

## **“WRONGFUL BIRTH” CLAIMS AND THE PARADOX OF PARENTING A CHILD WITH A DISABILITY**

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*“Wrongful birth” is a controversial medical malpractice claim raised by the mother of a child born with a disability against a medical professional whose failure to provide adequate prenatal information denied her the chance to abort. Plaintiff-mothers are required to testify that, but for the defendant’s negligence, they would have terminated their pregnancy. Accordingly, alongside pro-life activists, disability rights advocates have opposed “wrongful birth” claims for stigmatizing and discriminating against people with disabilities by framing their very existence as a harm. Despite plaintiff-mothers’ need for caretaking resources, scholars have recommended solutions ranging from the wholesale elimination of the wrongful birth claim to the curtailment of damages.*

*To the extent scholars and the media have acknowledged mothers in the wrongful birth discourse at all, often it has been to blame and shame them for allegedly rejecting their children. They have paid little attention to the ways wrongful birth jurisprudence forces mothers to disavow their children in court, and thereby to forfeit the “good mother” ideal, in exchange for the possibility of securing necessary resources for their children. Commentators who question plaintiff-mothers’ maternal devotion exacerbate the psychological toll the law already imposes.*

*This Article shifts the blame from mothers to the legal system. While wrongful birth proceedings portray mothers’ feelings about their children as categorically negative, real life accounts and social science findings reveal the true paradoxical experiences of all mothers, including plaintiff-mothers raising children with disabilities. To acknowledge this complex reality and mitigate the emotional strain of bringing a wrongful birth claim, this Article*

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\* Associate Professor, CUNY School of Law. I dedicate this piece to Virgie Foy and Reffie Foy, who inspired me to think about wrongful birth claims from the plaintiffs’ perspective. Thank you to the faculty of the CUNY School of Law, particularly Susan Bryant, Kristin Booth Glen, and Ruthann Robson, for thoughtful comments on drafts. My sincere gratitude to dedicated research assistants Kimberley Kearns, Michelle Lewin, and Alanna Sakovits, who persisted even as our explorations took many directions. Thank you also to Leslie Warfield, Psy.D., who shared her invaluable expertise in psychology. And last, but never least, a profession of overwhelming love for the two babies who made me a mother and for my favorite co-parent.

*proposes several legal reforms: (1) broadening the analysis of emotional distress to reflect and legitimize mothers' paradoxical feelings about their children; (2) reframing the harm to mothers as loss of reproductive choice rather than as the birth of a flawed child and, accordingly, expanding available economic damages to include plaintiff-mothers' unexpected childcare responsibilities; and (3) educating plaintiffs' attorneys to empathize with the emotional aspects of mothers' litigation experiences and to counsel mothers accordingly. Today's approach to "wrongful birth" claims, which both stigmatizes disability and strains caretakers, demands urgent reform.*

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#### INTRODUCTION

Donna Branca gave birth to her son, A.J., on June 11, 1999, about six weeks before her due date.<sup>1</sup> A.J. did not cry when he emerged, and, at two-and-a-half pounds, he was atypically small.<sup>2</sup> He was soon diagnosed with Wolf-Hirschhorn syndrome, caused by a deletion on his fourth chromosome.<sup>3</sup> Like many genetic anomalies, the syndrome manifests in a

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1. Elizabeth Weil, *A Wrongful Birth?*, N.Y. TIMES MAG. (Mar. 12, 2006), <https://www.nytimes.com/2006/03/12/magazine/a-wrongful-birth.html> [https://perma.cc/T56P-FXUT].

2. *Id.*

3. *Id.*

range of ways, most commonly including delayed growth and development, intellectual disability, low muscle tone (hypotonia), seizures, and a characteristic facial appearance.<sup>4</sup> A.J. was hospitalized with oxygen and feeding tubes for seventeen weeks after birth, and he required round-the-clock care after discharge.<sup>5</sup> By age six, he was thought to have the mental capacity of a six-month-old infant.<sup>6</sup> A.J. passed away on January 14, 2011, at the age of eleven.<sup>7</sup>

Despite various red flags during Ms. Branca's pregnancy, including bleeding, little weight gain, and markedly small fetal size, her doctor failed to diagnose A.J.'s genetic condition, instead reassuring Ms. Branca that the baby was fine.<sup>8</sup> In the months after A.J.'s birth, the Brancas traveled an emotionally fraught path—even as they “came to love A.J. deeply,” they also filed “a multimillion-dollar lawsuit claiming that Donna Branca’s obstetrician’s poor care deprived her of the right to abort him.”<sup>9</sup> The Brancas’ case took the form of a “wrongful birth” action.<sup>10</sup>

In most jurisdictions in the United States, parents may bring a wrongful birth claim when their child is born with a medical condition or disability<sup>11</sup> due to a provider’s failure to offer available prenatal testing or to interpret or communicate prenatal test results properly.<sup>12</sup> In such instances, the

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4. *Wolf-Hirschhorn Syndrome*, U.S. DEP’T HEALTH & HUM. SERVICES (Apr. 28, 2017), <https://rarediseases.info.nih.gov/diseases/7896/wolf-hirschhorn-syndrome> [<https://perma.cc/ZEK7-YSZG>].

5. Weil, *supra* note 1.

6. *Id.*

7. *Obituary: Anthony D. Branca Jr.*, DIGNITY MEMORIAL, <http://obits.dignitymemorial.com/dignity-memorial/obituary.aspx?n=Anthony+D.-Branca+Jr.&lc=4537&pid=147814585&mid=4516126> [<https://perma.cc/Y3ET-8QA9>] (last visited Oct. 4, 2018).

8. Weil, *supra* note 1.

9. *Id.*

10. *Id.*

11. The use of the term “disability” throughout this Article is intentionally vague. “[D]isabilities are highly variable bodily and cognitive conditions to which people with those conditions and their families may respond in various ways.” William Ruddick, *Ways to Limit Prenatal Testing*, in *PRENATAL TESTING AND DISABILITY RIGHTS* 95, 96 (Erik Parens & Adrienne Asch eds., 2000). The same diagnosis can manifest quite differently across people; therefore, the challenges it poses depend on its specific features, as well as family circumstances. *Id.* To avoid “prejudicial and oppressive simplifications” that would promote stereotypes about disability, this Article details particular disabilities only in the context of individual stories. *Id.* Readers can then apply the broader lessons of this Article on a case-by-case basis.

12. Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 166 (2017); see also Alberto Bernabe, *Do Black Lives Matter? Race as a Measure of Injury in Tort Law*, 18 SCHOLAR 41, 52 (2016). The “wrongful birth” cause of action has been recognized in more than half of U.S. states. See, e.g., *Kush v. Lloyd*, 616 So. 2d 415, 422–24 (Fla. 1992) (applying Florida law); *Vicar v. Milunsky*, 551 N.E.2d 8, 10–11 (Mass. 1990) (applying Massachusetts law); *Becker v. Schwartz*, 386 N.E.2d 807, 813 (N.Y. 1978) (applying New York law); see also Daniel W. Whitney & Kenneth N. Rosenbaum, *Recovery of Damages for Wrongful Birth*, 32 J. LEGAL MED. 167, 171–72 & nn.6–8 (2011) (surveying state laws).

provider's misconduct denies parents the opportunity to avoid conception or to terminate pregnancy based on a proper prenatal diagnosis.<sup>13</sup>

While “wrongful life” claims, which are not otherwise addressed in this Article, are brought by or on behalf of the child, wrongful birth claims focus exclusively on the harm caused by the health-care provider to the parents.<sup>14</sup> Like other types of medical malpractice, wrongful birth is a negligence claim,<sup>15</sup> which requires proof that the provider owed a duty to the parents, breached that duty, and that the breach was a factual and proximate cause of the parents' injury.<sup>16</sup> What is unique, and controversial, about a wrongful birth claim is that the parents' alleged injury is inextricably linked to the existence of their child. Nonetheless, wrongful birth actions have increased with the recognition of abortion rights and the expansion of prenatal testing.<sup>17</sup>

Courts have typically required parents to prove that, with the proper information, they necessarily would have chosen to abort the pregnancy or to prevent conception.<sup>18</sup> As reflected by the “wrongful birth” nomenclature, this evidentiary requirement forces parents to testify about their injury in terms of the very existence of their child.<sup>19</sup> To make their case, some parents have even sought to introduce their children as trial exhibits.<sup>20</sup> During trial in June 2004, to spare five-year-old A.J. from taking the stand, the Brancas showed a video of A.J. “hooked up to a feeding tube and taking endless meds.”<sup>21</sup>

Scholars have argued that the “wrongful birth” message, openly voiced by the mother of a living child, is stigmatizing to the entire disability community. “Wrongful birth . . . suits may exact a heavy price not only on

13. Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L.L. REV. 141, 142 (2005).

14. Bernabe, *supra* note 12, at 49; Marten A. Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 FAM. L.Q. 15, 18 (1980).

15. Bernabe, *supra* note 12, at 47.

16. Trotzig, *supra* note 14, at 21; *see also* Cailin Harris, Note, *Statutory Prohibitions on Wrongful Birth Claims & Their Dangerous Effects on Parents*, 34 B.C. J.L. & Soc. JUST. 365, 371 (2014).

17. Harris, *supra* note 16, at 368.

18. Fox, *supra* note 12, at 168. Courts compute wrongful birth damages in a way that “requires a woman to prove that she would have ended her pregnancy had she not been deprived of material information about it” and that “misses the distinct injury to her reasonable expectation of control over procreation—whatever its outcome.” *Id.*; *see* Hensel, *supra* note 13, at 166–67 (“In order to show causation in wrongful birth cases, courts require a mother to testify that she would have had an abortion or would have prevented conception if properly informed of her child’s defect. In these cases, it is not lost choice in the abstract that is actionable, but the lost opportunity to abort the impaired child or to prevent conception.”); *see also* Bernabe, *supra* note 12, at 50–51 (“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 proper treatment and information they would have terminated the pregnancy and that, for that reason, the child was ‘wrongfully born.’”).

19. To the extent parents seek damages associated with raising the child, such a framing of the harm seems largely inevitable. However, alternative frameworks are possible and are discussed in Part III.B.

