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# Do Black Lives Matter? Race As A Measure of Injury in Tort Law, 18 Scholar: St. Mary's L. Rev. & Soc. Just. 41 (2016)

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## I. Introduction

Discussions of race-related issues are a constant in American society. Within the last year alone, there have been several high profile events that have prompted important debates about race. Most of the events attracting nationwide attention involved the conduct of law enforcement agents, including incidents in which unarmed black men died at the hands of police officers,[1] peaceful protests that turned violent following the fail-

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1. *See, e.g.*, Martha Biondi, *Civil Rights: The Next Generation*, In These Times (June 12, 2015), http://inthesetimes.com/article/18034/civil-rights-the-next-generation ("The exchange [between activist DeRay McKesson and Wolf Blitzer] revealed a disconnect between mainstream media interest in the 'violence of rioters' and the efforts of organizers on the ground to bring attention to the structural violence of poverty in American cities, and the actual violence of policing."); Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. Times, http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0 (last updated Aug. 10, 2015) (detailing the incident in which police officers shot an unarmed black teenager, Michael Brown); Jason Hanna, *Video: Boy with air gun was shot 2 seconds after Cleveland police arrived*, CNN, http://www.cnn.com/2014/11/26/justice/cleveland-police-shooting (last updated Nov. 27, 2014, 4:52 PM) (reporting Temir Rice's death at the hands of police officers); Ken Murray et al., *Staten Island man dies after NYPD cop puts him in chokehold*, NYDailyNews,

ure to indict the police officers involved in those cases[2] and the use of excessive force on black teenagers attending social events [3] and while at school.[4] Other events included the racial identity controversy regarding a

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http://www.nydailynews.com/new-york/staten-island-man-dies-puts-choke-hold-article-1.1871486 (last updated Dec. 3, 2014, 3:50 PM) (reporting how police officers placed Eric Garner in a chokehold, leading to his death); *see also* U.S. DEP'T OF JUST. CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1–2 (2015) (concluding "Ferguson's police and municipal court practices reflected and exacerbated existing racial bias, including racial stereotypes."); *see* Sendhil Mullainathan, *Racial Bias, Even When We Have Good Intentions*, N.Y. TIMES (Jan. 3, 2015), http://www.nytimes.com/2015/01/04/upshot/the-measuring-sticks-of-racial-bias-.html (concluding "[t]he deaths of African-Americans at the hands of police in Ferguson, Mo., in Cleveland and on Staten Island have reignited a debate about race. Some argue that these events are isolated and that racism is a thing of the past. Others contend that they are merely the tip of the iceberg, highlighting that skin color still has a huge effect on how people are treated.").

2. *See* Peter Hermann & Paul Duggan, *Six Baltimore police officers indicted in death of Freddie Gray*, WASH. POST (May 21, 2015), http://www.washingtonpost.com/local/crime/six-baltimore-police-officers-indicted-in-death-of-freddie-gray/2015/05/21/182f2778-fe1b-11e4-805c-c3f407e5a9e9_story.html (describing the reaction of police union members to the indictment of three police officers, and accusing Baltimore State's Attorney of rushing her investigation); *cf.* Mark Berman & Wesley Lowery, *Cleveland judge finds probable cause for murder charge in Tamir Rice shooting*, WASH. POST (June 11, 2015), http://www.washingtonpost.com/news/post-nation/wp/2015/06/11/cleveland-judge-finds-probable-cause-for-murder-charge-in-tamir-rice-shooting (describing activists' efforts to influence Cleveland's city attorney to file charges against the police officer who shot and killed Tamir Rice). *See generally* Mark Berman et al., *South Carolina police officer charged with murder after shooting man during traffic stop*, WASH. POST (Apr. 7, 2015), http://www.washingtonpost.com/news/post-nation/wp/2015/04/07/south-carolina-police-officer-will-be-charged-with-murder-after-shooting (reporting the indictment of a South Carolina police officer for killing a black man during a routine traffic stop).

3. *See* Jamelle Bouie, *Our Segregated Summers: The police misconduct in McKinney, Texas, is part of America's long, fraught history of race and swimming*, SLATE (June 9, 2015, 10:27 AM), http://www.slate.com/articles/news_and_politics/politics/2015/06/mckinney_texas_police_misconduct_at_swimming_pool_party_america_s_ugly_history.html (reporting a group of black teenagers were harassed by white residents and police officers when they attended a pool party); *see also* Brit Bennett, *Who Gets to Go to the Pool?*, N.Y. TIMES (June 10, 2015), http://www.nytimes.com/2015/06/10/opinion/who-gets-to-go-to-the-pool.html; Ashley Southall, *McKinney, Tex., Police Officer Resigns Over Incident Caught on Video*, N.Y. TIMES (June 9, 2015), http://www.nytimes.com/2015/06/10/us/police-officer-in-mckinney-tex-resigns-over-incident-caught-on-video.html.

4. Scott Eric Kaufman, *"Come on, I'm going to get you up": South Carolina high school "resource officer" brutally attacks student for sitting while black*, SALON (Oct. 27, 2015), http://www.salon.com/2015/10/27/come_on_im_going_to_get_you_up_south_carolina_high_school_resource_officer_brutally_attacks_student_for_sitting_while_black/; Kevin Sawyer, South Carolina Police Officer Violently Attacks a Student in a Classroom, NAT'L MONITOR (Oct. 27, 2015), http://natmonitor.com/2015/10/27/south-carolina-police-officer-violently-attacks-a-student-in-a-classroom/; Janel George, S. Carolina case lesson: Police shouldn't be doing school discipline, CNN (Oct. 28, 2015, 10:53 AM), http://www.cnn.com/2015/10/28/opinions/george-school-discipline-police-south-carolina/index.html.

member of the National Association for the Advancement of Colored People (N.A.A.C.P.),[5] as well as the release of the movies *Selma*[6] and *Black or White.*[7] Events like these, and other events not as widely reported in the news,[8] continue to fuel a growing discussion about race[9] and

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5. In June 2015, the parents of Rachel Dolezal, the president of her local N.A.A.C.P. chapter and a university instructor in African-American studies, claimed she was white and had pretended to be African-American for most of her life. *See* Richard Pérez-Peña, *Black or White? Woman's Story Stirs Up a Furor*, N.Y. TIMES (June 12, 2015), http://www.nytimes.com/2015/06/13/us/rachel-dolezal-naacp-president-accused-of-lying-about-her-race.html ("[Dolezal] touched off a fierce internet debate over the nature of race and racial categorization in America today, with commentators black and white, liberal and conservative, finding meaning in her story."); Jamelle Bouie, *Is Rachel Dolezal Black Just Because She Says She Is?*, SLATE (June 12, 2015, 7:22 PM), http://www.slate.com/articles/news_and_politics/politics/2015/06/rachel_dolezal_claims_to_be_black_the_naacp_official_was_part_of_the_african.html; Beth Ethier, *President of Spokane NAACP Accused of Pretending to Be Black*, SLATE (June 12, 2015, 12:55 PM), http://www.slate.com/blogs/the_slatest/2015/06/12/rachel_dolezal_naacp_official_college_professor_accused_of_pretending_to.html ("Dolezal's race has become the focus of an investigation by Spokane's city government amid accusations that she lied when seeking a seat on the commission by claiming to be of Caucasian, Native American, and black American Background."); Ben Mathis-Lilley, *The Short but Intriguing History of White Americans Pretending to Be Black,* SLATE (June 12, 2015, 2:41 PM), http://www.slate.com/blogs/the_slatest/2015/06/12/other_white_americans_have_pretended_to_be_black_rachel_dolezal_s_predecessors.html (stating Rachel Dolezal has been pretending to be black for a decade); Eyder Peralta, *Spokane NAACP Leader's Race Becomes Subject of Controversy*, NPR (June 12, 2015, 9:34 AM), http://www.npr.org/sections/thetwo-way/2015/06/12/413882989/race-of-spokanes-naacp-leader-becomes-subject-of-controversy?utm_medium=RSS&utm_campaign=news; William Saletan, *Rachel Dolezal's Truth*, SLATE (June 15, 2015, 9:07 PM), http://www.slate.com/articles/news_and_politics/politics/2015/06/rachel_dolezal_claims_to_be_the_target_of_hate_crimes_the_former_naacp_official.html ("[Dolezal's] story has triggered an awkward discussion about what it means to be black and whether, in the age of growing transgender awareness, it's possible to change your race or ethnicity.").

6. Selma Cloud Eight Films 2014); *see* Aurin Squire, *Why 'Selma' Didn't Win Best Picture*, NEW REPUBLIC (Feb. 21, 2015), http://www.newrepublic.com/article/121113/selma-oscar-snub-why-film-wont-win-best-picture (arguing it was outrageous that Selma did not win the academy award for best picture).

7. BLACK OR WHITE (Sunlight Productions 2014); *see* Matt Zoller Seitz, *Black or White*, ROGEREBERT.COM, Jan. 30, 2015, http://www.rogerebert.com/reviews/black-or-white-2015 (describing *Black or White* as "a domestic drama about a custody battle over a mixed-race child"); Rebecca Theodore-Vachon, *Dear Hollywood: Let's Stop Making Movies Like 'Black or White,'* FORBES (Jan. 30, 2015, 3:26 PM), http://www.forbes.com/sites/rebeccatheodore/2015/01/30/black-or-white-movie-review-race (criticizing *Black or White* as operating "under the guise of being progressive and furthering the 'conversation' about race, but only serv[ing] to exalt Whiteness by marginalizing Blackness").

8. *See, e.g.*, *What Had to be Said*, PRINCETON ALUMNI WKLY (June 3, 2015), https://paw.princeton.edu/issues/2015/06/03/pages/0017/index.xml; *see also* Allie Wenner & Takim Williams, *Clash of Values*, PRINCETON ALUMNI WKLY (May 13, 2015), https://paw.princeton.edu/issues/2015/05/13/pages/5940/index.xml (discussing a special campus-wide meeting held at Princeton University in April 2015 concerning developing anger after

identity[10] that serves as a constant reminder of the racial divide that is still very much alive in the heart of American society.[11]

Much of the current debate revolves around police brutality and legal injustice.[12] However, prior to the incidents that prompted these debates, the nation's media was captivated briefly by another legal question related to race which originated in a complaint in a case called *Cramblett v. Midwest Sperm Bank*: whether the race of a child can be used to measure the harm done to the child's parents as part of a torts claim based on the "wrongful birth" of the child.[13] Nevertheless, once the media's attention turned to the events that resulted in racial unease in places like Ferguson, Missouri, the discussion about whether someone's racial identity could be

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a dance performance, which students considered demeaning to African and Native American Cultures).

9. It should be noted that there is a debate as to the validity of the concept of race in and of itself, based on the argument that the concept has no real basis on scientific or objective fact. According to this view, race is a social or political construct rather than a biological distinction among human beings. *See*, Univ. of Pa. Law School, *Is race a social invention?*, CASE IN POINT (June 9, 2015), http://caseinpoint.org/live/news/5438-is-race-a-social-invention#.VdJva_lJ0rk (arguing the biological definition of race is actually a social invention meant to justify the categorization of individuals). *See also* Allyson Hobbs, Op-ed, *Rachel Dolezal's Unintended Gift to America*, N.Y. TIMES (June 17, 2015), http://www.nytimes.com/2015/06/17/opinion/rachel-dolezals-unintended-gift-to-america.html (explaining that race is a social construct based in culture and is not based upon biological factors); Jenée Desmond Harris, *11 ways race isn't real*, VOX, http://www.vox.com/2014/10/10/6943461/race-social-construct-origins-census (last updated Oct. 10, 2014) (listing eleven reasons why racial categorizations are a social and political construct).

