilization was also not offensive because it purportedly "did not offend Mrs. Robinson's reasonable sense of personal dignity."[113] Remarkably, the court concluded that the injury to Mrs. Robinson's reproductive capacity had no connection to dignitary harm or harm to personal identity: the court bluntly stated that "the fact that she was not able to have a seventh child after previously giving birth to six children is hardly something which would offend her reasonable sense of personal dignity."[114] Not surprisingly, given this assessment of the situation, the court also dismissed the intentional-infliction claim, concluding that there was no evidence that the doctor had acted outrageously.[115]

Although Robinson's negligence claim survived—and with it,

107. *Id.* at 490–91.
108. *Id.*
109. *Id.* at 490.
110. *Robinson*, 140 F. Supp. 2d 488.
111. *Id.* at 491 n.1.
112. *Id.* at 493.
113. *Id.*
114. *Id.*
115. *Id.* at 494.

the prospect of recovering damages for emotional distress traceable to the sterilization procedure—the district court's opinion reveals a disconcerting tendency to devalue the plaintiff's procreative interests and to minimize her suffering. The opinion seems oblivious to the constitutional principle that it is an individual woman's right to decide whether to bear children and to determine the size of her family. Particularly given the fact that black women have historically been denied the right of self-determination in these matters, the court in *Robinson* should not have been so quick to dismiss the plaintiff's distress as unreasonable and to treat her lack of consent as having nothing to do with her sense of personal dignity.[116]

The miscarriage, stillbirth, and sterilization cases discussed above provide compelling contexts for heightened protection and for the imposition of a duty of due care in negligent-infliction cases. However, the heightened protection for reproductive interests should not be limited solely to prenatal cases. Even after a child is born, the connection between the parent and the infant should be recognized and valued, such that courts should impose a duty of care upon medical professionals to protect parents against emotional distress in the important period during and immediately following childbirth. Thus, there should be little difficulty finding liability for the mother's distress in the suffocation case, mentioned earlier, in which the hospital employee brought the one-day-old infant to a mother for breastfeeding and neglected to notice that the mother was heavily sedated when she left them alone.[117] Rather than have courts struggle with whether the mother was a bystander to her child's death, was in the danger zone, or contemporarily perceived her child's injury, tort protection should be allowed simply upon a showing of the defendant's failure to safeguard the plaintiff's reproductive interests. In real-world terms, the period of reproduction stretches from conception until the parents take the baby home from the hospital. During this period, the parents' special interest deserves heightened protection and warrants finding a duty to protect against negligent infliction of emotional distress.

CONCLUSION

In conclusion, I want to mention the obvious: my proposal for selecting sexual autonomy and reproduction as interests worthy of triggering a duty of due care under section 46(b) does not stem solely from the fact that these interests are already accorded considerable protection in the torts case law and have important implications for women's equality. It is also because they are fundamental constitutional interests and represent important norms of liberty

116. *Id.* at 493.
117. Garcia v. Lawrence Hosp., 773 N.Y.S.2d 59 (App. Div. 2004).

and equality. Thus, the United States Constitution prohibits governmental action that interferes with an individual's free choice of a sexual partner or with important decisions relating to childbearing and childrearing, absent proof that such interference is necessary to further a compelling state interest.[118] In constitutional doctrine, it is the fundamental nature of the personal interests at stake that trigger the Court's "strict scrutiny." As yet there is no similar strict scrutiny or condemnation of private activities that pose equally potent threats to these personal interests.

My proposal also reflects the premise that one of the virtues of tort law is that it is not a pristine field, but is constantly changing to absorb concepts, principles, and norms from other areas of law.[119] Several contributions to this Symposium track how tort law has become intermingled with concepts from more "pure" areas of law, such as contracts and property.[120] In the post-civil-rights era, there has also been a migration of constitutional and civil-rights principles and norms into tort law.[121] There is no good reason why tort law may borrow from contract, but not constitutional law. Naming sexual autonomy and reproduction as special interests that trigger a duty of care in tort law would bring the domain of torts and constitutional law closer together and provide much needed protection for liberty and equality in the private realm.

118. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (right of sexual intimacy); Santosky v. Kramer, 455 U.S. 745 (1982) (parental rights); Roe v. Wade, 410 U.S. 113 (1973) (right to abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to contraception); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate). *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES §§ 10.1–.4 (3d ed. 2006) (discussing fundamental rights to marry, custody of children, reproductive autonomy, and sexual activity).

119. *See* Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369, 390 (2005).

120. *See generally* Gregory C. Keating, *Is Negligent Infliction of Emotional Distress a Freestanding Tort?*, 44 WAKE FOREST L. REV. 1131 (2009) (contract law); Kenneth W. Simons, *The Restatement (Third) of Torts and Traditional Strict Liability: Robust Rationales, Slender Doctrines*, 44 WAKE FOREST L. REV. 1355 (2009) (property law).

121. *See* Chamallas, *supra* note 5, at 2118. *See generally* Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005).