20. Hensel, *supra* note 13, at 172.

21. Weil, *supra* note 1.

the psychological well-being of individuals with disabilities, but also on the public image and acceptance of disability in society.”<sup>22</sup> These scholars further argue that wrongful birth suits perpetuate the idea that a person’s impairment is determinative of her life’s value and that abortion is therefore the preferred and morally correct choice upon a prenatal diagnosis of impairment.<sup>23</sup>

Scholars have further contended that courts stigmatize disability by labeling, framing, and compensating harm differently when parents have a “healthy” child due to a medical provider’s failure to perform a proper sterilization or abortion.<sup>24</sup> The applicable claims are called “wrongful conception” or “wrongful pregnancy,” which emphasizes the mother’s flawed experience rather than the flawed child.<sup>25</sup> Moreover, courts have been more inclined to deem parents harmed and entitled to damages where they planned the birth of a child later found to have a disability (wrongful birth) than for the unwanted birth of a healthy child (wrongful conception or pregnancy).<sup>26</sup>

While justifiably warning of the risks wrongful birth claims pose to the disability community, legal critics of wrongful birth jurisprudence have largely neglected its effects on the emotional well-being of parents. Instead, parents, particularly mothers, who pursue wrongful birth claims in the face of an inadequate health-care system and limited social supports are routinely

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22. Hensel, *supra* note 13, at 144.

23. *Id.* at 144–45, 174–79; *see also* Fox, *supra* note 12, at 168 (“Reckoning [wrongful birth] damages in terms of child-rearing expenses also risks implying that parents do not want the child they now have or that they would have been better off had that child not been born.”); Anthony Jackson, *Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England*, 17 *LOY. L.A. INT’L & COMP. L.J.* 535, 609–10 (1995) (“Actions like ones for wrongful birth that lead to the vilification of handicapped persons should be denied on policy grounds alone.”); Jillian T. Stein, *Backdoor Eugenics: The Troubling Implications of Certain Damages Awards in Wrongful Birth and Wrongful Life Claims*, 40 *SETON HALL L. REV.* 1117, 1119 (2010) (noting that wrongful birth suits “stigmatize[] the disabled community by implying that parents and disabled children are harmed by the deprivation of the free exercise of procreative choice when a birth results in a disabled child”). Similarly, many disability rights advocates agree that prenatal testing and selective abortion, which are promoted by wrongful birth suits, stigmatize disability. Erik Parens & Adrienne Asch, *The Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, in *PRENATAL TESTING AND DISABILITY RIGHTS*, *supra* note 11, at 3, 12–17. It should be noted that, because disabling traits are extremely heterogeneous, there is nuance and disagreement among and within groups of people with disabilities about prenatal testing and selective abortion. *Id.* at 8–9.

24. Hensel, *supra* note 13, at 151.

25. *Id.*; Jackson, *supra* note 23, at 607 (“If the result of a medical procedure is the birth of a healthy baby, it is merely the ‘pregnancy’ that is ‘wrongful.’ If the child is less than perfect according to society’s standard, it is the ‘birth’ itself that is ‘wrongful.’”).

26. Jackson, *supra* note 23, at 589–94, 607 (noting that courts have been less inclined to award child-rearing and emotional distress expenses for wrongful conception and wrongful pregnancy cases, which involve the birth of a “healthy” child, than for wrongful birth cases, which involve the birth of a child with a disability); Kathryn C. Vikingstad, Note, *The Use and Abuse of the Tort Benefit Rule in Wrongful Parentage Cases*, 82 *CHI.-KENT L. REV.* 1063, 1070–72 (2007) (recognizing that the vast majority of jurisdictions limit parents’ recovery to costs associated with the pregnancy and birth of a healthy child on the explicit or implicit theory that a healthy child is never a harm).

vilified, by scholars, the media, jurors, and even courts, for ostensibly disavowing their children in just the way the law requires. While some critiques of proposed reforms address parents' need for resources and the import of deterring medical malpractice,<sup>27</sup> there has been no meaningful exploration of the anti-therapeutic impact of wrongful birth jurisprudence on parents and how that impact might be mitigated without denying parents the resources to care for their children. As one scholar acknowledged, "the desperate parent is placed in an untenable position—either she must deny needed medical care for her child or disavow his very existence in open court in order to secure financial assistance."<sup>28</sup>

This Article uses available social science to trace the detrimental impact of the prevailing wrongful birth jurisprudence on mothers and proposes remedies that might mitigate this impact, while also reducing stigma to the disability community and recognizing parental need for resources. A focus on mothers instead of parents reflects that mothers usually assert the wrongful birth claim,<sup>29</sup> bear the brunt of childrearing and tending to children's medical issues,<sup>30</sup> and are spotlighted when commentators make negative judgments about wrongful birth claims.<sup>31</sup>

Jurisprudential requirements forcing plaintiff-mothers to devalue their children publicly and to tell a monochromatically negative narrative of their parenting experience, paired with the ideal perpetuated by scholars and the media that a "good mother" has no emotional needs of her own and loves without reservation, have the potential to harm plaintiff-mothers and to make it harder for them to fulfill their maternal work.<sup>32</sup> More specifically, plaintiff-mothers may experience heightened guilt and anxiety because their litigation stance contradicts the idealized maternal role.<sup>33</sup> In the end, creating

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27. See, e.g., Harris, *supra* note 16, at 367, 384.

28. Hensel, *supra* note 13, at 172.

29. Whether fathers are entitled to bring wrongful birth claims is unsettled. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 369 (2d ed. 2017) (comparing *Fruiterman v. Granata*, 668 S.E.2d 127 (Va. 2008), which did not deem a pregnant woman's husband a patient to whom the woman's doctor owed a duty for purposes of a wrongful birth claim, with *Laboratory Corp. of America v. Hood*, 911 A.2d 841 (Md. 2006), which concluded that whether the lab that misdiagnosed a cystic fibrosis genetic mutation owed a duty to the father as well as the mother was a fact-dependent inquiry as "in many cases, especially when the woman is married, that decision [to terminate a pregnancy] is one jointly arrived at by the woman and her husband"); see also Whitney & Rosenbaum, *supra* note 12, at 201 (arguing that, while the mother unquestionably sustains a direct injury under wrongful birth jurisprudence, this is not so for the father).

30. "Mothers in contemporary western societies are expected to adhere to the principles of intensive parenting, spending a great deal of time and effort caring for their children, protecting them from harm and illness and promoting their health, development and wellbeing." Deborah Lupton, 'It's a Terrible Thing when Your Children Are Sick': *Motherhood and Home Healthcare Work*, 22 HEALTH SOC. REV. 234, 234 (2013). The unpaid labor undertaken at home to care for ill family members is "overwhelmingly undertaken by women." *Id.*

31. See *infra* Parts II.B.2–3.

32. See *infra* Part II.A.

33. Joan Raphael-Leff, *Healthy Maternal Ambivalence*, 18 PSYCHO-ANALYTIC PSYCHOTHERAPY IN S. AFR. 57, 58 (2010); see *infra* Part II.B.

space in wrongful birth jurisprudence to present and normalize true, paradoxical narratives of the parenting experience may help reduce stigma about disability and free mothers from painful feelings of shame and guilt.

Although courts continue to require plaintiff-mothers to present their harm in terms of their child's existence, an alternative is to frame the injury as less about the child and more about the mother's loss of autonomy and control over procreation.<sup>34</sup> Such a reframing of the mother's harm would eliminate the need for a mother to testify that she would have aborted her child,<sup>35</sup> and, arguably, it would more directly answer criticisms that the wrongful birth claim inherently stigmatizes disability.

This Article proceeds as follows: Part I sets out existing theories about the stigmatizing impact of prenatal testing, selective abortion, and wrongful birth on the disability community. It uses these theories to identify ways the wrongful birth claim also subjects plaintiff-mothers to criticism by scholars, courts, the media, and jurors. Part II uses social science, particularly a critique of the "good mother" ideal and a presentation of the more realistic "maternal ambivalence" framework, to theorize that wrongful birth jurisprudence is psychologically damaging to plaintiff-mothers. Finally, Part III proposes ways to make wrongful birth claims available, while mitigating the psychological harm to plaintiff-mothers and the stigma to individuals with disabilities, including: (1) broadening the emotional distress narrative to reflect and normalize, rather than condemn, mothers' paradoxical feelings about their children; (2) reframing the harm to mothers as a loss of reproductive choice rather than as the birth of a flawed child and, accordingly, expanding available economic damages to include plaintiff-mothers' unexpected childcare responsibilities; and (3) educating plaintiffs' attorneys to empathize with the emotional aspects of mothers' litigation experiences and to collaborate with and counsel mothers accordingly.

#### I. STIGMATIZING WRONGFUL BIRTH REQUIREMENTS EXPOSES PLAINTIFF-MOTHERS TO EXTERNAL CRITICISM

Legal literature critiques wrongful birth jurisprudence for harming the children at the center of these lawsuits, as well as the entire disability community. However, scholars have failed to explore the harm the same problematic jurisprudential characteristics may cause plaintiff-mothers. To the contrary, some scholars have portrayed these mothers—accomplices in stigmatizing and seeking to eliminate disability—rather than as themselves victims of flawed jurisprudence. In so doing, instead of

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34. See, e.g., Fox, *supra* note 12, at 168 (noting that wrongful birth involves "the distinct injury to [a woman's] reasonable expectation of control"); Hensel, *supra* note 13, at 142–43 ("The injury identified in these cases is the parents' lost choice over whether or not to carry an impaired child to term.").

35. Harris, *supra* note 16, at 373 ("It is not necessary for parents to prove decisively that they would have aborted an unhealthy fetus because the crux of their claim is that the defendant's negligence deprived them of the opportunity to make that choice.").

searching for ways to aid the family unit, they have positioned mothers as their children's oppressors.