10. *See How Fluid is Racial Identity?*, N.Y. TIMES (June 16, 2015), http://nytimes.com/roomfordebate/2015/06/16/how-fluid-is-racial-identity (initiating a discussion on the fluidity of racial identity); Amanda Kay Erekson, *Being Able to Negotiate Our Racial Identity is Important*, N.Y. TIMES (June 16, 2015, 9:10 PM), http://nytimes.com/roomfordebate/2015/06/16/how-fluid-is-racial-identity (arguing the fluidity of race calls for a negotiation of racial identities to reflect heritage, culture, and experience to create a better representation of the lived experiences of mixed race people).

11. *See* Charles Green, *A Conversation With Jimmy Carter*, AARP BULL. (June 2015), http://www.aarp.org/politics-society/history/into-2015/jimmy-carter-reflections-at-90.html. In a recent interview with former President Jimmy Carter, in which he stated "[t]he recent publicity about mistreatment of black people in the judicial and police realm has been a reminder that the dreams of the civil rights movement have not been realized." *Id.*

12. *See The #BlackLivesMatter Movement: Marches & Tweets For Healing*, NPR (June 9, 2015, 3:31 AM), http://www.npr.org/2015/06/09/412862459/the-blacklivesmatter-movement-marches-and-tweets-for-healing?utm_medium=RSS&utm_campaign=news (explaining the phrase "black lives matter" has become the signature message of the protest movement against police brutality and racism in the American justice system); *see also* Stephen Lendman, *Police Brutality in America*, MWC NEWS (Aug. 19, 2014, 11:27 AM), http://mwcnews.net/focus/politics/45029-police-brutality-in-america.html (providing several instances of minority civilians' mistreatment and murders at the hands of police officers).

13. Complaint at 1, Cramblett v. Midwest Sperm Bank, LLC, No. 2014-L-010159 (Ill. Cir. Ct. filed Sept. 29, 2014), 2014 WL 4853400.

used as a measure of injury, unfortunately, faded from the national spotlight.

Yet, the issues raised by *Cramblett* are too important and interesting to be dismissed in the continuing debate on racial issues. The case not only offers the opportunity to discuss the issue of using race as an element in a tort law claim, but also poses interesting questions about the extent to which modern reproductive technologies change the way we think about injuries for purposes of tort law. There have been many wrongful birth, wrongful life and wrongful pregnancy cases in the past,[14] but *Cramblett* is different. Unlike in those other cases, in *Cramblett*, the plaintiff's claim was based on the argument that the child's race should be considered to be the equivalent of a disability or birth defect because the child's existence was claimed to be an injury to the mother.[15] Thus, because the law already recognizes a claim in cases where the child is born with a condition that could have been avoided had the defendant not been negligent, the question that arises from this case is whether that type of claim should be extended to include a situation where a child turns out to have different physical traits than planned or expected.

This article will address these issues by analyzing the wrongful birth cause of action asserted by the plaintiff in *Cramblett*. First, the article will describe the facts that resulted in the claim in *Cramblett*. Part II will discuss the wrongful birth claim. Part III considers an alternative possible claim that could be applied to the facts asserted by the plaintiff in *Cramblett*. Part IV examines whether the claims raised by the complaint in *Cramblett* have a basis in law. Finally, Part V discusses whether the approach to the issue raised by the complaint in *Cramblett* should be af-

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14. *See, e.g.*, Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa.1978) (applying Pennsylvania law); Moores v. Lucas, 405 So.2d 1022 (Fla. Dist. Ct. App. 1981) (applying Florida law); Blake v. Cruz, 698 P.2d 315 (Idaho 1984) (applying Idaho law); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987) (citing Robak v. United States, 658 F.2d 471 (7th Cir.1981) (applying Illinois law); Smith v. Cote, 513 A.2d 341 (N.H. 1986) (applying New Hampshire law); Schroeder v. Perkel, 432 A.2d 834 (N.J. 1981) (applying New Jersey law); Speck v. Finegold, 439 A.2d 110 (Pa. 1981) (holding a wrongful birth claim is an extension of existing tort claims); Phillips v. United States, 508 F. Supp. 537 (D.S.C. 1980) (applying South Carolina law to a wrongful life cause of action); Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981) (applying South Carolina law to a wrongful birth cause of action); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (applying Texas law); Naccash v. Burger, 290 S.E.2d 825 (Va. 1982) (applying Virginia law); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983) (en banc) (applying Washington law); James G. v. Caserta, 332 S.E.2d 872 (W.Va.1985) (applying West Virginia law); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975) (applying Wisconsin law).

15. *See* Complaint, *supra* note 13, at 6 (describing plaintiff's daughter as "obviously mixed race" and that plaintiff suffers from anxiety, fear, and uncertainty about the future).

fected by the fact that the facts of the case involved the use of modern reproductive technologies.

## II. THE FACTS AND ALLEGATIONS THAT GAVE RISE TO THE ISSUE IN *CRAMBLETT*

On September 29, 2014, Jennifer Cramblett filed a complaint against a sperm bank alleging that the defendant mistakenly gave her vials of sperm from an African-American donor even though she had specifically requested the sperm of a white donor with blond hair and blue eyes.[16] Ms. Cramblett had been artificially inseminated with the sperm and she was four or five months pregnant when she was informed about the mistake.[17] She chose to take the pregnancy to term and gave birth to a healthy child of mixed races.[18] However, two years after the birth of the child, Ms. Cramblett sued the sperm bank, arguing she should be compensated for the child's wrongful birth.[19] The complaint included two counts: one for wrongful birth and one for breach of warranty under a specific Illinois statute.[20] Neither had a basis in law and, thus, both should have been rejected.

It took some time, but eventually, just as this article was getting ready to go to print, the trial court did dismiss the complaint in *Cramblett*.[21] However, oddly, the court's order stated the plaintiff could file her claim again as a negligence claim.[22] This was an odd conclusion because the complaint *was* a claim for negligence.[23]

The second claim included in the complaint was based on an alleged breach of warranty under the Illinois Blood and Organ Transaction Liability Act.[24] Section 3 of the Act recognizes the warranty upon which the

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16. *Id.* at 4.
17. *Id.* at 4–5.
18. *Id.* at 6.
19. *Id.*
20. *Id.* at 7–8.
21. *Judge Throws Out Lawsuit Against Sperm Bank*, CBS NEWS, (Sept. 4, 2015, 11:38 AM), http://www.cbsnews.com/news/judge-throws-out-lawsuit-against-sperm-bank/.
22. Michael Harthorne, *Woman Loses Lawsuit Over Sperm Bank's Race Mixup*, NEWSER, (Sept. 5, 2015, 4:01 PM), http://www.newser.com/story/212435/woman-loses-lawsuit-over-sperm-banks-race-mixup.html.
23. *See* Complaint, *supra* note 13, at 7–8 (asserting that the defendant had a legal duty, that duty was breached, and the breach of that duty was the direct and proximate causation of Cramblett's damages).
24. *Id.* at 8; *see* Illinois Blood and Organ Transaction Liability Act, 745 ILL. COMP. STAT. § 40/1 (effective Oct. 1, 1972) (stating the Illinois statute limits the liability arising out of procedures involving blood or organ transfusions to acts of negligence and willful misconduct). According to the statue, the imposition of liability without fault could inhibit the availability of important scientific knowledge, skills, and materials. *Id.* Given this pub-

claim in *Cramblett* was based,[25] which is a warranty that the defendant acted with reasonable care.[26] Thus, as this language suggests, the so-called warranty is not really a warranty but a presumption that the defendant acted according to the standard of care.[27] For this reason, this "warranty" adds nothing to what the common law already requires.[28] The plaintiff still has the burden to argue and prove the standard of care and that the defendant breached it.[29] Thus, the statute does not provide any additional, or different, avenue of relief than that provided by a claim based on negligence. The claim for breach of warranty under the statute would only be successful if the plaintiff could support a claim that the defendant breached the warranty, which is to say that the defendant did not act using reasonable care or, in other words, that the defendant was negligent. Therefore, given the second count in the complaint, even when originally filed, the claim for breach of warranty was, at best, redundant. To say that it could be filed again "as a negligence claim" is to allow the plaintiff to repeat her failed attempt to support the original claim.

In addition, the first claim in the complaint, a claim based on wrongful birth, was, by definition, a negligence claim. [30] The label "wrongful birth" refers to the type of injury used as a basis for the claim, not as a reference to the theory of liability upon which the claim is based.[31] The theory of liability is negligence. Clearly it is not intent nor strict liability,[32] so what else could it be? For this reason, again, refiling as a negligence claim would mean refiling the same failed claim.

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lic policy, the statute specifically limits the possible liability of the defendants to causes of action based on negligence or willful misconduct. *Id.* *See id.* § 40/3.

25. Complaint, *supra* note 13, at 8.

26. § 40/3.

27. *See id.* (suggesting that an individual receiving the relevant service will always be afforded due care because the statute imposes such a requirement on "[e]very person, firm or corporation involved in the rendition of any of the services described in Section 2 . . . ").

28. *See* W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 30, 164–165 (W. Page Keeton et al. eds., West Publishing Co. 5th ed. 1984) (listing the elements for a negligence cause of action: duty owed, breach of that duty, casual connection between the breach and the injury, actual loss or damages).

29. *See* § 40/3 (implying there is no liability if due care is exercised and professional standards of care are followed).

30. *See* Complaint, *supra* note 13, at 7–8 (containing a claim based on wrongful birth which is comprised of the same elements as a claim for negligence: duty, breach, causation, and damages).

31. *See id.* at 7–8 (comprising, for the most part, of a claim that a duty was owed, that duty was breached, and the breach caused damages to the plaintiff).

32. *See id.* at 7 (focusing on the defendant's failure to exercise the degree of skill, care and diligence of an ordinary and reasonable sperm bank). The complaint lacks any mention of intentional misconduct or strict liability. *Id.*

Having said that, given that the court left open the possibility that the plaintiff could file her claim again in the future, the court's dismissal did not resolve the most interesting policy questions raised by the original complaint. Since the claim was for wrongful birth but the child did not suffer from any medical condition, disability, or birth defect, Ms. Cramblett was, in essence, asking the court to recognize a claim to compensate her for emotional distress for having to care for a child who is different than the child she wanted. And she is different solely because of her race.[33]

As will be discussed below, even though many jurisdictions recognize the concept of wrongful birth, it would be wrong to extend its application to the alleged emotional distress suffered due to the birth of a healthy child simply because of the child's race. The typical "textbook definition" of a tort is "[a] civil wrong, other than breach of contract, for which a remedy may be obtained."[34] Based on this definition, one of the first important lessons to learn about tort law is that it does not always recognize a remedy for certain wrongs. More importantly, sometimes the law *should not* recognize a remedy. Simply stated, sometimes unexpected (even bad) things happen, and yet, there is no remedy under tort law. The reasons for this seemingly unfair result vary, but public policy dictates that sometimes there are other competing values that are more important than providing an avenue for redress.[35] Such is the case in *Cramblett*.

## III. WRONGFUL BIRTH AND WRONGFUL LIFE CLAIMS

A wrongful birth claim is one of three possible claims based on the assertion that, but for the defendant's negligence, a mother would have avoided giving birth to a child.[36] The other two types of claims are usually referred to as wrongful life and wrongful pregnancy.[37] Typically, in a

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33. *See id.* at 7–8 (claiming that plaintiff should recover for wrongful birth because the sperm bank breached its duty to her and caused her to have a mixed race child).