*A. Disability Rights Critique of Prenatal Testing and Selective Abortion as a Framework*

The disability rights critique of prenatal diagnosis and selective abortion provides a framework for discussing the harmful impact of wrongful birth claims on mothers. After all, selective abortion on the basis of prenatal diagnosis and wrongful birth claims are inextricably linked. As shaped by courts, wrongful birth claims endorse selective abortion by calling on mothers to contend that they would have aborted their child had medical professionals provided the requisite prenatal information about their child's disability.<sup>36</sup>

Disability rights advocates make two relevant arguments that prenatal testing and selective abortion are morally problematic: (1) the "expressivist" argument and (2) the "parental attitude" argument.<sup>37</sup>

1. Prenatal Testing and Selective Abortion Express a Hurtful Message

The first argument is that prenatal tests to select against disabling traits "express a hurtful attitude about and send a hurtful message to people who live with those same traits."<sup>38</sup> Central to this message is the notion that "people are reducible to a single, perceived-to-be-undesirable trait," the presence of which warrants the abortion of an otherwise desirable fetus.<sup>39</sup>

Advocates living with disabilities of their own have voiced concern that prenatal testing and selective abortion perpetuate stereotyping and discrimination.<sup>40</sup> Adrienne Asch, a bioethicist who was blind, wrote that prenatal diagnosis discriminates against people with disabilities by reducing the whole person to a single trait, as though nothing else matters: "As with discrimination more generally, with prenatal diagnosis, a single trait stands in for the whole, the trait obliterates the whole. With both discrimination and prenatal diagnosis, nobody finds out about the rest. The tests send the message that there's no need to find out about the rest."<sup>41</sup> According to disability rights advocate Marsha Saxton, who lives with spina bifida,<sup>42</sup>

36. See *supra* Introduction; see also Hensel, *supra* note 13, at 166–67.

37. Parens & Asch, *supra* note 23, at 13–20.

38. *Id.* at 13.

39. *Id.* at 14.

40. *Id.*

41. *Id.* at 13.

42. "Spina bifida is a birth defect that occurs when the spine and spinal cord don't form properly." *Spina Bifida*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/spina-bifida/symptoms-causes/syc-20377860> [https://perma.cc/GQ5A-4FF6] (last visited Oct. 4, 2018). It can range from mild to severe. *Id.* Spina bifida is a relatively common subject of wrongful birth cases. Whitney & Rosenbaum, *supra* note 12, at 171 ("Wrongful birth cases in jurisdictions recognizing the cause of action have been limited to instances where children are born with severe birth defects (for example, Down syndrome, Tay-Sachs disease, spina bifida, cystic fibrosis).").

selective abortion poses a fundamental threat to civil rights by signaling that people with certain traits are not worthy of existence:

The message at the heart of widespread selective abortion on the basis of prenatal diagnosis is the greatest insult: some of us are “too flawed” in our very DNA to exist; we are unworthy of being born. . . . [F]ighting for this issue, our right and worthiness to be born, is the fundamental challenge to disability oppression; it underpins our most basic claim to justice and equality . . . .<sup>43</sup>

For Saxton, selective abortion is central to the oppression of people with disabilities. Accordingly, there is evidence that many people with disabilities receive a message of discrimination from selective abortion and “are pained by it.”<sup>44</sup>

## 2. Prenatal Testing and Selective Abortion Reflect a Flawed Parental Attitude

The second argument of disability rights advocates is that individuals who engage in prenatal testing and selective abortion have “a problematic conception of and attitude toward parenthood.”<sup>45</sup> One part of the “parental attitude” argument is that parents who engage in prenatal testing fail to understand that their children’s particular traits are relatively unimportant in the context of what they should be seeking from the parenting experience.<sup>46</sup> Another part of the argument is that parents who want to avoid raising a child with a diagnosable disability likely act on misinformation and stereotypes, disregarding the many accompanying traits that “are likely to be as enjoyable, pride-giving, positive (and as problematic, annoying, and complicated) as any other child’s traits.”<sup>47</sup>

In this narrative, parents who engage in prenatal testing and selective abortion stand in stark contrast to “good parent[s],” who “appreciate, enjoy, and develop as best one can the characteristics of the child one has, not turning the child into someone she is not or lamenting what she is not.”<sup>48</sup> The issue, then, is the parent’s morally troubling conception of parenthood and effective role as messenger of discriminatory attitudes about disability, rather than the child’s “disabling” trait.<sup>49</sup>

### *B. Mothers Suing for Wrongful Birth Have Been Condemned Widely*

Legal scholars have implicitly adopted disability rights advocates’ expressivist and parental attitude arguments in critiquing wrongful birth

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43. Parens & Asch, *supra* note 23, at 14 (first and second alterations in original) (quoting Marsha Saxton, *Disability Rights and Selective Abortion*, in *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000*, 374, 391 (Rickie Solinger ed., 1998)).

44. *Id.* at 15.

45. *Id.* at 17.

46. *Id.* at 17–18.

47. *Id.* at 17.

48. *Id.* at 18.

49. *Id.* at 17.

claims and the parents who bring them. Specifically, they have (1) contended that wrongful birth claims express a hurtful message to people with disabilities; and (2) condemned mothers who bring wrongful birth claims as disavowing their children, stigmatizing disability, and seeking to eliminate disability. Early courts, the media, and even jurors similarly have condemned plaintiff-mothers for allegedly rejecting their children.

### 1. Wrongful Birth Claims Express a Hurtful Message

Just as disability rights advocates argue about prenatal testing and selective abortion, legal scholar Wendy Hensel contends that wrongful birth actions harm the disability community by reinforcing or expressing “the centrality of impairment in defining personhood.”<sup>50</sup> Hensel reasons that, for wrongful birth claims to succeed, courts require plaintiff-mothers to prove the element of causation (i.e., that a medical professional caused their injury) by testifying that they would have had an abortion if properly informed of their child’s “defect.”<sup>51</sup> Thus, “the embodiment of the mother’s injury is the child with defects who exists in the wake of the physician’s negligence.”<sup>52</sup> Wrongful birth actions accordingly serve as “a community pronouncement, via a government institution, that an individual’s life with impairments is worse than nonexistence, or that a reasonable person would have aborted a now-living child.”<sup>53</sup>

Invoking therapeutic jurisprudence, which is the study of law’s impact on the mental and physical health of society’s members,<sup>54</sup> Hensel contends that wrongful birth claims have “anti-therapeutic consequences.”<sup>55</sup> Even when the child at issue in a wrongful birth suit is unable to comprehend the nature of the claim due to youth or impairment, as open-court testimony is recorded by court reporters and analyzed by media and scholars, it sends “a potentially powerful message to all people with disabilities” that they do not have an equal or rightful place in society.<sup>56</sup>

Saxton agrees that wrongful birth claims send a negative and misleading message about life with disability:

“I know that it’s not true that spina bifida causes people to have miserable lives . . . . *Wrongful birth suits* give children and adults with disabilities the message that our very existence was a tragic mistake . . . and [is] such a burden to the family that the only compensation would be millions of

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50. Hensel, *supra* note 13, at 144.

51. *Id.* at 166.

52. *Id.* at 167.

53. *Id.* at 173. Nonetheless, Hensel acknowledges that there may be extreme conditions for which wrongful birth is appropriate. *Id.* at 169 n.158.

54. *Id.* at 163.

55. *Id.* at 167.

56. *Id.* at 174–75.

dollars. And this is such a distortion, of what these children's lives are like."<sup>57</sup>

Other scholars have gone further, critiquing wrongful birth claims not only for sending a stigmatizing message to the disability community, but also for serving as a state vehicle to promote eugenics and its associated *elimination* of individuals with disabilities. Eugenics, or the "science of the improvement of the human race by better breeding,"<sup>58</sup> promotes the reproduction of the "fit" over the "unfit" and opposes the birth of the "unfit."<sup>59</sup> The argument is that the state discriminates and engages in eugenics when its judiciary or legislature deems parents "damaged" by the birth of a child with a disability<sup>60</sup> and when it imposes liability on physicians for these so-called "wrongful births."<sup>61</sup>

State-endorsed wrongful birth claims arguably encourage physicians to avoid liability by recommending abortions or abstention from conception.<sup>62</sup> Accordingly, it has been said that wrongful birth jurisprudence "travels the same path that American courts paved in the early twentieth century when they recognized and condoned sterilization laws targeting the enfeebled."<sup>63</sup>

"Wrongful birth" nomenclature itself implicitly denigrates life with a disability. Some courts have recognized that "[t]he very phrase 'wrongful birth' suggests that the birth of the disabled child was wrong and should have been prevented."<sup>64</sup> This "emotive label[]" has contributed to a revulsion toward such claims, even "colouring judicial reaction by [the] implicit denigration of life."<sup>65</sup>

## 2. Scholars Have Condemned Mothers Who Bring Wrongful Birth Claims

Plaintiff-mothers are neither the architects of wrongful birth standards nor the coiners of the claim's troubling name. Nonetheless, like disability rights advocates, legal scholars have portrayed mothers who bring wrongful birth claims as the blameworthy messengers of discriminatory attitudes about

57. Rebecca Leung, *Is 'Wrongful Birth' Malpractice?*, CBS NEWS (Jun. 19, 2003) (emphasis added), <https://www.cbsnews.com/news/is-wrongful-birth-malpractice/> [<https://perma.cc/J4YF-B4ZX>].

58. RUTH CLIFFORD ENGS, *THE EUGENICS MOVEMENT: AN ENCYCLOPEDIA* xiii (2005).

59. James E. Bowman, *The Road to Eugenics*, 3 U. CHI. L. SCH. ROUNDTABLE 491, 491 (1996).

60. Notably, while awarding certain damages in wrongful birth cases for rearing an "unhealthy" child, most courts in the United States have refused to award damages for rearing an *unwanted* "normal, healthy child." Stein, *supra* note 23, at 1140. The latter issue arises in wrongful conception and wrongful pregnancy cases, which address a parent's lost opportunity to avoid having *any* child. *Id.* at 1118.

61. *Id.* at 1138.

62. *Id.*

63. *Id.* at 1144; *see also* Trotzig, *supra* note 14, at 38 (implicitly associating wrongful birth claims with eugenics and noting that "[o]ne problem associated with eugenics . . . is that by eliminating people with certain diseases, some very creative and productive people, who could manage quite well despite their handicap, would also be eliminated").

64. *See, e.g.*, Taylor v. Kurapati, 600 N.W.2d 670, 688 (Mich. Ct. App. 1999).

65. Harvey Teff, *The Action for "Wrongful Life" in England and the United States*, 34 INT'L & COMP. L.Q. 423, 427 (1985).

disability. Hensel observes that “this insidious message of disparagement is not whispered innuendo,” but “[i]s a message openly voiced by the mother of a living child.”<sup>66</sup> It is a message heard by those involved in the court proceedings and beyond, as media and scholars revisit court transcripts.<sup>67</sup> Moreover, the message influences others powerfully, for “[w]hen a mother disavows the worthiness of her child’s life in open court, those who lack first-hand knowledge of the child will naturally trust the mother’s judgment.”<sup>68</sup>

In addition to presenting plaintiff-parents as messengers of their children’s inadequacies, scholars have portrayed them as invidious discriminators attempting to cleanse the world of people with disabilities. Despite recognizing the expense parents face in raising children with disabilities and the inadequacies of the health-care system,<sup>69</sup> one scholar ascribes negative motive to parents seeking recourse through a wrongful birth suit: “The law, therefore, should take care to ensure that it does not affirm parents’ efforts, and possibly physicians’ efforts as well, to achieve the ‘betterment’ of mankind at the expense of a minority group through wrongful discrimination.”<sup>70</sup>

The notion that all plaintiff-mothers have the same motive and send the same disparaging “message” can be challenged. Addressing the related pursuit of prenatal testing, some philosophers have contended that “it is impossible to conclude just what ‘message’ is being sent by any one decision to obtain prenatal testing” because the attitudes and circumstances of prospective parents differ widely.<sup>71</sup> For instance, while some parents have negative attitudes about life with a disability, others may believe life could be rich for the child but compromised for them as caretakers, or that they could not afford the necessary care.<sup>72</sup> The range of possible attitudes goes on. Thus, scholars sympathetic to prenatal testing have even argued that, as prospective parents act to further their own familial goals rather than to hurt living people with disabilities, “there is no ‘message’ being sent at all.”<sup>73</sup>

Even assuming that plaintiff-mothers cannot be faulted for negative messaging, they have been condemned for allegedly failing their own children. Without saying so directly, Hensel contrasts plaintiff-mothers with “good mothers” who are denied assistance through a wrongful birth action because they “embrace” and “accept” their child: “No matter how compelling the need, or how gross the negligence involved, no assistance will be extended to the family who would have chosen to embrace or simply accept the impaired child prior to his birth.”<sup>74</sup> Another scholar explicitly

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66. Hensel, *supra* note 13, at 172.

67. *Id.* at 174.

68. *Id.* at 173.

69. Stein, *supra* note 23, at 1125–28.

70. *Id.* at 1144 (emphasis added); *see also id.* at 1142 (“It well may be that when parents *act* on the hope that their children will not be disabled, it is a form of possibly invidious discrimination against the disabled community.”).

71. Parens & Asch, *supra* note 23, at 14–15.

72. *Id.* at 15.

73. *Id.*

74. Hensel, *supra* note 13, at 172.

distinguishes plaintiff-mothers, who “openly discount the worth of their children with disabilities,” from “parents who accept and care for such children.”<sup>75</sup> In essence, parents seeking to recover for wrongful birth are condemned for allegedly failing to love their children “unconditionally.”<sup>76</sup>

Scholars have even sought to penalize plaintiff-mothers’ alleged lack of devotion to their children by arguing that they should be denied damages for making the very assertion the law requires: that, but for the medical provider’s negligence, they would have aborted their child.<sup>77</sup> These critics imply that bringing a wrongful birth claim reflects the sum total of how plaintiff-mothers feel about their children. Their implication is fundamentally flawed given that: (1) these critics do not rely on empirical evidence of plaintiff-mothers’ experiences; (2) when mothers sue in this context, they are constrained by stigmatizing legal standards and labels; and (3) most mothers likely sue out of necessity in the face of inadequate health-care coverage and social supports, and perhaps to hold accountable providers who failed to meet the medical community’s standard of care.<sup>78</sup>

### 3. Early Courts, the Media, and Jurors Have Also Condemned Plaintiff-Mothers

Current scholarly condemnation of mothers pursuing wrongful birth claims is reminiscent of the judicial mindset of the 1960s and 1970s, before such claims became widely accepted by courts.<sup>79</sup> Notwithstanding that plaintiff-mothers are legally required to prove that they would have aborted their child in the absence of medical negligence, the first significant wrongful birth decision disparaged the plaintiff-mother for so alleging.<sup>80</sup> Contemporary media outlets reporting on wrongful birth cases and juries deciding these cases continue to view plaintiff-mothers in a negative light for satisfying the central wrongful birth requirement.<sup>81</sup>

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75. Darpana M. Sheth, *Better Off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans with Disabilities Act*, 73 TENN. L. REV. 641, 666 (2006).

76. Stein, *supra* note 23, at 1145 (arguing that, in contrast to wrongful birth jurisprudence, the “irrebutable presumption of the law . . . should be that a parent loves his or her child unconditionally, regardless of the state of that child’s health”).

77. Sheth, *supra* note 75, at 666 (arguing that plaintiff-mothers “should not be rewarded monetarily through tort claims that are unavailable to parents who accept and care for . . . children [with disabilities]”); Stein, *supra* note 23, at 1145 (“Similarly, the legal system should not award damages to parents in a wrongful birth action on the premise that they have been injured by the birth of a disabled child. Doing so would affirm and condone the parents’ professed choice to have aborted the disabled fetus if they had been properly presented with the opportunity.”).

78. *See infra* Part I.C.

79. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 128 (2010); DOBBS ET AL., *supra* note 29, § 369.

80. *See infra* Part I.B.3.a.

81. *See infra* Part I.B.3.b.

a. *The First Major Wrongful Birth Decision Disparaged the Plaintiff-Mother*

Courts universally rejected the initial wave of wrongful birth claims in the 1960s and 1970s.<sup>82</sup> In 1985, one scholar wrote, “[T]he characterisation of ‘birth’ . . . as ‘wrongful’ has often prompted judicial hostility, if not sheer incredulity.”<sup>83</sup> Judicial revulsion toward “wrongful birth” claims harkens back to past generations that almost universally regarded as immoral “the very notion that birth, even of a seriously deformed child,<sup>84</sup> could provide a basis for claiming damages.”<sup>85</sup>

In a 1967 case, *Gleitman v. Cosgrove*<sup>86</sup>—considered the first significant wrongful birth case<sup>87</sup>—the court directed its hostility toward the plaintiff-parents. Denying the parents’ wrongful birth claim, the Supreme Court of New Jersey denounced the parents personally for allegedly treating their child like “prize cattle” by bringing the claim:

The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. *It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life to support a remedy in tort.*<sup>88</sup>

The plaintiff-mother alleged that her doctors were profoundly negligent in advising her that her bout of rubella during pregnancy—at the time, a known cause of birth defects—would cause no harm to the fetus.<sup>89</sup> Assuming the truth of this claim,<sup>90</sup> the court nonetheless directed its disdain at the parents and portrayed the plaintiff-mother as too lazy and the plaintiff-father as too miserly to appreciate the preciousness of their child’s life.<sup>91</sup>

Admittedly, the *Gleitman* decision predated *Roe v. Wade*,<sup>92</sup> which established a woman’s constitutional right to an early-pregnancy abortion.<sup>93</sup> After *Roe v. Wade*, the vast majority of courts faced with wrongful birth claims grant some form of recovery.<sup>94</sup>

82. See CHAMALLAS & WRIGGINS, *supra* note 79, at 128.

83. Teff, *supra* note 65, at 428.

84. Terms such as “deformed child” reflect outdated, disparaging language that is not endorsed by this Article.

85. Teff, *supra* note 65, at 427.

86. 227 A.2d 689 (N.J. 1967).

87. Weil, *supra* note 1.

88. *Gleitman*, 227 A.2d at 693 (emphasis added).

89. *Id.* at 689–90; Weil, *supra* note 1.

90. *Gleitman*, 227 A.2d at 691.

91. The court’s focus on the mother’s laziness and the father’s concern with finances also makes gendered assumptions about their roles. See *id.* at 693.

92. 410 U.S. 113 (1973).

93. *Id.* at 164–67.

94. DOBBS ET AL., *supra* note 29, § 369.

*b. Various Present-Day Media Outlets Have Disparaged Plaintiff-Mothers*

Media outlets continue to portray plaintiff-mothers negatively by claiming that these mothers wish that their children had never been born. Although conservative outlets have led the charge, mainstream media have vilified plaintiff-mothers as well.

For example, on February 16, 2016, pro-life website LifeNews.com reported that Kerrie Evans claimed wrongful birth because her doctor had not provided prenatal testing for cystic fibrosis—a progressive genetic disease that causes persistent lung infections and limits the ability to breathe over time<sup>95</sup>—and her child was born with the condition. Featuring a photograph of Evans, the article opened with an incredulous, condemnatory headline: “Mother Loses \$15 Million in Wrongful Birth Lawsuit, *She Wishes Her Daughter Was Never Born?*”<sup>96</sup>

Moreover, as the headline forecasted, Evans’s devotion to her child was a subject of great scrutiny in the article. The defendant-doctor’s attorney used Evans’s legal claim to challenge her love for her child, telling LifeNews.com, “[Evans] can’t say, ‘I’m so glad [the girl] was born,’ and in the same breath say, ‘I need money because I would have terminated.’”<sup>97</sup> Evans’s lawyer came to her defense, describing her endurance of public scrutiny for the love of her child: “She has born [sic] the brunt, walking through the fire of public opinion . . . . They love their child more than anything. Who would do what she’d done but for the love of her child?”<sup>98</sup> Notably, the Associated Press similarly quoted both the defense attorney and Evans’s attorney.<sup>99</sup> A LifeNews.com blogger responded dismissively to Evans’s claims of love and portrayed the plaintiff-parents as would-be killers: “The parents often use the excuse that they love their child; they are simply suing to acquire funds to care for their sick or disabled offspring. But to get those funds they have

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95. *About Cystic Fibrosis*, CYSTIC FIBROSIS FOUND., <https://www.cff.org/What-is-CF/About-Cystic-Fibrosis/> [<https://perma.cc/GPF8-DXPW>] (last visited Oct. 4, 2018) (“In people with [cystic fibrosis], a defective gene causes a thick, sticky buildup of mucus in the lungs, pancreas, and other organs. In the lungs, the mucus clogs the airways and traps bacteria leading to infections, extensive lung damage, and eventually, respiratory failure. In the pancreas, the mucus prevents the release of digestive enzymes that allow the body to break down food and absorb vital nutrients.”).