34. *Tort*, BLACK'S LAW DICTIONARY (9th ed. 2009).

35. *See* Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 822 (1994) (restating Oliver Wendell Holmes's observation that "law is shaped by 'institutions of public policy'").

36. Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 694–95 (Ill. 1987); Williams v. Rosner, 7 N.E.3d 57, 64 (Ill. App. Ct. 2014); Williams v. Univ. of Chicago Hosp., 688 N.E.2d 130, 132 (Ill. 1997).

37. *Williams*, 7 N.E.3d at 64–65; DAN DOBBS, THE LAW OF TORTS 792–93 (1st ed. 2000); Jeffrey R. Botkin, *Prenatal Diagnosis and the Selection of Children*, 30 FLA. ST. U. L. REV. 265, 269 (2003); Jennifer R. Granchi, Comment, *The Wrongful Birth Tort: A Policy Analysis and the Right to Sue for an Inconvenient Child*, 43 S. TEX. L. REV. 1261, 1264 (2002); Kathleen Mahoney, Note, *Malpractice Claims Resulting from Negligent Preconception Genetic Testing: Do These Claims Present a Strain of Wrongful Birth or Wrongful*

wrongful birth claim, the plaintiffs are the parents of a child born with a medical condition, birth defect, or genetic problem that could have been detected had the defendant not been negligent during the mother's pregnancy.[38] A wrongful life claim is similar but the plaintiff is the child.[39] These claims, therefore, typically involve a combination of a planned pregnancy, the birth of an unhealthy child, and a claim for the lost opportunity to terminate a pregnancy.[40] Wrongful life claims have been over-

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*Conception, and does the Categorization Even Matter?*, 39 SUFFOLK U. L. REV. 773, 773–74 (2006); Caroline Crosby Owings, Note, *The Right to Recover for Emotional Distress Arising from a Claim of Wrongful Birth*, 32 AM. J. TRIAL ADVOC. 143, 146 (2008).

38. *Siemieniec*, 512 N.E.2d at 695; *Williams*, 7 N.E.3d at 64; MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 128 (N.Y. Univ. Press 2010); DOBBS, *supra* note 37, at 792; 1 JAMES A. DOOLEY, MODERN TORT LAW 352 (Callaghan & Company 1982); Martin A. Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 FAM. L. Q. 15, 16 (1980); *see* Botkin, *supra* note 37, at 269 (emphasizing wrongful birth claims are actions against doctors for neglecting to properly inform the parents of potential reproductive risks); Paula Bernstein, Comment, *Fitting a Square Peg in a Round Hole: Why Traditional Tort Principles Do Not Apply to Wrongful Birth Actions*, 18 J. CONTEMP. HEALTH L. & POL'Y 297, 299 (2001) (listing different ways a wrongful birth claim may arise, such as defendant's negligence in failing to inform and perform prenatal diagnostic testing); Thomas Keasler Foutz, Comment, *"Wrongful Life": The Right Not to be Born*, 54 TUL. L. REV. 480, 484–85 (1980); Regina Goulding Paul, Note, *Damages for Wrongful Birth and Wrongful Pregnancy in Illinois*, 15 LOY. U. L. J. 799, 799–800 (1984) (stating parents may claim wrongful birth for disabled children negligently screened for genetic diseases); Kathrine Say, Note, *Wrongful Birth—Preserving Justice for Women and Their Families*, 28 OKLA. CITY U. L. REV. 251, 253 (2003) (indicating wrongful birth claims arose from technological advances in prenatal testing allowing practitioners to inform patients of increased risk of genetic defects); David D. Wilmoth, Comment, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions for a Consistent Analysis*, 63 MARQ. L. REV. 611, 611 (1980).

39. *Siemieniec*, 512 N.E.2d at 695; *Williams*, 7 N.E.3d at 65; Donald L. DeVries, Jr. & Alan M. Rifkin, *Wrongful Life, Wrongful Birth, and Wrongful Pregnancy: Judicial Divergence in the Birth-Related Torts*, 20 FORUM 207, 211 (1985); Thomas DeWitt Rodgers, III, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C. L. REV. 713, 715 (1982); Geoffrey Disston Minott & Vincent Phillip Zurzolo, Comment, *Wrongful Life: A Misconceived Tort*, 15 U.C. DAVIS L. REV. 447, 450 (1981); Maxine A. Sonnenburg, Note, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice*, 55 S. CAL. L. REV. 477, 477 (1982); Richard E. Wolff, Note, *Wrongful Life: A Modern Claim Which Conforms to the Traditional Tort Framework*, 20 WM. & MARY L. REV. 125, 125 (1978); Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1500 (1978).

40. *Siemieniec*, 512 N.E.2d at 695. More commonly, the negligent conduct alleged in wrongful birth claims happens after the child has been conceived, but there are cases that involve pre-conception conduct. Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1250 (Ill. 1977). In this type of so-called pre-conception claim, the plaintiff seeks to recover for injuries that can be attributed to the defendant's negligence before the child was conceived. *Id.* These cases relate to conduct that affect the mother's body in a way that later results in injury to her offspring. *See Id.* at 1251 (explaining the defendant provided a

whelmingly rejected,[41] but a majority of jurisdictions have recognized the validity of wrongful birth claims because courts have become more comfortable recognizing the loss of parental choice as an injury, and because recognizing the claim advances the goals of tort law.[42]

Because wrongful birth claims have been recognized, at least in part, to vindicate the protected right to terminate a pregnancy, in order to support the claim, the plaintiffs must assert that had they been given the

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blood transfusion to the plaintiff's mother with incompatible blood that later caused prenatal damage to plaintiff). If the defendant in such a case is someone who should have discovered the risk of injury to a future child, the eventual claim against that defendant would be similar to wrongful birth claims. *See generally Id.* at 1252 (citing John R. Brantley, Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140, 141 n.5 (1976)) (describing the evolution of tort law toward allowing a claim for injuries inflicted prenatally). Other examples of pre-conception claims are those against defendants who negligently expose women to toxic substances or harmful drugs before they became pregnant. *See, e.g.*, Sindell v. Abbott Laboratories, 607 P.2d 924, 924 (Cal. 1980) (analyzing a class action lawsuit brought against drug companies because of "injuries sustained as a result of the drug DES to their mothers during pregnancy"); Enright v. Eli Lily, 570 N.E.2d 198, 198 (N.Y. 1991) (refusing to extend liability to reach "third generation" plaintiffs injured by DES as infants); Grover v. Eli Lily, 591 N.E.2d 696, 696 (Ohio 1992) (holding the defendant was not liable to the grandchild of a woman who was given DES while she was pregnant with the child's mother for birth defects caused by the harmful drug).

41. Moores v. Lucas, 405 So. 2d 1022, 1025 (Fla. Dist. Ct. App. 1981); *Siemieniec*, 512 N.E.2d at 696; *Williams*, 7 N.E.3d at 58; Azzolino v. Dingfelder, 337 S.E.2d 528, 533 (N.C. 1985); *see, e.g.*, Elliott v. Brown, 361 So.2d 546, 546 (Ala.1978) (arguing there is no legal right not to be born in the state of Alaska); Blake v. Cruz, 698 P.2d 315, 322 (Idaho 1984) (disallowing a cause of action for wrongful life in Idaho); Goldberg v. Ruskin, 499 N.E.2d 406, 410 (Ill. 1986) (holding a child cannot recover for an action for wrongful life in Illinois); Bruggeman v. Schimke, 718 P.2d 635, 636 (Kan. 1986) (concluding Kansas does not recognize a cause of action for wrongful life); Miller v. Duhart, 637 S.W.2d 183 (Mo. Ct. App.1982) (applying Missouri law and holding the plaintiffs did not have a "legally cognizable cause of action"); Smith v. Cote, 513 A.2d 341, 355 (N.H. 1986) (declining to recognize a cause of action for wrongful life in New Hampshire); Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978) (concluding plaintiffs failed to state a cause of action in their wrongful life claim); Ellis v. Sherman, 515 A.2d 1327, 1327 (Pa. 1986) (asserting plaintiff did not suffer a legal injury and thus, could not recover for damages); Nelson v. Krusen, 678 S.W.2d 918, 925 (Tex. 1984) (recognizing there is no cause of action for wrongful life in Texas); James G. v. Caserta, 332 S.E.2d 872, 881 (W.Va. 1985) (rejecting a cause of action for wrongful life in West Virginia); Beardsley v. Wierdsma, 650 P.2d 288, 293 (Wyo. 1982) (affirming Wyoming's trial court was correct in dismissing the wrongful life action).

42. Speck v. Finegold, 439 A.2d 110, 114 (Pa. 1981) (holding parents may bring action because they have interests that are entitled to protection); *Siemieniec*, 512 N.E.2d at 705; Phillips v. United States, 508 F.Supp. 544 (D.S.C.1981); Gildiner v. Thomas Jefferson University Hospital, 451 F. Supp. 692 (E.D.Pa.1978); *Moores*, 405 So.2d 1022; *Cruz*, 698 P.2d at 319; Eisbrenner v. Stanley, 308 N.W.2d 209 (Mich. App. 1981); *Cote*, 513 A.2d 341; Schroeder v. Perkel, 432 A.2d 834 (N.J. 1981); Jacobs v. Theimer, 519 S.W.2d 846 (Tex.1975); Naccash v. Burger, 290 S.E.2d 825 (Va. 1982); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983) (en banc); *Caserta*, 332 S.E.2d 872; Dumer v. St. Michael's Hospital, 233 N.W.2d 372 (Wis. 1975).

proper treatment and information they would have terminated the pregnancy[43] and that, for that reason, the child was "wrongfully born." Thus, had the defendant not been negligent, the child would not have been born at all.

This also explains why the cause of action is controversial.[44] Some jurisdictions have refused to recognize it,[45] while others have tried to pro-

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43. *Siemieniec*, 512 N.E.2d at 705; *Dumer*, 233 N.W.2d at 377; *see, e.g.*, Robak v. United States, 658 F.2d 471, 477 (7th Cir. 1981) (noting the defendant would have recommended an abortion had he known of the plaintiff's disease, and alleging the plaintiff would have opted to have an abortion but for the defendant's negligence); *Phillips*, 508 F. Supp. at 550 (discussing the relationship between legal abortion and various courts' recognition of wrongful birth claims); *Gildiner*, 451 F. Supp. at 695–96 (stating the plaintiff's right to obtain a lawful abortion allows for recognition of a cause of action where a physician's negligence causes the birth of a child with Tay-Sachs disease); *Moores*, 405 So. 2d at 1026–27 (recognizing that a plaintiff may recover compensation if, but for the defendant's negligence, she would have terminated her pregnancy); *Cote*, 513 A.2d at 348 (holding that wrongful birth causes of action require negligent intrusion on the parental right to decide whether to give birth to a genetically defective child); *Perkel*, 432 A.2d at 840 (stating another's negligent misconduct depriving parents of their right to forego a pregnancy creates a cause of action for wrongful birth); *Theimer*, 519 S.W.2d at 848 (stating that a physician has a duty to inform a patient about any medical conditions that may affect the patient's decision to have a legal abortion); *Naccash*, 290 S.E.2d at 830 (holding a physician's negligence, which led to the deprivation of a parent's decision to continue a pregnancy, entitled the parents to recover compensation); *Harbeson*, 656 P.2d at 488 (declaring a parent's right to prevent the birth of a defective child is central to wrongful birth claims); *Caserta*, 332 S.E.2d at 875 (indicating the legal theory behind wrongful birth claims is that a physician's failure to provide parents with information regarding the existence of birth defects prevents them from making an informed decision regarding abortion).