96. Micaiah Bilger, *Mother Loses \$15 Million in Wrongful Birth Lawsuit, She Wishes Her Daughter Was Never Born?*, LIFE NEWS.COM (Feb. 16, 2016, 11:10 AM) (emphasis added), <http://www.lifenews.com/2016/02/16/mother-loses-15-million-in-wrongful-birth-lawsuit-she-wishes-her-daughter-was-never-born/> [<https://perma.cc/P4M8-ZWWR>].

97. *Id.* (alterations in original).

98. *Id.*

99. Associated Press, *A Jury Has Ruled Against a Montana Woman Who Sought Millions of Dollars from Health Care Providers She Said Failed to Diagnose Her Daughter’s Cystic Fibrosis*, WPON (Feb. 11, 2016, 11:55 PM), <http://accesswdun.com/article/2016/2/369530> [<https://perma.cc/A64U-C55X>]; Associated Press, *Jury Rules Against Montana Woman’s Wrongful-Birth Suit*, SAN DIEGO UNION-TRIB. (Feb. 11, 2016), <http://www.sandiegouniontribune.com/sdut-jury-rules-against-montana-womans-wrongful-birth-2016feb11-story.html> [<https://perma.cc/UD2Z-KZTT>].

to insist that, had they known, they would have killed that very same child.”<sup>100</sup>

In March 2012, Ariel and Deborah Levy won a suit for the “wrongful birth” of their daughter, born with Down syndrome after a doctor performed and analyzed a chromosomal test incorrectly. The *New York Daily News* emphasized that the Levys argued that they “would have terminated [the pregnancy] if they had not been assured their baby did not have the genetic condition.”<sup>101</sup> Questions about the Levys’ dedication to their child also prompted their lawyer to defend them.<sup>102</sup> The Levys’ lawyer told the *Daily News*, “It’s been difficult for them . . . . There’s been a lot of misinformation out there. . . . These are parents who love this little girl very, very much . . . . Their mission since the beginning was to provide for her and that’s what this is all about.”<sup>103</sup>

Scrutiny of the Levys did not end there. In an article entitled, “Why Do Some See My Daughter’s Life as Wrongful?,” a *Huffington Post* contributor indirectly criticized the Levys for bringing a wrongful birth suit: “As the mother of a child with Down syndrome, I could write an essay in which I criticize Ariel and Deborah Levy or question their devotion as parents or express sadness or outrage over their decision. But I can’t see what good that essay would do.”<sup>104</sup> The writer concluded that sharing her daughter’s “good life” with Down syndrome was the best response to a recent series of wrongful birth suits.<sup>105</sup>

On September 19, 2011, media outlet TheBlaze, founded by conservative talk-radio host Glenn Beck, covered a story about a couple that won a wrongful birth suit after their son was born without three limbs.<sup>106</sup> Again, the story featured a photograph of the plaintiff-mother and the headline emphasized the legally requisite claim that the parents would have aborted their child had they been given the appropriate information by their doctor: “Couple Wins \$4.5 Million in ‘Wrongful Birth’ Lawsuit After Claiming They Would Have Aborted Disabled Son.”<sup>107</sup>

Moreover, the article quoted the *Palm Beach Post*’s editorial board, which opposed the lawsuit and made serious assumptions about the plaintiff-

100. Bilger, *supra* note 96.

101. Meena H. Duerson, *Parents Awarded \$2.9M in ‘Wrongful Birth’ Lawsuit over Daughter Born with Down Syndrome*, N.Y. DAILY NEWS (Mar. 11, 2012, 4:10 PM), <http://www.nydailynews.com/life-style/health/parents-awarded-2-9m-wrongful-birth-lawsuit-daughter-born-syndrome-article-1.1037159> [<https://perma.cc/7FC9-A9FE>].

102. *Id.*

103. *Id.*

104. Amy Julia Becker, *Why Do Some See My Daughter’s Life as Wrongful?*, HUFFINGTON POST (May 16, 2012, 2:45 PM), [http://www.huffingtonpost.com/amy-julia-becker/down-syndrome-wrongful-life\\_b\\_1353045.html](http://www.huffingtonpost.com/amy-julia-becker/down-syndrome-wrongful-life_b_1353045.html) [<https://perma.cc/KL5D-DBNA>].

105. *Id.*

106. Billy Hallowell, *Couple Wins \$4.5 Million in ‘Wrongful Birth’ Lawsuit After Claiming They Would Have Aborted Disabled Son*, THEBLAZE (Sept. 19, 2011, 2:42 PM), <http://www.theblaze.com/news/2011/09/19/couple-wins-4-5-million-in-wrongful-birth-lawsuit-after-claiming-they-would-have-aborted-disabled-son/> [<https://perma.cc/9XN2-KAA6>].

107. *Id.* (emphasis added).

mother's view of her son based on the wrongful birth suit.<sup>108</sup> The editorial board denounced the plaintiff-mother for allegedly deciding that her son would be better off dead, reasoning that, while "Bryan's parents are understandably upset that they had no warning about the issues that awaited [Bryan]," they had "no reason to assume that Bryan cannot lead a fulfilling and productive life . . . . Whether [Bryan's] obstacles mean his life is not worth living should be up to him to decide, not to [his mother] and a jury of her peers."<sup>109</sup>

Like scholars, media outlets have strongly implied that plaintiff-mothers reject their children with disabilities. These accusations are not supported by empirical evidence of plaintiff-mothers' experiences, and they fail to recognize that plaintiff-mothers are constrained by stigmatizing legal standards and likely sue out of financial necessity.<sup>110</sup>

According to an uncharacteristically empathic article, requiring parents to testify that they would have had an abortion had they received accurate test results creates "a cruel quandary for parents and children alike—even crueler if their child's disabilities are such that the child can understand what her parents have said about her when she's older."<sup>111</sup> The writer noted that, despite the cruelty these parents must endure, they are "routinely vilified."<sup>112</sup>

*c. Juries Empaneled for Wrongful Birth Suits Judge  
Plaintiff-Mothers as Well*

For testifying that they would have aborted their child, plaintiff-mothers are vilified even by the juries on which they rely to obtain relief. California medical malpractice defense attorney Cindy Shapiro described wrongful birth cases as "incredibly difficult to win for precisely this reason."<sup>113</sup> Shapiro's law firm, which represents health care providers, has never lost a wrongful birth suit arising from a provider giving falsely reassuring prenatal test results. In posttrial discussion with juries, Shapiro noted that jurors routinely disapprove of the parents for saying their child's existence is harmful to them.<sup>114</sup>

Undeniably, the condemnation of mothers suing for "wrongful birth" highlights the "problematic collision between feminism's prioritizing of legal abortion and the disability rights movement's opposition to any social system

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108. *Id.*

109. *Id.* (quoting Opinion Staff, *Point/Counterpoint: Is 'Wrongful Life' Lawsuit Morally Justified?*, PALMBEACHPOST (Sept. 6, 2011), <http://opinionzone.blog.palmbeachpost.com/2011/09/06/pointcounterpoint-is-wrongful-life-lawsuit-morally-justified/> [https://perma.cc/XGP2-GC6C]).

110. *See supra* Part I.B.2.

111. Elizabeth Picciuto, *Parents Sue for 'Wrongful Birth,'* DAILY BEAST (Aug. 17, 2014, 6:45 AM), <https://www.thedailybeast.com/parents-sue-for-wrongful-birth> [https://perma.cc/V5BD-VF7Z].

112. *Id.*

113. *Id.*

114. *Id.*

that devalues difference.”<sup>115</sup> But the criticism of mothers in the wrongful birth context also has significant implications beyond anti-abortion rhetoric for the living children at the heart of the lawsuits. When jurors judge mothers based on their requisite wrongful birth testimony, they often deny them the monetary damages necessary to care for their children.

*C. Plaintiff-Mothers Face Public Condemnation Regardless of Their Intentions*

Generally speaking, disability “entails colossal expense,” which most plaintiff-mothers hope to defray with wrongful birth damages.<sup>116</sup> The costs of caring for a child with special health-care needs are high due to elevated primary and specialty medical care requirements, as well as therapeutic and supportive services such as rehabilitation, assistive devices, personal assistance, mental health, and home health.<sup>117</sup> Families with children who have special health-care needs spend more than twice as much out of pocket as families of children without disabilities.<sup>118</sup>

The high cost of care is not adequately addressed by the American health-care system. For those who have medical insurance, many health insurers do not cover the costs of necessary treatments for certain disorders, and some do not cover necessary items like special formulas and foods, neurodevelopmental assessments, and therapies for children.<sup>119</sup> Also, many managed-care plans restrict which professionals may be consulted and whether specialists may be used, making it difficult to organize the kind of specialist teams necessary to treat complex disorders.<sup>120</sup> Access to optimal care, even for the insured among us, comes at a high price.

Not surprisingly, most parents who launch wrongful birth suits do so “to guarantee care for their children.”<sup>121</sup> Andrew Solomon, a writer who has interviewed hundreds of families raising children with disabilities,<sup>122</sup> notes, “In an ugly twist, mothers and fathers must discharge the obligations of

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115. ANDREW SOLOMON, *FAR FROM THE TREE: PARENTS, CHILDREN, AND THE SEARCH FOR IDENTITY* 29 (2012).

116. *Id.* at 40; see Stein, *supra* note 23, at 1125 (“The financial burden on parents to care for disabled children is no small consideration.”); see also Jen Gann, *Every Parent Wants to Protect Their Child. I Never Got the Chance. To Fight For My Son, I Have to Argue That He Should Never Have Been Born*, *CUT* (Nov. 27, 2017), <https://www.thecut.com/2017/11/raising-child-with-cystic-fibrosis.html> [<https://perma.cc/84HL-WAZ8>]. Reporting on her own wrongful birth suit, *New York Magazine* parenting editor Jen Gann wrote that “[t]he money awarded in wrongful-birth cases goes toward the cost—usually astronomically high—of the child’s medical care.” *Id.*

117. Karen Kuhlthau et al., *Financial Burden for Families of Children with Special Health Care Needs*, 9 *MATERNAL CHILD HEALTH J.* 207, 214–17 (2005).

118. *Id.*

119. Stein, *supra* note 23, at 1125–26.

120. *Id.* at 1126.

121. SOLOMON, *supra* note 115, at 40.

122. *Id.*

responsible parenting by stating in legal documents that they wish their children had never been born.”<sup>123</sup>

In addition to a need for resources, some plaintiff-mothers believe that negligent medical providers should be held accountable. Legal scholar Dov Fox argues that “[s]cholarly immersion in these questions about . . . offspring disability has crowded out reflection on the professional misconduct that denies people control over reproductive life.”<sup>124</sup> One plaintiff-mother explains that, although she is “not litigious,” the medical office that misread her daughter’s genetics test results “should not be able to treat a matter of such importance with such negligence without any redress.”<sup>125</sup> Another plaintiff-mother recounts the missteps of her providers, who should have communicated prenatal test results that would have led to additional testing.<sup>126</sup> She asserts, “That I continued my pregnancy under mistaken pretenses feels like an irreparable violation.”<sup>127</sup>

Plaintiff-mothers are vilified whether they act in their child’s best interests and whether they were profoundly betrayed by their medical provider. While a more direct and sweeping response to plaintiff-mothers’ need for resources may be reform of the American health-care system, this Article focuses on incremental changes to the wrongful birth scheme that are feasible, particularly in the current political climate.

## II. WRONGFUL BIRTH CLAIMS MAY HARM MOTHERS PSYCHOLOGICALLY

Mothers bringing a wrongful birth claim are the subjects of significant, sometimes public, external blame for taking legally required controversial positions about their children to obtain necessary caretaking resources.<sup>128</sup> The next natural inquiry is whether plaintiff-mothers are suffering internally, or self-blaming, as a result of their legal pursuit.<sup>129</sup> Hensel hypothesizes that, “Whatever the ultimate result of [wrongful birth] litigation, those involved are likely to feel abused and diminished rather than empowered and vindicated.”<sup>130</sup>

As it stands, to prove a wrongful birth claim, a plaintiff-mother is legally required to allege that she would have aborted her child had she known about the child’s disability.<sup>131</sup> Existing evidence does not support the assumption of some scholars, journalists, and jurors that such an allegation reflects a plaintiff-mother’s actual lack of acceptance and love for her child. Indeed, such an all-or-nothing perspective reinforces a longstanding feminist critique

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123. *Id.*; see also Gann, *supra* note 116 (stating that, in a wrongful birth suit, “a mother desperate to help her child [with money for astronomical medical costs] declares that she would not have had that child”).

124. Fox, *supra* note 12, at 156–57.

125. Picciuto, *supra* note 111.

126. Gann, *supra* note 116.

127. *Id.*

128. See *supra* Part I.

129. Stein, *supra* note 23, at 1125–28; Harris, *supra* note 16, at 385–86.

130. Hensel, *supra* note 13, at 172.

131. See *supra* Part I.

that society fails to see mothers as human beings entitled to their own complex emotional experiences. Research studies and other real-life accounts reveal that mothers of children with disabilities and chronic ailments have paradoxical feelings about their children—driven by deep love and intense labor—much like the ambivalence all mothers experience while parenting.<sup>132</sup>

Plaintiff-mothers are potentially harmed and hindered in their ability to fulfill their maternal work when, due to legal requirements that force them publicly to devalue their children and to tell a monochromatic narrative of their parenting experience, commentators condemn them for failing to attain the ideal of a “good mother” who has no emotional needs of her own and loves without reservation. More specifically, plaintiff-mothers may experience heightened guilt and anxiety as their litigation stance contradicts the idealized maternal role. Ultimately, incorporating true, paradoxical narratives of the parenting experience into wrongful birth proceedings may help reduce stigma about disability and free mothers from painful feelings of shame and guilt.

#### *A. Critics of Plaintiff-Mothers Hold Mothers to an Unattainable Standard*

Critics of mothers who bring wrongful birth claims implicitly hold them to the “good mother” ideal, a myth that arguably leaves these mothers feeling painfully inadequate, particularly once they have testified that they would have aborted their now-living child.

In North America, the ideology of “intensive mothering” dominates and defines socially appropriate mothering, portraying the “good mother” as “devoted to the care of others; . . . self-sacrificing and ‘not a subject with her own needs and interests.’”<sup>133</sup> Even psychoanalysts long neglected “maternal subjectivity,” treating the mother as the “object” of the child’s desires rather than as a person in her own right.<sup>134</sup> The predominant image of the mother in Western society has been described as

a mother who lovingly anticipates and meets the child’s every need. She is substantial and plentiful; she is not destroyed or overwhelmed by the demands of her child. Instead she finds fulfillment and satisfaction in caring for her offspring. This is the mother who, devoid of her own needs and interests, “loves to let herself be the baby’s whole world.”<sup>135</sup>

Over the course of American history, childrearing expectations have increased, and “more and more mothers [have] adopt[ed] ever greater

132. “Paradoxical” and “ambivalent” are used interchangeably throughout this Article.

133. Terry Arendell, *Conceiving and Investigating Motherhood: The Decade’s Scholarship*, 62 J. MARRIAGE & FAM. 1192, 1194 (2000) (quoting Donna Bassin et al., *Introduction to REPRESENTATIONS OF MOTHERHOOD* 1, 2 (Donna Bassin, Margaret Honey & Meryl Mahrer Kaplan eds., 1994)); see also SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* x (1998).

134. Raphael-Leff, *supra* note 33, at 57.

135. Donna Bassin et al., *Introduction to REPRESENTATIONS OF MOTHERHOOD* 2–3 (Donna Bassin, Margaret Honey & Meryl Mahrer Kaplan eds., 1994).

portions” of the intensive mothering model.<sup>136</sup> The most intensive mothering model in American history emerged shortly before World War II and has maintained its dominance ever since, despite the entry of mothers into the paid workforce.<sup>137</sup> Women continue to receive an onslaught of messages about good mothering from popular culture, courts, medicine, and psychology.<sup>138</sup> Popular contemporary childrearing books assume that child care is primarily the mother’s responsibility<sup>139</sup> and that it is an emotionally absorbing experience characterized by genuine unconditional love that flows naturally from the mother.<sup>140</sup> The ideal mother’s love remains undeterred, despite the labor-intensive nature of appropriately responding to a child’s many individual needs.<sup>141</sup>

As if plaintiff-mothers, like most mothers, had not already internalized this message,<sup>142</sup> critics of plaintiff-mothers add to the existing chorus by blaming and shaming them for allegedly failing to love their children enough.<sup>143</sup> Critics rely on requisite wrongful birth testimony, generally without asking plaintiff-mothers directly how they feel about their children or exploring the complexity of those feelings.

Feminists have long argued that the vision of the ever-giving, self-sacrificing mother is a “socially supported myth designed to keep women in their place.”<sup>144</sup> Feminist theorists of the 1970s worked to dismantle this motherhood ideology by identifying its patriarchal roots and emphasizing that it does not reflect the experiences of mothers themselves.<sup>145</sup> Thus, “seeing the mother as a subject, a person with her own needs, feelings, and interests” has come to be understood as “critical to fighting against the dread and the devaluation of women.”<sup>146</sup> “Establishing more realistic contours of motherhood . . . and articulating feminist positions explaining mothers’ circumstances represent a start toward healing our mass mother-blaming psychosis and toward reorienting public policies and debates on numerous issues in which women and their children figure.”<sup>147</sup>

In the meantime, intensive mothering persists as a deeply entrenched, harmful fantasy. Intensive mothering disregards the empirical reality that all mothers experience ambivalent feelings about their children<sup>148</sup> and thus leaves many mothers, and arguably plaintiff-mothers in particular, feeling

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136. HAYS, *supra* note 133, at 22.

137. *See id.* at 49–50.

138. Bassin et al., *supra* note 135, at 2.

139. HAYS, *supra* note 133, at 51–57.

140. *Id.* at 57.

141. *Id.* at 58–64.

142. “The denial of ambivalence . . . is not imposed on mothers by a fearful and punitive society. It lives in all of us.” ROZSIKA PARKER, *TORN IN TWO: THE EXPERIENCE OF MATERNAL AMBIVALENCE* 47 (rev. ed. 2005).

143. *See supra* Part I.B.

144. Bassin et al., *supra* note 135, at 3.

145. *Id.*

146. *Id.* at 2; Ellen Ross, *New Thoughts on “the Oldest Vocation”*: *Mothers and Motherhood in Recent Feminist Scholarship*, 20 *SIGNS* 397, 399 (1995).

147. Ross, *supra* note 146, at 399 (emphasis added).

148. *See infra* Part II.B.

inadequate and distressed. Its negative impact on women is exacerbated in the wrongful birth context, where mothers are required to disavow their children by testifying that they would have aborted them and are then criticized by scholars, media, jurors, and courts for failing the “good mother” test.

*B. Mothers Who Bring Wrongful Birth Claims Likely Exhibit  
Typical Maternal Ambivalence*

Implicitly relying on the “good mother” ideal, critics of plaintiff-mothers allege that a plaintiff-mother’s wrongful birth testimony reflects an unwillingness to accept and love her child with a disability.<sup>149</sup> Indeed, some have gone further to assert that a parent cannot possibly believe both that she would have aborted her child *and* that she is now glad the child exists.<sup>150</sup> Assuming plaintiff-mothers truly believe that they would have chosen to abort the fetus had it not been for the doctor’s negligence,<sup>151</sup> it is entirely conceivable that they now also accept and love their living child.