44. *Compare, e.g.*, Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 141 (2005) (arguing that courts and legislatures should reject wrongful birth and wrongful life claims because their social and moral costs are too high), *with* Shelley A. Ryan, *Wrongful Birth: False Representations of Women's Reproductive Lives*, 78 MINN. L. REV. 857, 858 (1994) (arguing courts have been wrong to reject wrongful birth claims because they "have judged pregnancy, motherhood, and abortion by male standards, even though each of these experiences is a uniquely female one"), *and* Say, *supra* note 38, at 289 (arguing the tort of wrongful birth fulfills an important protective need for the decisional rights of women in our society, and that it has a valuable deterrent effect, ensuring that patients get the necessary information for informed medical decision-making).

45. *See, e.g.*, Atlanta Obstetrics & Gynecology Grp. v. Abelson, 398 S.E.2d 557, 560 (Ga. 1990) (holding that wrongful birth actions will not be recognized in Georgia absent the legislature's intervention); Schork v. Huber, 648 S.W.2d 861, 863 (Ky. 1983) (refusing to recognize a cause of action for wrongful birth for public policy reasons, which is in the domain of the General Assembly); Wilson v. Kuenzi, 751 S.W.2d 741, 746 (Mo. 1988) (en banc) (declaring a cause of action for wrongful birth will not be recognized due to its incompatibility with the legislature's policy regarding malpractice actions); *Azzolino*, 337 S.E.2d at 537 (concluding wrongful birth claims will not be recognized because the legislature is in a better position than the courts to address the issues raised by such claims).

hibit it by statute.[46] Yet, the majority of jurisdictions *do* recognize the cause of action,[47] although some courts attempt to mitigate controversy

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46. Different states forbid causes of action or awards of damages based on the claim that one would have sought an abortion but for another's act or omission. *E.g.*, IDAHO CODE § 5-334(1) (2014); MINN. STAT. § 145.424(2) (2015); MO. REV. STAT. § 188.130(2) (2014); UTAH CODE ANN. § 78B-3-109(2) (2008); 42 PA. CONS. STAT. § 8305(a) (amended 1988), *invalidated by* Sernovitz v. Dershaw, 57 A.3d 1254 (Pa. Super. Ct. 2012); S.D. CODIFIED LAWS § 21-55-2 (1981); *see* Alberto Bernabe, *Arizona considers ban on wrongful life lawsuits*, BERNABETORTS.BLOGSPOT.COM (Feb. 13, 2012, 11:13 AM), http://bernabetorts.blogspot.com/2012/02/arizona-considers-ban-on-wrongful-life.html (discussing a proposed Arizona statute that would ban wrongful birth lawsuits in circumstances not involving negligence); Alberto Bernabe, *Arizona senate approves law barring wrongful birth/wrongful life and wrongful conception claims*, BERNABETORTS.BLOGSPOT.COM (Apr. 11, 2012, 11:21 PM), http://bernabetorts.blogspot.com/2012/04/arizona-senate-approves-law-barring.html (criticizing the Arizona Senate for enacting a statute banning wrongful birth claims).

47. *See, e.g.*, *Robak*, 658 F.2d at 474, 476 (holding the plaintiffs' complaint stated a valid cause of action for wrongful birth); Liddington v. Burns, 916 F. Supp. 1127, 1133 (W.D. Okla. 1995) ("[T]his Court concludes Oklahoma would, if presented the question, recognize wrongful birth actions."); *Phillips*, 508 F. Supp. at 551 ("[T]he South Carolina Supreme Court, if confronted with this issue, would recognize such an assertion as a legally cognizable cause of action, in keeping with both the trend of authorities and the applicable policy considerations."); Turpin v. Sortini, 643 P.2d 954, 962 (Cal. 1982) (finding a wrongful birth action could be sustained where a defendant was negligent in diagnosing a hereditary ailment); Lininger ex rel. Lininger v. Eisenbaum, 764 P.2d 1202, 1208 (Colo. 1988) (en banc) (arguing a cause of action exists in meritorious wrongful birth claims); Rich v. Foye, 976 A.2d 819, 824 (Conn. Super. Ct. 2007) ("Connecticut recognizes a cause of action for wrongful birth."); Haymon v. Wilkerson, 535 A.2d 880, 886 (D.C. 1987) (asserting a cause of action for wrongful birth is consistent with the "District of Columbia's public policy that physicians should be liable for losses proximately caused by their negligence"); Kush v. Lloyd, 616 So. 2d 415, 422–24 (Fla. 1992) (holding that certain extraordinary expenses can be claimed under a wrongful birth action); *Siemieniec*, 512 N.E.2d at 705–06 (agreeing with the majority of jurisdictions that a wrongful birth cause of action may be maintained); Bader v. Johnson, 732 N.E.2d 1212,1216 (Ind. 2000) (recognizing the plaintiff's cause of action as sustainable but refusing to distinguish the cause of action from a medical malpractice action); Arche v. U.S. Dep't of Army, 798 P.2d 477, 480 (Kan. 1990) ("[W]e hold that the action of wrongful birth is recognized in Kansas."); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1158 (La. 1988) ("We have concluded that the law recognizes a duty by a physician in this kind of situation to potential parents to take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to lead to the birth of a child."); Thibeault v. Larson, 666 A.2d 112, 115 (Me. 1995) (holding that a cause of action exists when the birth of an unhealthy child is proximately caused by a physician's negligence); Reed v. Campagnolo, 630 A.2d 1145, 1152 (Md. 1993) (recognizing a tort cause of action for wrongful birth in Maryland); Greco v. United States, 893 P.2d 348 (Nev. 1995) (finding a cause of action ordinarily referred to as wrongful birth can be brought under an ordinary medical malpractice action); *Cote*, 513 A.2d at 348 ("We hold that New Hampshire recognizes a cause of action for wrongful birth."); Becker v. Schwartz, 386 N.E.2d 807, 813 (N.Y. 1978) (holding plaintiff's cause of action for wrongful birth contains ascertainable damages unlike causes of action for wrongful life); Flanagan v. Williams, 623 N.E.2d 185, 189–90 (Ohio Ct. App. 1993) (recognizing a wrongful birth claim as a medical

by limiting the type of recovery available.[48] As explained by a well-known torts treatise:

> Although wrongful birth and wrongful pregnancy claims are accepted in most courts, they are often undermined by unusual damages rules. The normal compensatory damages rules would award damages for emotional harm and economic costs inflicted by the tort. In the case of wrongful birth or pregnancy, that would mean a recovery for emotional harm to the mother and perhaps to the father and also the costs of rearing the child—two harms that would have been avoided if the physician had not been negligent. Courts have been struck, however, by the idea that a child, healthy or not, would give the parents pleasure and that the parents' putative pleasure should somehow be taken into account. The result has been not only the usual variation among judicial approaches but a series of special rules that do not appear to comport with ordinary rules of damages or evidence.[49]

Given the different approaches among jurisdictions, recovery in wrongful birth cases varies in scope and detail: recovery for extraordinary ex-

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malpractice cause of action); Owens v. Foote, 773 S.W.2d 911, 913 (Tenn. 1989) (finding damages for wrongful birth could be sustained if proven through a negligence cause of action); *Theimer*, 519 S.W.2d at 849–50 (allowing plaintiffs to state a cause of action for a physician's alleged negligence in failing to diagnose a disease that would cause her child to born deformed); *Naccash*, 290 S.E.2d at 830 (holding that there was an injury sustained by the plaintiffs when, due to negligence, they were not afforded the opportunity to accept or reject the continuance of a pregnancy that would result in the birth of a fatally defective child); *Harbeson*, 656 P.2d at 493 ("The action for wrongful birth . . . fits within the conceptual framework of our law of negligence.); *Caserta*, 332 S.E.2d at 882 (concluding parents may bring a wrongful birth action to recover extraordinary costs for raising a child with birth defects); *Dumer*, 233 N.W.2d at 377 (holding a doctor could be found negligent for failing to inform a plaintiff-mother of the effects of a disease on a fetus and therefore, denying her the opportunity to choose whether to move forward with her pregnancy).

48. *See* Daniel W. Whitney & Kenneth N. Rosenbaum, *Recovery of Damages for Wrongful Birth*, 32 J. LEGAL MED. 167, 173 (2011) ("Despite majority recognition of the wrongful birth tort, no consensus has emerged on recoverable or the measure of such damages."); *see also Siemieniec*, 512 N.E.2d at 706 ("The complex legal, moral, philosophical, and social issues raised by wrongful birth claims have resulted in a widely divergent judicial treatment of damages."); Elizabeth F. Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: A Time for a New Framework*, 22 J. FAM L. 677, 695, 697–99 (1984) (discussing how jurisdictions award damages in wrongful birth cases); Rodgers, III, *supra* note 39, at 740 (asserting courts have limited recovery to only extraordinary expenses); Lee Ann Nicholson, Note, *Damages: Recovery of Damages in Actions for Wrongful Birth, Wrongful Life and Wrongful Conception*, 23 WASHBURN L.J. 309, 325–27 (1984) (analyzing the public policy reasons courts use to limit damages in wrongful birth cases).

49. DOBBS, *supra* note 37, at 794.

penses related to the child's medical condition is common,[50] while recovery for emotional distress is rare,[51] and recovery for ordinary expenses related to raising the child is even more rare.[52] In Ohio, the jurisdiction where the plaintiff in *Cramblett* actually lives, the state supreme court has held that only pregnancy and childbirth costs are recoverable in a wrongful birth claim.[53] In contrast, in Illinois, the state where Ms. Cramblett filed her claim, courts have allowed the recovery of extraordinary economic costs of caring for a child's medical condition or needs during the child's minority.[54]

Notably, however, Ms. Cramblett's child does not suffer from any medical condition which would require the need for extraordinary expenses, as the child is healthy, both physically and mentally.[55] The only thing Ms. Cramblett is asserting is "wrong" with her child is the child's race.[56] To justify compensation for a wrongful birth claim based on that allegation necessarily implies that the child's race is, itself, a disability, and that, for the mother, giving birth to and raising a child of a mixed race is an injury.[57]

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50. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 158 (Lexis Nexis 4th ed. 2010); DOBBS, *supra* note 37, at 794; *e.g.*, *Siemieniec*, 512 N.E.2d at 706 (limiting parents' recovery to the extraordinary expenses, such as medical, hospital, institutional, educational and otherwise, which are necessary to properly manage and treat the congenital or genetic disorder until the age of majority).

51. DIAMOND ET AL., *supra* note 50, at 158 n.48; *see* DOBBS, *supra* note 37, at 795 (noting how some courts deny recovery of emotional distress altogether, while some limit it by offsetting the recovery by an amount equivalent to the benefits of having a child).

52. *See* Cockrum v. Baumgartner, 447 N.E.2d 385, 390 (Ill. 1983) (holding that although it might be logical to allow recovery for all costs brought upon plaintiffs, doing so would not be sound public policy); DIAMOND ET AL., *supra* note 50, at158 (noting most jurisdictions limit recovery of damages to extraordinary expenses); DOBBS, *supra* note 37, at 794–98 (indicating courts usually limit recovery to extraordinary expenses in wrongful birth causes of action, and stating that "[e]xcept in very few states, the cost of rearing the child cannot be recovered in wrongful pregnancy cases").