Although there are no formal research studies addressing this specific question, there are several journalistic accounts, including one first-person account, of plaintiff-mothers’ devotion to children they would have chosen to abort had they been properly informed by their doctors while pregnant. Moreover, assuming the wish to abort a fetus translates into negative feelings toward a living child (in itself an empirical question), psychology research reveals that it is natural for all mothers, whether their children have serious disabilities or not, to hold ambivalent feelings about their children. “Mothering is a font of personal fulfillment, growth, and joy, on the one hand, and one of distress, depression, and anxiety, on the other.”<sup>152</sup>

Acknowledging the universal experience of maternal ambivalence is an important step toward advancing maternal well-being in the wrongful birth context and beyond. The potential negative impact of the intensive mothering ideal on a woman’s sense of self in the face of maternal ambivalence is reflected in the fact that mothering has been considered a more powerful source of identity than occupation or marital status.<sup>153</sup> Moreover, psychologists have found that idealizing the maternal function, coupled with denigrating mothers, “is inevitably linked to failure to deliver.”<sup>154</sup> Conversely, pathologizing maternal ambivalence leads to demonizing “all mothers for all ills in the child.”<sup>155</sup> As a consequence, mothers experience “guilt, anxiety, and self-blame.”<sup>156</sup> The high incidence

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149. *See supra* Part I.

150. *See supra* Part I.

151. It is conceivable that a plaintiff-mother might testify out of legal necessity and not really believe that she would have aborted, but that is not the topic of this Article.

152. Arendell, *supra* note 133, at 1196.

153. *Id.*

154. Raphael-Leff, *supra* note 33, at 58.

155. *Id.*

156. *Id.*

of perinatal emotional distress in the Western world is perhaps no surprise then.<sup>157</sup>

### 1. Embracing the Paradox of Mothering Any Child

Mothers who bring wrongful birth claims have been described, with disdain, as fulfilling their caretaking role inadequately by disavowing their children through testimony that they would have aborted if given the chance. To the extent these mothers may be ambivalent about the children they were unable to abort but whom they now claim to love,<sup>158</sup> they are very much like all mothers. Maternal ambivalence is the long-unacknowledged norm.

“Maternal ambivalence is the experience shared variously by all mothers in which loving and hating feelings for their children exist side by side.”<sup>159</sup> “Ambivalence” is often misused in reference to “mixed” feelings when, in fact, psychoanalysts developed the concept to describe the coexistence of “quite contradictory impulses and emotions towards the same person.”<sup>160</sup> Thus, throughout this Article, ambivalent impulses are also referred to as “paradoxical.” While love and hate “sit side by side and remain in opposition,” ambivalence is a dynamic rather than “static condition.”<sup>161</sup> The intensity of feeling and the relationship between love and hate changes with circumstances and over the course of a child’s development.<sup>162</sup>

Although love and hate are extreme emotions, maternal ambivalence need not stem from the most dramatic mother-child dynamics; it is embodied in everyday examples with which most people are familiar. For instance, psychoanalyst Roszika Parker writes:

Mothers gain enormous satisfaction and receive gratifying devotion from their children. Yet, the children who love us are also the children who scream “I hate you, Mummy” and . . . [who] “do not yield unconditionally to our desires.” Mothers expect—and are expected—to control children whose development as individuals demand that they “do not submit to us in everything.” Motherhood is governed by frustration which . . . produces ambivalence.<sup>163</sup>

Thus, the inability to control one’s child fully—and the child’s rebellion against attempts at control—can lead to maternal ambivalence.

Parker further provides examples of maternal ambivalence when mothers feel burdened by the weight of responsibility for their infants.<sup>164</sup> One mother

157. *See id.* at 59.

158. *See infra* Parts III.B–C.

159. PARKER, *supra* note 142, at 1 (emphasis added). It is hard to imagine a mother actually hating her child. Indeed, according to psychoanalysts, any hatred is unconscious. For most mothers, most of the time, hate is “largely invisible—concealed, masked, contained—but never wiped out by love for the child.” *Id.* at 6.

160. *Id.* at 7.

161. *Id.*

162. *Id.*

163. *Id.* at 9.

164. *Id.* at 22–23.

“hated the baby for constantly being there.”<sup>165</sup> Another mother lamented “the full weight of [the baby’s] dependency on [her] . . . and what a huge drain that [was].”<sup>166</sup> “[T]he co-existence of [maternal] love” ultimately protected the babies from their mothers’ “raging despair.”<sup>167</sup> Maternal ambivalence of this nature can arise beyond the infant stage, particularly when a child has special needs that require intense, ongoing care.

Ambivalence itself is not the problem; it becomes a problem when a mother has difficulty managing the guilt and anxiety that ambivalence provokes.<sup>168</sup> Culture plays a role in producing such difficulty by prohibiting open discussion and exploration of maternal ambivalence and its potential value.<sup>169</sup>

Ambivalence has the potential to be valuable, from safeguarding against hate to inspiring mothers to use their inner resources to work on their relationship with their child.<sup>170</sup> Regarding the latter, Parker contends that “the conflict between love and hate actually spurs mothers on to struggle to understand and know their baby,” which is arguably the most important part of mothering.<sup>171</sup>

Over the past forty years, feminists have raised awareness that mothers have their own feelings and independent needs and desires.<sup>172</sup> Nonetheless, painful experiences of maternal ambivalence have remained underexplored, such that the glorification of the ideal mother “continues to assert its influence over ordinary mothers, compelling us to hide our conflictual and shameful negative feelings from professionals—and from ourselves.”<sup>173</sup>

## 2. Embracing the Paradox of Loving a Child You Would Have Aborted

Three journalistic accounts stand out for their rare exploration of the ambivalent, or paradoxical, feelings of parents suing for wrongful birth.

### *a. Sarah and Mark Hall, and Their Daughter, Ellie*

Without referencing ambivalence explicitly, the first account acknowledges and normalizes the parents’ ambivalence toward their child. It simultaneously recognizes the parents’ distress in having to disclose publicly what might be considered the “hate” component of their ambivalence, particularly in light of their deep love for their child.

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165. *See id.* at 23.

166. *Id.*

167. *Id.*

168. *See id.* at 8.

169. *See id.* at 2; *see also id.* at 24–25 (“Society’s wariness of maternal ambivalence, . . . defended against by the idealisation or denigration of mothers, provides a context which inflates maternal guilt, rendering ambivalence at times unmanageable.”).

170. *Id.* at 8.

171. *Id.*

172. Raphael-Leff, *supra* note 33, at 59.

173. *Id.*

In August 2014, Elizabeth Picciuto, writer for the *Daily Beast* and parent of a child with a genetic syndrome, profiled plaintiff-parents Sarah and Mark Hall.<sup>174</sup> A geneticist had told the Halls that Mark is a carrier of a syndrome that would result in significant cognitive and physical impairment in his offspring.<sup>175</sup> Mark's sister, for whom the Halls are legally and financially responsible, has the syndrome.<sup>176</sup> Sarah received prenatal testing, but the obstetrician's office mistakenly told the Halls that their child would be an asymptomatic carrier of the syndrome.<sup>177</sup> When their child was eighteen months old, and had for a year slowed in development and brain growth, the Halls requested the original prenatal test from the obstetrician's office and discovered that it had in fact shown their daughter to have the genetic syndrome.<sup>178</sup>

The Halls would have terminated the pregnancy had the obstetrician's office provided accurate prenatal information.<sup>179</sup> As anticipated, caring for their daughter, Ellie, has presented significant challenges. Ellie's therapies occupy much of the day, which prevents the Halls from completing their dissertations and strains "their friendships, professional lives, and marriage."<sup>180</sup> At the same time, they "adore" the daughter whom they now know: "Ellie is a captivating, laughing child with twinkling eyes. She looks uncannily like Mark, with a crop of soft dark curls. She is now three-and-a-half. She walks, albeit a little uneasily, and speaks in two-word sentences. By the standards of Syndrome Z, her developmental progress is remarkable."<sup>181</sup>

The journalist herself explains how parents can feel both that they would have terminated the pregnancy and that they love their child:

I too have a child with a genetic syndrome and am all too familiar with the feelings that the Halls have, and that so many of us who are parents of kids with disabilities have. *I wouldn't have asked for this, and goodness knows it's really rough sometimes. But now that my child is here, I wouldn't give her up for anything.* Isn't this true not only about children with disabilities, but so many aspects of our lives? Some of what we value the most arises from moments of pain. A [w]rongful birth suit is far too blunt a tool to acknowledge such complexities of life.<sup>182</sup>

Implicitly describing a parent's "love" for a child she has grown to appreciate in all her uniqueness—from the twinkle in her eye to the curl of her hair—and "wouldn't give . . . up for anything," alongside the "hate" that comes

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174. See Picciuto, *supra* note 111.

175. See *id.*

176. See *id.*

177. See *id.*

178. See *id.*

179. See *id.*

180. *Id.*

181. *Id.*

182. *Id.*

with “really rough,” painful challenges, Picciuto unknowingly applies the maternal ambivalence framework to the wrongful birth context.<sup>183</sup>

Wrongful birth was the only suit available to the Halls in California after Sarah’s provider communicated inaccurate prenatal test results to them.<sup>184</sup> Not surprisingly, the Halls were distressed by the suit because it exploited the “hate” component of their ambivalence. The journalist stressed that those who vilify parents for bringing a wrongful birth suit may not realize “just how much the parents do not want to bring such a suit.”<sup>185</sup> She described the Halls’ disgust with having to testify that they would have aborted their child but for the obstetrician’s negligence:

Sarah and Mark Hall spent hours giving depositions . . . . Again and again, their doctor’s lawyers asked them the same question while [a] court stenographer sat ready to record their responses. The Halls knew what they had to say—there was no other way their lawsuit could proceed. *Yes*, they each said, swallowing their repugnance. *Had I known that our daughter had a genetic disorder, I would have chosen abortion.*<sup>186</sup>

The Halls “hate that they said what they did about their daughter” for the wrongful birth case.<sup>187</sup> Mark explained, “That’s a shitty thing to say about a person—basically that you don’t deserve to live and breathe on this earth.”<sup>188</sup> Sarah shared, “Who wants to say ‘I wish this child wasn’t here’? What kind of mother is going to feel okay saying that?”<sup>189</sup>

The Halls found their own required testimony repugnant, even though they truly believed that they would have aborted the fetus had the doctor provided accurate information.<sup>190</sup> In a culture that, at best, silences any mention of parental ambivalence and, at worst, shames and pathologizes this ambivalence,<sup>191</sup> the Halls’ distress is no wonder.