53. Schirmer v. Mt. Auburn Obstetrics & Gynecological Assocs., Inc., 844 N.E.2d 1160, 1165 (Ohio 2006).

54. Williams v. Rosner, 7 N.E.3d 57, 64 (Ill. App. Ct. 2014).

55. *See generally* Complaint, *supra* note 13 (containing no allegation of any mental or physical defects).

56. *See id.* at 6 (describing the child's race and the plaintiff's anxieties surrounding the issue of race within her family).

57. *See id.* at 6–8 (stating the defendant's negligence, resulting in a mixed race child being born, caused pain and suffering that is the basis of the damages in the wrongful birth claim).

## IV. WRONGFUL PREGNANCY CLAIMS

Even though the complaint filed in *Cramblett* was based on a wrongful birth claim, it is worth considering whether the case could also have been argued as a wrongful pregnancy claim, the third type of claim based on the notion that, but for a defendant's negligence, a mother would have avoided giving birth to a child. Wrongful pregnancy claims, which are sometimes also referred to as wrongful conception claims, typically involve claims by parents suing defendants for their negligence in performing a procedure to prevent conception.[58] For this reason, these cases typically involve pre-conception negligence, an unplanned pregnancy, and a claim for the lost opportunity to avoid a pregnancy.[59] In some cases, the reason for avoiding the pregnancy is purely financial or personal,[60] while in others, the reason is medical, as when parents want to avoid a pregnancy because there is a high probability that the child will have a hereditary medical condition.[61]

Although it is true that the mother in *Cramblett* was trying to have a child, while in a typical wrongful pregnancy case the plaintiffs would have been trying to avoid having a child, the claim filed in *Cramblett* resembles a wrongful conception or pregnancy claim more than a wrongful birth claim. Just like in a typical wrongful pregnancy case, Ms. Cramblett decided to take the pregnancy to term and keep the child who was then born healthy into a loving (if not necessarily ready) family.[62] In a typical wrongful pregnancy case, the lack of readiness is due to the financial stress on the family.[63] In *Cramblett*, the mother claimed she was not

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58. *Siemieniec*, 512 N.E.2d at 696; *Williams*, 7 N.E.3d at 65 (citing Williams v. Univ. of Chicago Hosp., 688 N.E.2d 130 (Ill. 1997); KEETON, *supra* note 28, § 55 at 372; Lawrence P. Hampton, *The Continuing Debate over the Recoverability of the Costs of Child-Rearing in "Wrongful Conception" Cases: Searching for Appropriate Judicial Guidelines*, 20 FAM L.Q. 45, 47–48 (1986); Joseph S. Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409, 1410 (1977); Gerald B. Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 4 AM. J.L. & MED. 131, 132 (1978).

59. *Siemieniec*, 512 N.E.2d at 696 (identifying the essential claim in these cases as being unplanned and unwanted child birth resulting from the negligent act or acts by the defendant); Miller v. Johnson, 343 S.E.2d 301, 302–03 (Va. 1986) (claiming plaintiff's damages originates from defendant's negligence to successfully perform the abortion).

60. *E.g.*, Sorkin v. Lee, 434 N.Y.S.2d 300 (N.Y. App. Div. 1980) (noting the plaintiffs decided for sterilization for family planning and financial reasons).

61. *See, e.g.*, *Williams*, 7 N.E.3d 57 (recognizing a claim in favor of the parents of a child afflicted with sickle cell disease who had attempted to prevent a future pregnancy to avoid the risk of giving birth to a second child with the same condition).

62. Complaint, *supra* note 13, at 6.

63. *See, e.g.*, Jones v. Malinowski, 473 A.2d 429, 430 (Md. 1984) (alleging plaintiff's unplanned pregnancy placed a financial burden in the rearing of another child).

ready (or capable) emotionally for caring for a child of mixed race.[64] Just as in a typical wrongful pregnancy case, therefore, in *Cramblett*, the baby was not actually "unwanted" once she was born, but she was argued to impose a burden on the parents and it is for the value of that burden that the plaintiff sought compensation. [65]

Ms. Cramblett, however, did not file a claim for wrongful pregnancy, probably because, even if successful, her recovery would have been limited. Illinois recognizes wrongful pregnancy actions, but follows the majority view as to the type of recovery allowed.[66] Generally, recovery has been limited to costs associated with the unsuccessful procedure to prevent the pregnancy, pain and suffering, any medical complications caused by the pregnancy, the cost of delivery, lost wages, loss of consortium, and for extraordinary expenses needed to care for a child born with a disability or condition the parents had hoped to avoid when seeking to prevent the pregnancy.[67]

## V. Is There a Basis for Relief in *Cramblett*?

For all the reasons previously discussed, it is clear that the claim in *Cramblett* is neither a typical wrongful birth claim nor a typical wrongful pregnancy claim. Thus, the categorization of the claim itself will not be enough to determine whether a cause of action should be recognized. For this, it would be better to examine the basis of the injury claimed.

### A. *Relevant Case Law*

Interestingly, there are a couple of decided cases concerning similar claims that might be useful in this regard. In *Harnicher v. Univ. of Utah Medical Center*, [68] a husband and wife attempted to facilitate fertilization by artificial insemination using a combination of sperm from the husband and an anonymous donor.[69] In an attempt to diminish speculation regarding the true biological father, the parents sought a donor who already

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64. *See* Complaint, *supra* note 13, at 6 ("[Cramblett] lives each day with fears, anxieties and uncertainty about her future and [the child's] future.").

65. *See id.*; *Malinowski*, 473 A.2d at 430 (stating the parents love their daughter, but her birth has added costs related to child-rearing); Miller v. Johnson, 343 S.E.2d 301, 303 (Va. 1986) (describing one of the plaintiffs sought damages for financial burdens, such as lost wages, expenses of pregnancy, and the costs of rearing the child to majority).

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

67. *Id.*; *Williams*, 7 N.E.3d at 65.

68. 962 P.2d 67 (Utah 1998).

69. *Id.* at 68.

closely matched the husband in physical characteristics and blood type.[70] After evaluating a few donor options, they chose "donor 183."[71] All the necessary procedures were successful and the wife eventually gave birth to triplets.[72] Shortly after the birth, however, it was determined that two of the children could not possibly have been the children of either the husband or "donor 183." [73] A DNA test performed on one of the children confirmed that the child's father was actually "donor 83."[74] Based on these facts, the Harnichers alleged that the defendant's mistaken use of the wrong donor's sperm caused them "severe anxiety, depression, grief, and other mental and emotional suffering and distress."[75]

Understanding this argument to be a claim for emotional distress arising out of the birth of their children, the court affirmed the dismissal of the claim.[76] Following well established principles of tort law, the court held that, to be actionable, the emotional distress claimed must be severe. [77] Applying that principle to the case, the court decided the successful birth of three normal, healthy children, outweighed any degree of emotional distress caused by the mistake.[78] It also held that the fact the mother was hoping her children would have better physical features was not enough to support a claim.[79] The court, however, did hint that the result may have been different if the allegation had been based on a "racial mismatch":

> [r]ealistically, however, it is impossible to know whether the children of donor # 183 would have been superior in any way to the triplets .... The supposition that the road not taken would have led to a better result ... cannot support an action for negligent infliction of emotional distress. The Harnichers do not allege that the triplets are unhealthy, deformed, or deficient in any way. Nor do they claim any racial or ethnic mismatch between the triplets and their parents. In fact, the couple has presented no evidence at all that the physiological characteristics of three normal healthy children, which could not have been reliably predicted in any event, present circumstances

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 72.
77. *Id.*
78. *Id.*
79. *Id.* (refusing to validate the mother's claim that she was damaged based on the fact she knew the children of donor #183 would have been better looking than her triplets).

> with which 'a reasonable [person,] normally constituted, would be unable to adequately cope.'[80]

Thus, although the Utah Supreme Court was clearly unwilling to consider that the birth of a healthy child should give rise to a claim for emotional distress, it hints at the possibility that a racial mismatch might lead to a different result. On the other hand, the key to the ruling seems to be whether the basis for the claimed emotional distress is one with which a reasonable person would be able to cope. [81] Therefore, the question remains whether giving birth to a mixed race child is something with which a reasonable person in today's society would (or should) be able to cope.

The question left unanswered by the court in *Harnicher* on whether a racial mix-up could support a claim was addressed by the New York Supreme Court in *Andrews v. Kelz*.[82] In this case, the plaintiffs, a married couple, agreed to undergo an in-vitro fertilization procedure intended to fertilize Mrs. Andrews' eggs with Mr. Andrews' sperm so "they could have a child who would be biologically their own."[83] According to the complaint, however, the defendants negligently used someone else's sperm to fertilize the eggs, resulting in the birth of a daughter with, "skin, facial and hair characteristics more typical of African, or African-American descent."[84]

The allegations in *Andrews* are very similar to those stated in the *Cramblett* complaint. For example, the plaintiffs argued that:

> [b]oth parents have been forced to raise a child that is not even the same race, nationality, color & descent of them & other family members; [which] will cause confusion, ill ease, depression and emotion [sic] strain and damage for the entire life of all the parties involved . . . ; that [the plaintiffs] have, are, & will in the future be caused to suffer extreme emotional distress & uncertainty as to [the daughter's] identity . . . .[85]

The court in *Andrews*, however, did not give much importance to the racial mix-up aspect of the claim because New York courts had already decided that the birth of a healthy child does not constitute a harm for

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80. *Id.*

81. *See id.* (specifying as part of the court's reasoning that a reasonable person would not suffer severe emotional distress from having healthy children).

82. *See* 838 N.Y.S.2d 363 (N.Y. Sup. Ct. 2007).

83. *Id.* at 365.

84. *Id.*

85. *Id.* at 366.

which the law recognizes a remedy. [86] Thus, the court stated that recognizing a cause of action on behalf of parents who argue that the birth of a healthy child, even if the parents are distressed due to a racial mix up,

> would be incompatible with contemporary views concerning one of life's most precious gifts—the birth of a normal and healthy child. We are loath to adopt a rule, the primary effect of which is to encourage, indeed reward, the parents' disparagement or outright denial of the value of their child's life.[87]

As in *Harnicher*, the complaint in *Cramblett* asserts that the plaintiff has suffered "personal injuries, medical expense, pain, suffering, emotional distress, and other economic and non-economic losses, and will do so in the future."[88] As in *Andrews*, the complaint argues these injuries were caused by the birth of a healthy child of a different race than what was expected.[89] And, as in both of those cases, the claim in *Cramblett* should be rejected.

### B. *Cramblett*'s Unpersuasive Argument

The *Cramblett* complaint explains the nature of the non-economic damages,[90] including the claimed pain, suffering and emotional distress, as follows:

> On August 21, 2012, [the plaintiff] gave birth to . . . a beautiful, obviously mixed race, baby girl. [The plaintiff] bonded with [the daughter] easily, and she and [the plaintiff's same sex partner] love her very much. Even so, [the plaintiff] lives each day with fears, anxieties and uncertainty about her future and [her daughter's] future. [The plaintiff] admits that she was raised around stereotypical attitudes about people other than those in her all-white environment. Family members, one uncle in particular, speaks openly and derisively about persons of color. She did not know African Americans until her college days at the University of Akron.

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86. *See id.* 366 ("As a matter of public policy we are unable to hold that the birth of an unwanted but otherwise healthy and normal child constitutes an injury to the child's parents and is, therefore, compensable in a medical malpractice action.").

87. *Id.* at 367.

88. Complaint, *supra* note 13, at 7.

89. *See id.* at 6 (arguing that because of her child's mixed race, the petitioner experiences anxiety and stress about her daughter's future in an all-white community).

90. *Id.* at 6–7. The complaint does not offer an explanation of the claimed "personal injuries" but hints that they refer to current expenses for having to provide for the child's "special needs" due to her race (*e.g.* the need to drive to an African-American neighborhood to get a haircut) and future expenses for relocation to a different neighborhood with better schools. *Id.*

> Because of this background and upbringing, [the plaintiff] acknowledges her limited cultural competency relative to African Americans, and steep learning curve, particularly in [the] small, homogeneous [town she lives in] which she regards as too racially intolerant.
>
> As just one example, getting a young daughter's hair cut is not particularly stressful for most mothers, but to [the plaintiff] it is not a routine matter, because [her daughter] has hair typical of an African American girl. To get a decent cut, [the plaintiff] must travel to a black neighborhood, far from where she lives, where she is obviously different in appearance, and not overtly welcome.[91]

There are a number of problems with these allegations. First, the Illinois Supreme Court has expressed its agreement with the view that the birth of a normal healthy child should not be judged to be an injury to the parents because such a notion offends fundamental values attached to human life.[92] Thus, in *Cockrum v. Baumgartner*, a wrongful pregnancy case, the court stated that

> [w]e consider that . . . the holding of a majority of jurisdictions that the costs of rearing a normal and healthy child cannot be recovered as damages to the parents is to be preferred. One can, of course, in mechanical logic reach a different conclusion, but only on the ground that human life and the state of parenthood are compensable losses. In a proper hierarchy of values the benefit of life should not be outweighed by the expense of supporting it. Respect for life and the rights proceeding from it are at the heart of our legal system and, broader still, our civilization.[93]

Although this assertion was made in the context of a wrongful pregnancy claim, it can easily be applied to a wrongful birth claim as the one in *Cramblett*.

Another problem with the allegations in *Cramblett* is that, not long after filing the complaint, Ms. Cramblett made numerous assertions that contradict her own claims.[94] For example, she has asserted that her com-

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91. *Id.* at 6.

92. Cockrum v. Baumgartner, 447 N.E.2d 385, 389 (Ill. 1983).

93. *Id.*

94. *Compare* Complaint, *supra* note 13, at 6–8 (expressing concern and feelings of anxiety about her future and her daughter's future due to her child's race), *with* Terry Shropshire, *White woman sues sperm bank for birthing Black baby; says it's not about race*, NEW PITTSBURGH COURIER (Oct. 3, 2014), http://newpittsburghcourieronline.com/2014/10/03/white-woman-sues-sperm-bank-for-birthing-black-baby-says-its-not-about-race (reporting plaintiff's claims that her child's race is not an issue), *and* Scott Stump, *Woman in sperm bank mix-up: Lawsuit isn't about race,* NBC NEWS (Oct. 2, 2014, 8:30 AM), http://

plaint is "not about race,"[95] an argument that is, at best, naive. Also, although Ms. Cramblett is suing for wrongful birth—the basis of which is the deprivation of her right to terminate the pregnancy and the undesirability of having either an unwanted child or a child with a serious medical condition or disability—she has publicly declared that she is happy she did not terminate the pregnancy.[96] Ms. Cramblett has also stated publicly that she loves her daughter, that her daughter is a "dream come true," and that she does not "find any problems with having a mixed-race child." [97] Finally, she has asserted that "[f]or people to think I don't want this child because of her skin tone is just not the case. It angers me that people would even think I don't want my child."[98]

The problem is that Ms. Cramblett cannot have it both ways. If the child is a "dream come true," Ms. Cramblett cannot convincingly argue that having the child has become "an injury," or assert that the child's race is somehow a disability, or express that she would rather not have had the child. More importantly, if she admits that having a mixed race child is not a problem, then there is no basis to claim compensation for an injury since the claim is based on her allegation that having a mixed race child is, in fact, a problem that has resulted in an injury to her.

Given that the typical claims in support of a wrongful birth case have been contradicted by Ms. Cramblett's own statements, it seems that her complaint is asking for compensation for the emotional distress suffered due to the realization that her child is not what she expected, and that the child's life might be more challenging because of her race.[99] Should these types of arguments give rise to a claim for which the law should recognize a remedy in tort law?

A general claim that a parent should be compensated based solely on the notion that the child did not turn out the way the parent expected has little, if any, support.[100] Tort law is certainly not an adequate mechanism to provide a remedy for parental disappointment.

Even more interesting is the claim that Ms. Cramblett will suffer due to fear, anxiety, and uncertainty about the future of her daughter. There is

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www.nbcnews.com/news/other/woman-sperm-bank-race-mix-lawsuit-isnt-about-race-f2D8 0188932 (communicating plaintiff's assertion that the lawsuit is not about race).

95. Shropshire, *supra* note 94.

96. *See id.* (referring to the fact that she loves her daughter regardless of her race).

97. Stump, *supra* note 94.

98. Shropshire, *supra* note 94.

99. *See* Complaint, *supra* note 13, at 6 (arguing the plaintiff's unfamiliarity with African-American culture contributed to her anxiety of raising a mixed race daughter).

100. *See, e.g.*, Andrews v. Keltz, 838 N.Y.S.2d 363, 367 (N.Y. Sup. Ct. 2007) (holding parents did not suffer a harm recognized by law even though their healthy child was a different race than expected).

no doubt that African-Americans often face more difficulties in life because of the color of their skin.[101] However, the realization that life can be difficult for a child is part of the reality of parenthood, and is not specific to any race.[102] Children may turn out to have any number of physical or emotional characteristics that may make them face difficulties in life. The list can be endless and, again, it is questionable whether tort law is an adequate mechanism to handle the mother's fears, particularly when the alternative, as explained above, is that the child would not have been born at all.

Perhaps understanding the difficulty of defending her argument, the plaintiff in *Cramblett* has also declared publicly that the reason for the complaint is her desire to pay for moving expenses so she can relocate to raise her child in a better suited environment.[103] Raising a child in a good environment is every parent's desire, but in the context of the plaintiff's claim, a monetary reward depends on the notion that having a mixed race child is an injury for which the law should recognize a remedy. And,

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101. *See, e.g.*, Mullainathan, *supra* note 1 (discussing empirical research that shows African-Americans, on average, earn less income than whites, attend worse schools, and get less job and housing opportunities if they have a stereotypical African-American name); Nia-Malika Henderson, *Study: Black girls suspended at higher rates than most boys*, WASH. POST (Mar. 21, 2014), http://www.washingtonpost.com/blogs/she-the-people/wp/2014/03/21/study-black-girls-suspended-at-higher-rates-than-most-boys (describing a recent report by the Department of Education that concluded African-American students were suspended at higher rates than children of different races). *See also* Patricia Cohen, *For Recent Black College Graduates, a Tougher Road to Employment*, N.Y. TIMES (Dec. 24, 2014), http://www.nytimes.com/2014/12/25/business/for-recent-black-college-graduates-a-tougher-road-to-employment.html (noting that African-Americans who recently graduated from college faced more difficulties in obtaining jobs after the Great Recession than their white counterparts); Jim Dwyer, *Unequal Treatment of 2 Protesters in Eric Garner Case, One White and One Black*, N.Y. TIMES (Dec. 9, 2014), http://www.nytimes.com/2014/12/10/nyregion/unequal-treatment-of-2-protesters-in-eric-garner-case-one-white-and-one-black.html (illustrating the difference between a black man's and a white man's interaction with police in the aftermath of Eric Garner's death); Jana Kooren, *ACLU releases data showing racial disparities in low level arrests in Minneapolis*, ACLU-MN (Oct. 28, 2014), http://www.aclu-mn.org/news/2014/10/28/aclu-releases-data-showing-racial-disparities-low-level-arre (reporting on recent data released by the American Civil Liberties Union revealing high racial disparities between the arrests of African-Americans and whites); Kevin Montgomery, *Alienation & Stress: What It's Like to Be Black and Female at Google*, VALLEY WAG (Nov. 5, 2014, 3:50 PM), http://valleywag.gawker.com/alienation-and-stress-what-its-like-to-be-black-and-fe-1655102039 (discussing an African-American woman's experience with discrimination while working in an almost exclusively homogenous environment at Google).

102. *Cf.* Patricia J. Williams, *The Value of Whiteness*, NATION (Nov. 12, 2014), http://www.thenation.com/article/value-whiteness (arguing Ms. Cramblett and her partner "face no more or less than what any black family faces in the United States").

103. *See generally* Shropshire, *supra* note 94 (reporting Cramblett plans on moving from her small town since it is racially intolerant).

since the law does not recognize a remedy for ordinary expenses in wrongful birth cases involving children with birth defects and medical conditions, it would be difficult to justify recognizing such a remedy for a child whose only claimed "defect" is that she is "of the wrong race." Since Ms. Cramblett's alleged harm is purely emotional rather than financial, the law should not favor this type of remedy.

In the end, Jennifer Cramblett has essentially argued that she is not well equipped to be the mother of her child because of her ignorance regarding race relations in this country.[104] The complaint asserts that raising a mixed race daughter has been, and will continue to be, stressful.[105] This is understandable, but the fact of the matter is that life is stressful. Parenting itself is stressful.[106] Watching a child grow, struggle, make mistakes, get picked on, and face other challenges, is indeed stressful. In Ms. Cramblett's case, the reason for her alleged stress is her daughter's race. The only way to argue the sperm bank caused that stress is to contend, again, that her daughter should have been white—which is essentially another way of arguing that she should not have been born.

Furthermore, the claim that Ms. Cramblett should be compensated for emotional distress because she is not well equipped to be a parent[107] has been rejected in a different context. In *Procanik by Procanik v. Cillo*, a famous case in which the plaintiff was the child, the argument was made from the child's perspective.[108] The New Jersey Supreme Court referred to the argument as a claim for an "impaired childhood," the substance of which was that the plaintiff's parents were not prepared to handle the difficulties involved in raising a child with disabilities,[109] and that, as a

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104. *See* Williams, *supra* note 102 (explaining plaintiff's argument that she is uninformed about African-American culture and that this lack of knowledge resulted in her anxiety).

105. *See* Complaint, *supra* note 13, at 6 (alleging plaintiff has fears, anxieties, and uncertainty about her and her daughter's future).

106. *See generally* Andrew Flowers, *Putting A Price Tag On The Stress Of Having A Child*, FIVETHIRTYEIGHT (June 11, 2015, 6:01 AM), http://fivethirtyeight.com/features/putting-a-price-tag-on-the-stress-of-having-a-child (discussing an economist's study on how much stress having a child adds to a parent's life, including the fact that the added stress did not diminish during the first few years of a child's life).

107. *Cf.* Complaint, *supra* note 13, at 6 (arguing plaintiff has had trouble dealing with a steep learning curve on how to care for her daughter and citing as an example the fact that her daughter's hair is so different it requires an inconvenient drive to an all-black neighborhood for a haircut).

108. *See* 478 A.2d 755, 757 (N.J. 1984) (discussing a claim brought by a child who was born with congenital rubella syndrome after his mother had contracted German measles and doctors had misdiagnosed her).

109. *Id.* at 758.

result, the child suffered a compensable injury.[110] However, the court rejected the argument concluding that the notion of an "impaired childhood" as a compensable injury was just as objectionable as a claim based on "wrongful life," and on the idea that the child should not have been born at all.[111]

In addition, as discussed above, a number of jurisdictions that recognize wrongful birth claims attempt to balance the benefit of having a child against the problems the parents have to face due to the fact that their child suffers from health problems.[112] In those jurisdictions, the final award granted to the parents is reduced by an amount equivalent to the emotional benefits of having a child. This approach is based on the view that the birth of a child should rarely, if ever, be judged to be an injury to the parents. Thus, according to this view, having a baby, regardless of how stressful it can be, should be considered to be something positive, not an injury. As mentioned above, this was the view adopted by the court in *Andrews v. Kelz* and, in the context of a wrongful pregnancy claim, in *Cockrum v. Baumgartner*.[113]

This view is particularly relevant in a case like *Cramblett* in which the claimed injury related to the birth of the child is almost exclusively emotional rather than financial. In other words, since the injury claimed in *Cramblett* is emotional, it can be easily argued that it should be counterbalanced by the emotional gain of having a child. After all, Ms. Cramblett has already declared publicly that: (1) both she and her same sex partner love their child, (2) that they did not have much of a chance to get pregnant without the use of artificial insemination, (3) that they wanted to have a child, (4) that they do not have a problem having a mixed race child, and (5) that they think the child is a dream come true.[114] Thus, given all these benefits, the child's birth should not be con-

110. *Id.* at 763–64 (describing that since the parents were not given a choice about terminating the pregnancy, and consequently, had a child with handicaps, the child suffered an impaired childhood due to the unpreparedness of the parents).

111. *See id.*

112. This approach is consistent with a principle adopted by the Restatement of Torts which suggests that a plaintiff's compensation should be offset by the value of the benefit caused by the plaintiff's negligence. *See* RESTATEMENT (SECOND) OF TORTS § 920 (asserting that to reach an equitable result, the value of the plaintiff's compensation should be offset by the value of any special benefit caused by the defendant's negligence).

113. *Cf.* Andrews v. Kelz, 838 N.Y.S.2d 363, 368 (N.Y. Sup. Ct. 2007) (concluding the birth of a normal healthy child should not be judged as an injury to the parents); Cockrum v. Baumgartner, 447 N.E.2d 385, 388–89 (Ill. 1983).

114. Shropshire, *supra* note 94; Stump, *supra* note 94.

sidered to be an injury even if parenting turns out to be more stressful because of the child's race.[115]

Simply stated, validating a claim on behalf of Ms. Cramblett would send a negative message about the value of parenting. In fact, it can easily be argued that the benefits of having a child are greater than the value of the claim altogether. The awakening to a different reality and the exposure to cultural differences are likely to (or hopefully should) help Ms. Cramblett and her partner grow as people and become more understanding and tolerant themselves.[116]

Finally, recognizing the claim on behalf of the mother could also have a negative effect on the daughter.[117] This is one reason the causes of action for wrongful life and wrongful birth have been criticized,[118] and also why many courts deny recovery for the ordinary expenses needed to raise a healthy child.[119] If the cause of action is recognized, the child will, at some point, learn that her parents asserted publicly that the child was "unwanted" or that the parents would have preferred it if the child had never been born.[120] Although it is possible that the child may grow to

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115. *See generally* Botkin, *supra* note 37, at 290 (discussing how some in the disability rights advocacy community argue that children with disabilities do not have adverse effects on parents and families, and the literature supports the conclusion that the possible adverse effects are overstated; on the contrary, the literature suggests that most families cope quite well with the demands of a disabled child and that the child is loved and supported).

116. *See* Williams, *supra* note 102 (suggesting that Ms. Cramblett and her partner should learn to think of their concerns as part of a civil rights issue for affirmative action, and a pushback against racial stigma rather than as a private claim for individual compensation).

117. Janessa Robinson, *The Price of Black Life: A Response to Sperm Bank Lawsuit Over Black Baby*, HUFFINGTON POST, http://www.huffingtonpost.com/janessa-e-robinson/the-price-of-black-life_b_5928822.html (last updated Dec. 3, 2014, 5:59 AM). One can only imagine the anxiety and stress the daughter will experience when she later has the opportunity to see how her mother so viciously characterized the burden of raising a multi-ethnic child. *See id.*

118. *See, e.g.*, Hensel, *supra* note 44, at 173 ("[W]rongful birth and wrongful life actions entail . . . a community pronouncement, via a governmental institution, that an individual's life with impairments is worse than nonexistence . . . ."); *see also* Flowers v. District of Columbia, 478 A.2d 1073, 1076–77 (D.C. 1987) (agreeing with a public policy argument which asserts that permitting litigation on these issues can destabilize a family).

119. Cockrum v. Baumgartner, 447 N.E.2d 385, at 390 (Ill. 1983). In denying recovery for ordinary expenses in a case involving a claim for wrongful conception, the Illinois Supreme Court based its decision, in part, on the fact that "allowing recovery would engender the unseemly spectacle of parents disparaging the 'value' of their children or the degree of their affection for them in open court." *Id.*

120. The child in *Cramblett* is too young to understand what is happening right now, but at some point she will be mature enough to know about the claim. In fact, the mother has declared she will explain the case to her daughter eventually. Mayra Cuevas, *Ohio Woman sues sperm bank after racial mix-up*, CNN, http://www.cnn.com/2014/10/02/us/sperm-bank-race-lawsuit/index.html (last updated Oct. 2, 2014, 3:25 PM). She has also as-

understand, and maybe even appreciate, the reason behind the parents' action, it is certainly not guaranteed. In addition, in cases where the claim relates to children with disabilities, it has been argued that recognizing the cause of action creates a demoralizing and demeaning image of life with a disability as a life that is not worth living.[121] What message would it send to recognize a claim based on the argument that a child has, or *is*, a disability because of his or her race? Exactly what does recognizing the claim indicate regarding the value of life as an African-American or as a member of any other minority group in American society?

The phrase "black lives matter" states something that should be obvious, but the fact that it is a slogan raised in protest suggests that American society still has some work to do to achieve equality in terms of race.[122] At first glance, it appears that recognizing a claim based on the argument that a child's life will be more difficult because of the prevailing inequality furthers the movement that seeks to expose this inequality. Yet, the effect would be just the opposite.[123] Recognizing the cause of action would support the view that life as an African-American is worth so little that it is not worth living at all.[124]

Sadly, and ironically, by filing the complaint, Ms. Cramblett embraced the same bias and prejudice from which she is trying to protect her child.[125] As has been argued elsewhere, Ms. Cramblett seems over-

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serted that her daughter will understand the complaint was not based on a preference for a white child. Stump, *supra* note 94.

121. Jillian T. Stein, Comment, *Backdoor Eugenics: The Troubling Implications of Certain Damages Awards in Wrongful Birth and Wrongful Life Claims,* 40 SETON HALL L. REV. 1117, 1119 (2010) (arguing that wrongful birth claims stigmatize the disabled community); *see* Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation,* 86 WASH. L. REV. 709, 719–20 (2011) (discussing the distorted definition of disability as applied in tort law); *see also* Botkin, *supra* note 37, at 273 ("Wrongful life (and wrongful birth) suits are seen by many authors as reflective of an inaccurate and inappropriate attitude in society toward life with a disability."); Hensel, *supra* note 44, at 173 (claiming statements of mothers disavowing the worthiness of their child causes the disabled community to pit itself against each other); Dorothy E. Roberts, *Race, Gender, and Genetic Technologies: A New Reproductive Dystopia?*, 34 SIGNS 783, 794 (2009) (asserting some disability rights advocates oppose prenatal genetic diagnosis because the procedure devalues people who have disabilities, sending the message that they never should have been born).

122. *See The #BlackLivesMatter Movement*, *supra* note 12 (discussing the caption "Black Lives Matter" should be used "to develop a new narrative around what it means to believe and fight for black life in this moment").

123. *See* Hensel, *supra* note 44, at 176 ("Recovery in wrongful birth and wrongful life suits . . . does not affirm the value of the plaintiff's life—instead, it negates it.").

124. *See id.* at 176 (arguing that by allowing recovery in a wrongful birth suit, the court is not recognizing the value of the child's life, but rather their worthlessness).

125. *See* Williams, *supra* note 102 ("Cramblett seems engulfed by the same race panic that has put the bodies of other children at risk.").

whelmed by her own panic based on the notion of race. She has translated this fear into a claim, the basis of which is that her daughter "dispossesses her mother by being born, taking the space of a more qualified, more desired white candidate, erupting into the world as damaged goods—a neighborhood defiled as well as a family disappointed."[126] Thus described, the question turns back into whether tort law should be used to provide a remedy for the disappointment caused by a biracial child because "[d]ealing with [the daughter's] blackness has become burdensome and inconvenient for the[ ] two white mothers—because the biracial baby completely upended their decades of enjoying the spoils of white privilege."[127]

For all the reasons discussed above, the answer to that question should be no. It is not a good idea to use tort law to create a remedy for this type of injury; if it is an injury at all. Courts should not extend the notion of wrongful birth to apply to a claim where the injury is not based on a physical condition but only on the race of a child.

## VI. The Impact of Modern Reproductive Technologies

Having concluded that tort law is not the proper avenue for seeking redress for wrongful birth based on a child's race, it is worth analyzing whether the approach to the question should change when taking into account the fact that Ms. Cramblett's attempt to have a child involved the use of modern reproductive technologies.

The history of wrongful birth claims is a good illustration of how societal attitudes toward reproductive rights and practices affect the way we think about torts remedies.[128] The initial wave of wrongful birth claims seeking to recover compensation for injuries related to birth defects were universally rejected because courts consistently found that the defendant-physicians' conduct had not been the cause of the children's medical conditions.[129] However, after it was recognized that women have a legally protected right to terminate a pregnancy, most courts altered their approach.[130] Given the change in attitudes toward women's rights, the analysis of wrongful birth claims shifted to asking whether the conduct of the defendant deprived the mother of the right to terminate the preg-

126. *Id.*

127. Derrick Clifton, *White Mom's Lawsuit Over Black Baby Exposes Ugly Truths About White Privilege*, Identities.Mic (Oct. 3, 2014), http://mic.com/articles/100242/white-mom-s-lawsuit-over-black-baby-exposes-ugly-truths-about-white-privilege.

128. *See* Chamallas & Wriggins, *supra* note 38, at 133.

129. *See id.* at 128–32 (noting courts declined to recognize wrongful birth claims because they found that the defendants could not have done anything to prevent or decrease the likelihood that a child would be born with defects).

130. Dobbs, *supra* note 37, at 792.

nancy.[131] Based on this new approach, courts began to recognize the availability of a remedy in tort for the birth of an unwanted child or a child with medical conditions that could have been avoided by preventing the birth in the first place.[132]

The technology available to facilitate reproduction has also changed over the years, and with every new development, new legal questions arise.[133] For example, artificial insemination is commonly used by people seeking to have children, but who, for any number of reasons, would prefer not to, or cannot, achieve a pregnancy naturally.[134] On the other hand, in recent years, "[u]sing donor sperm has become a less necessary option for heterosexual couples who can improve sperm quality through other methods, but continues to be an important option for single women and lesbian couples."[135] In addition, through the use of modern technology, parents can exercise a degree of control over the process of reproduction that was not possible a few decades ago.[136] For example, they can search for and select specific sperm or egg donors to avoid certain genetic mutations or possible health risks.[137] But this also means they can select specific donors to increase the possibility that their child will have other desired characteristics.[138]

In the circumstances that led to the complaint in *Cramblett*, Ms. Cramblett and her partner wanted a specific type of child, of a specific race, with specific hair and eye colors. To achieve the desired result, they had the opportunity to choose from an array of possible donors,

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131. *See id.* at 793 (explaining wrongful birth claims can be viewed as a species of an informed consent claim, protecting essential values of individual choice, autonomy, and self-determination).

132. *See* CHAMALLAS & WRIGGINS, *supra* note 38, at 132–33 (discussing how courts began referring to scientific developments when recognizing wrongful birth claims).

133. *See* Sonia Bychkov Green, *How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law,* 24 WIS. J.L. GENDER & SOC'Y 25, 35–36 (2009) ("The world of [assisted reproductive technologies] has been referred to for many years as the 'Wild West' of medicine because it uses so many new technologies and reinvents medical procedures in unique ways. Because of this, lawsuits have arisen on a variety of issues . . . .").

134. *See generally id.* at 27–30 (discussing the advancements in technology that allow reproduction in situations where it would otherwise not be possible).

135. *Id.* at 33.

136. *See* Sonia Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law*, 24 WIS. J. L. GENDER, & SOC'Y 25, 32–33 (2009) (illustrating new reproductive technology, which gives parents a variety of choices in the genetic make up of their child).

137. *See generally* Green, *supra* note 133, at 41 (describing a couple's choice to examine their embryos in order to avoid having a child with cystic fibrosis).

138. *Id.* at 37 (explaining how a couple chose a donor who resembled one of the plaintiffs in order to have a child that looked like both of them).

each with different characteristics and specific genetic material in order to hand pick the genetic makeup they wanted.[139] There was no guarantee that the child born to the process was going to be exactly what they wanted, but by using their chosen components they were certainly trying to improve the chances of getting the desired result.[140]

Whether society is ready to accept the idea that parents should have the right to select specific traits to increase the chances that a child will look a certain way, or that the reproductive process should be controlled by the parents in a way that allows them to essentially manufacture children to meet certain specifications, are ethical issues that are beyond the scope of this article. However, it is clear that the idea that parents can shop around to essentially manufacture their children according to desired specifications makes many people uncomfortable because it suggests that reproduction can be reduced to a process akin to shopping for a commodity, or that it is the equivalent of "eugenics."[141] Yet, it is precisely the possibility of managing the process of reproduction in this manner that gives parents in cases like *Cramblett* the chance to blame

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139. Complaint, *supra* note 13, at 2–3.

140. *See generally id.* (noting briefly the expectations the plaintiffs had in having a child with similar traits as themselves).

141. Generally speaking, eugenics has been described as "the science of the improvement of the human race by better breeding" and the "notion that the human race can be gradually improved and social ills simultaneously eliminated through a program of selective procreation, is a eugenic premise." Stein, *supra* note 121, at 1135–140. *See also* Roberts, *supra* note 121, at 783 (criticizing "eugenic thinking or values," or the belief that reproductive strategies can improve society by reducing the births of socially marginalized people); Granchi, *supra* note 31, at 1285 ("[I]t can now be argued that science is allowing a more acceptable, 'non-coercive version of eugenic practiced by caring parents as opposed to a racist state.'"). On October 26, 2014, the popular TV show *60 Minutes* broadcast a segment on certain issues related to genetic testing. 60 MINUTES, *Breeding out disease*, CBS NEWS (Oct. 26, 2014, 8:24 PM), http://www.cbsnews.com/videos/breeding-out-disease. Among other topics, the broadcast explored the debate over whether the technology could be used by parents to select genetic traits in their children. *Id.* Many audience comments left on the show's website expressed concern, or even outrage, at the ethical implications, with several commentators objecting to the profit motive behind what could be labeled as eugenics or genetic engineering. *Id.* Likewise, in an episode of *The Nightly Show* that aired soon after, it was announced that Great Britain had legalized a new type of in-vitro fertilization technique to prevent genetic diseases. Host Larry Wilmore addressed the debate over what he called "designer babies," by joking that the issue is "fraught as hell" because "what we are talking about is kinda Hitlery" in that "eugenics kinda way." THE NIGHTLY SHOW, *Designer Babies*, COMEDY CENTRAL (Feb. 5, 2015), http://www.cc.com/video-clips/fvvmpj/the-nightly-show-with-larry-wilmore-designer-babies; *see also* Botkin, *supra* note 37, at 265 (alleging how the new capability to select our children based on detailed biologic characteristics will likely create a very difficult and divisive social debate over whether our society should promote or restrict this power).

someone else for the fact that their children turned out to be different than expected.

The allegations in *Cramblett*, however, lead to an even more complex question because the alleged difference is merely based on the notion of race, which, again, suggests a connection between reproductive technologies and the notion of eugenics.[142] In fact, as it relates to race, eugenics is necessarily based on the argument that humans are biologically divided into distinct races, some of which are more "valuable" than others, and that public policy should be used to ensure the enhancement of those who are valuable and the gradual elimination of those who are not.[143]

Arguing a connection between these concerns and the wrongful birth claim in *Cramblett* is not far-fetched. After all, the claim seeks compensation for the alleged emotional distress suffered due to the birth of a healthy child who did not meet the mother's expectations because of her race, and to support the claim the mother would have to argue she would have terminated the pregnancy. Thus, to the extent that the *Cramblett* claim is based on the relative value of a person's race,[144] the argument can be made that recognizing the claim would support a eugenic view of the concept of tort damages.

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142. For a brief discussion of the concept of eugenics within the debate on whether race is a social, rather than a biological, concept, *see generally* Univ. of Pa. Law School, *Is race a social invention?*, CASE IN POINT (June 9, 2015), http://caseinpoint.org/live/news/5438-is-race-a-social-invention#.VdJva_lJ0rk.

143. *See* Roberts, *supra* not 121, at 796 (arguing that the eugenic approach to social problems locates them in reproduction rather than social structure and therefore seeks to solve them by eliminating disfavored people instead of social inequities). Regrettably, for many years, this notion was an official policy in many states. In fact, it is estimated that Virginia sterilized 7,325 people under the Virginia Eugenical Sterilization Act of 1924, which was a valid law until 1979. Fredrick Kunkle, *Virginia under renewed pressure to give reparations for those sterilized under state law*, WASH. POST (Dec. 8, 2013), http://www.washingtonpost.com/local/virginia-politics/people-sterilized-under-infamous-virginia-law-renew-effort-to-obtain-reparations/2013/12/08/10f0bc30-5c8a-11e3-bc56-c6ca94801fac_story.html. Similarly, North Carolina sterilized about 7,600 people between 1929 and 1974. *Id. See also* Jaydee Hanson, *Virginia Votes Compensation for Victims of its Eugenic Sterilization Program*, BIOPOLITICAL TIMES (Mar. 5, 2015), http://www.biopoliticaltimes.org/article.php?id=8420 (stating Virginia and North Carolina are the only two states to adopt programs to provide restitution to those sterilized by the government).

144. Matthew McKnight, *The Ohio Sperm-Bank Controversy: A New Case for Reparations?*, THE NEW YORKER (Oct. 14, 2014), http://www.newyorker.com/news/news-desk/ohio-sperm-bank-controversy-new-case-reparations (concluding that "[b]y arguing that a child with darker skin and hair that is different from hers is an impediment to her chosen life style, Cramblett tacitly condones the hierarchy in this country that determines the relative worth of one life over another").

In fact, the notion of "eugenic abortions" has been part of the debate over whether to recognize wrongful birth claims from the beginning.[145] For example, in 1983, in one of the early reported wrongful birth cases, *Harbeson v. Parke-Davis, Inc.*,[146] the Washington Supreme Court asked whether recognizing a claim would be "the first step[ ] towards a 'Fascist-Orwellian societal attitude of genetic purity,' or Huxley's brave new world?"[147] Notwithstanding this concern, however, as so many other courts have since then, the court did recognize the claim based on the belief that emerging reproductive technologies could provide positive benefits to families.

In contrast, in refusing to recognize a cause of action for wrongful birth in 1999, the Michigan Court of Appeals was even more direct in its reference to eugenics when it stated:

> [i]f one accepts the premise that the birth of one "defective" child should have been prevented, then it is but a short step to accepting the premise that the birth of classes of "defective" children should be similarly prevented, not just for the benefit of the parents but also for the benefit of society as a whole through the protection of the "public welfare."[148]

Similarly, in 2000, Indiana Supreme Court Justice Brent Dickson wondered whether parents could sue for wrongful birth when they had sought genetic counseling to predict a child's gender and the child turned out to be of the "wrong gender."[149]

The claim in *Cramblett* reignites this debate and raises similar concerns because it could open the door for claims of race as an injury, thus forcing courts to pass value judgment on the relative value of people's lives based solely on their race. Therefore, regardless of whether the claim in *Harbeson* was the first step toward a "brave new world," given the connection to modern reproductive technologies that allow parents to select specific components to create their children, it certainly can be argued that recognizing a claim in *Cramblett* could be what opens the door to it.

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145. *See* Botkin, *supra* note 37, at 273 (arguing that, although it is unlikely that many women would choose to terminate a pregnancy for what might be considered trivial reasons, cultural norms and pressures have a strong influence, something that has contributed to the relatively common termination of female fetuses in India and China).

146. 656 P.2d 483 (Wash. 1983) (en banc).

147. *Id.* at 491.

148. Taylor v. Kurapati, 600 N.W.2d 670, 688 (Mich. Ct. App. 1999).

149. Bader v. Johnson, 732 N.E.2d 1212, 1223 (Ind. 2000).

## VII. CONCLUSION

The claim filed by the white mother for the alleged wrongful birth of a biracial daughter in *Cramblett v. Midwest Sperm Bank* provides a great opportunity to discuss the question of whether race should be used as a measure of value regarding damages in tort law. In short, the answer to that question is, or should be, that recognizing race as a disability for which the law provides a remedy, is wrong as a matter of public policy. Even if there is a strong argument that the defendant sperm bank in *Cramblett* was negligent and that Ms. Cramblett was, in fact, wronged in that she was provided a product that was different than the one the defendant had agreed to provide, there are good reasons to deny her claim for a remedy in tort law.

If it is true that having a child with a disability has an adverse effect on the parents in terms of emotional pain, time, effort, or money, it would be consistent with tort law principles to allow the parents to recover for these effects when they could have been avoided but for the negligence of the defendant. This is precisely the principle behind wrongful birth claims. However, the argument is less persuasive when the claimed adverse effect on the parents is weaker. When the child's "disability" is mild or treatable, or, more importantly, when it is not related to the child's health, the argument is much more difficult to justify. Such is the case when a parent argues that he or she has suffered an injury because of the child's race.

Ms. Cramblett has stated publicly that she wants to make sure that what happened to her does not happen to anyone else.[150] This is an understandable concern, but the proper remedy for it would be either a cause of action for breach of the terms of her contract with the sperm bank, or a call for better regulation of sperm banks[151] and the imposition of sanctions based on the violation of that regulation.

What message would it send to hold that it is better to not have had a child than to have a child of mixed races? Acknowledging this type of claim would require the court to place a value on children's lives based on the color of their skin. Because black lives *do* matter, this should not be the case.

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150. Shropshire, *supra* note 94.

151. *See* Green, *supra* note 133, at 33 (explaining that some states do not require licensing of sperm banks while others mandate stringent screening for various diseases prior to donation).