#### *b. Jen Gann and Her Son, Dudley*

In November 2017, *New York Magazine* parenting editor, Jen Gann, wrote a cover article about her own wrongful birth suit. Gann’s son, Dudley, was born with cystic fibrosis following her medical provider’s failure to relay prenatal genetic testing information.<sup>192</sup> Gann broadcasts her own maternal ambivalence in the article’s headline: “Every Parent Wants to Protect Their Child. I Never Got the Chance. To Fight for My Son, I Have to Argue That He Should Never Have Been Born.”<sup>193</sup>

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183. *Id.* (emphasis omitted).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *See supra* Part II.B.

192. *See Gann, supra* note 116.

193. *Id.*

Throughout the article, Gann stresses that she would have certainly ended her pregnancy had she known her son would have cystic fibrosis.<sup>194</sup> She views this as the only “merciful”<sup>195</sup> choice given “the pain and disappointment he’ll have” learning that his disease is terminal, lung infections loom, staggeringly time-consuming daily treatments are inevitable, and infertility is likely.<sup>196</sup>

Despite her conviction, Gann reveals the difficulty of having to articulate that she would have chosen abortion alongside her paradoxical, yet profound, love for her son:

Having to put this kind of pain into words is, to me, the hardest part of wrongful birth. To have to specify what would make me terminate a pregnancy, to imagine my life today without a toddler. . . . But the most consuming, language-defying pain is just the other side of the most overwhelming joy. There are no words for the feeling of walking down the street with the person I love most, no words to describe why I wanted to have a child in the first place. After all this pain and humiliation and anger boiled down to records and money and who did what, the love I have for my son feels like the one thing that can’t be taken from me. It’s what I know more than anything in this world.<sup>197</sup>

Wrongful birth has placed Gann, much like the Halls, in the excruciating position of having to emphasize the “hate” part of her maternal ambivalence even in the face of an inviolable “love” for her child.

*c. Donna and Anthony Branca, and Their Son, A.J.*

In 2006, Donna and Anthony Branca shared their “wrongful birth” story with the *New York Times*.<sup>198</sup> Their child was born with a chromosomal deletion that the obstetrician failed to identify prenatally.<sup>199</sup> The story’s writer acknowledged the paradoxical feelings that most other journalists have been unwilling to capture: “The Brancas love the son they wish they hadn’t had. My family continues to mourn the child we don’t regret terminating.”<sup>200</sup>

The details of the Brancas’ experiences raising their son bring their ambivalence to life. The Brancas’ son, A.J., endured significant medical and developmental challenges that made caring for him quite labor-intensive and emotional. He was hospitalized for the first four months of his life—hooked up to oxygen and feeding tubes and living in an incubator for temperature

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194. “If something were wrong, we’d decided, we wouldn’t continue the pregnancy.” *Id.* “I grinned back at her as hard as I could, as if the strength of a smile could eclipse why we were sitting in front of pancakes: the assertion that we would not have had him be here, or anywhere, had we known.” *Id.* “I would have ended the pregnancy. I would have terminated. I would have had an abortion.” *Id.*

195. *Id.*

196. *See id.*

197. *Id.*

198. *See supra* Introduction.

199. Weil, *supra* note 1.

200. *Id.*

regulation.<sup>201</sup> Donna spent every day by his side, leaving only to eat dinner.<sup>202</sup> After being discharged from the hospital, A.J. required “round-the-clock care and he spent nearly as many calories trying to eat and regurgitating his food as he managed to keep down in his stomach.”<sup>203</sup> Fearing A.J. would not survive living at home, the Brancas placed him in a residential facility for children.<sup>204</sup> Donna said leaving A.J. there made her feel “awful” and like she wasn’t a mother.<sup>205</sup>

When A.J. visited home as an infant, Anthony often shared a bed with him at night, “dispensing food and meds at one- and two-hour intervals and making sure A.J . . . didn’t vomit and choke.”<sup>206</sup> At age one, A.J. weighed only nine pounds.<sup>207</sup> He continued to use a feeding tube and require endless medications even as he got older.<sup>208</sup> Although A.J. was thought to have the mental capacity of a six-month-old at age six, no one really knew how much he comprehended.<sup>209</sup>

Despite A.J.’s many challenges, he provided his parents with opportunities for connection and immense pride. A.J. “turn[ed] his head toward his family, sometimes reache[d] out an arm,” and once seemed to cry at their departure.<sup>210</sup> While no one expected A.J. would learn to talk, he made slow progress in other ways; at age six, A.J. learned to belly crawl.<sup>211</sup> Unlike most other parents, the Brancas would not get to rejoice in their son’s first word.<sup>212</sup> However, equating A.J.’s school award for “Most Improved Mobility” with a home run in the Little League World Series, Anthony reported that he and A.J.’s mother “ha[d] more satisfaction” in A.J.’s accomplishments than parents of typically developing children.<sup>213</sup>

The wrongful birth damages that the Brancas won enabled them to hire a night nurse when A.J. visited home.<sup>214</sup> Parental unburdening of this sort potentially shifts the “love-hate” balance of maternal ambivalence more strongly toward love.<sup>215</sup>

Such complex narratives of parental experience, replete with hardship and joy, begin to illustrate how a mother can feel both that she would have aborted her child if given the choice and that she loves her child as she is. However, the reality and even typicality of the maternal ambivalence of plaintiff-mothers is small comfort in a culture that idealizes selfless,

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201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *See supra* Part II.B.1.

emotionally uncomplicated mothering and explicitly blames plaintiff-mothers for falling short.

To reduce the emotional burden on plaintiff-mothers and to capitalize on the value of maternal ambivalence, for starters, it is important to expand the maternal ambivalence discourse through further illustration. Open dialogue about ambivalence, in the disability context and beyond, can begin to normalize the experience and reduce its negative emotional consequences for mothers.<sup>216</sup>

### 3. Embracing the Paradox of Mothering a Child with a Disability

The preceding wrongful birth accounts portray just three families. However, according to a multitude of additional accounts, parents raising children with severe disabilities are no strangers to paradoxical feelings of grief and regret, as well as joy and love.

Before further exploring accounts of parents' paradoxical feelings about children with disabilities, a disclaimer is in order. Studies about the experiences of parents raising children with disabilities have been highly contradictory and seem to reflect researcher bias.<sup>217</sup> Until quite recently, researchers had not done well identifying parents' positive experiences raising children with disabilities. Rather, they painted raising a child with a disability as an unmitigated tragedy for the family.<sup>218</sup> These narratives have shifted, likely in no small part due to researchers' growing open-mindedness with the help of the disability rights movement.<sup>219</sup> Thus, even research-based reform must be approached cautiously.

Andrew Solomon traveled the country interviewing parents<sup>220</sup> about their experiences raising children with "horizontal" identities—that is, identities not shared by their parents.<sup>221</sup> Examples include children with physical disabilities raised by parents without physical disabilities, children with intellectual disabilities or advanced intelligence raised by parents of typical intelligence, gay children raised by straight parents, and children who commit serious crimes raised by law-abiding parents.<sup>222</sup> While vertical

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216. See PARKER, *supra* note 142, at 1.

217. See SOLOMON, *supra* note 115, at 25.

218. See *id.* at 72.

219. Philip M. Ferguson, Alan Gartner & Dorothy K. Lipsky, *The Experience of Disability in Families: A Synthesis of Research and Parent Narratives*, in PRENATAL TESTING AND DISABILITY RIGHTS, *supra* note 11, at 72, 73.

220. Solomon interviewed more than three hundred families over ten years, producing nearly forty thousand pages of interview transcripts. SOLOMON, *supra* note 115, at 40.

221. *Id.* at 2. This Article assumes that plaintiff-parents typically do not share their child's disability.

222. *Id.* Solomon devotes a lengthy chapter of his book to "disability." *Id.* at 355–404. Diagnoses such as Down syndrome, autism, and schizophrenia have their own chapters. *Id.* at 169–353. By exploring specific narratives, Solomon rejects turning parental experience into generalizations driven by ideology.

identities, which children share with their parents,<sup>223</sup> are usually respected, children's horizontal identities are often treated by families as flaws.<sup>224</sup>

Nonetheless, Solomon discovered that myriad families go through a "transformative process," during which they learn "to tolerate, accept, and finally celebrate children who are not what they originally had in mind."<sup>225</sup> Parents typically expect that a child will surpass them and, when the child does not conform to such expectations, there is an adjustment period.<sup>226</sup> Ultimately, "most of the parents" Solomon profiled "love across the divide," even in "the most harrowing of circumstances."<sup>227</sup> Indeed, his "book's conundrum is that most of the families described . . . ended up grateful for experiences they would have done anything to avoid."<sup>228</sup>

Solomon argues that "[b]roadcasting these parents' learned happiness is vital to sustaining identities that are now vulnerable to eradication. Their stories point a way for all of us to expand our definitions of the human family."<sup>229</sup> Incorporating positive aspects of maternal ambivalence into the wrongful birth narrative, alongside the negative aspects that mothers are traditionally required to report without nuance, may further a similar goal.

Parents have found not only grief and despair, but also love and joy, even in the most extreme circumstances, such as when their child is virtually unresponsive due to multiple severe disabilities. Solomon theorizes that such circumstances "compel[] purity in parental engagement not with what might or should or will be, but with, simply, what is."<sup>230</sup>

One couple raised a son who was unable to see, speak, move, feed himself, or urinate. Eight years later, they had a second child with the same syndrome. The parents experienced grief over the imagined child they would never have, and they endured the intensive physical and emotional labor of rushing to the hospital for frequent seizures and tending to the many physical needs of a nonambulatory grown child.<sup>231</sup> At the same time, they found love and wonder in the experience:

It absolutely blows my mind, the impact that a blind, [intellectually disabled], nonverbal, nonambulatory person has had on people. He has a

223. *Id.* at 2.

224. *Id.* at 4–5.

225. *Id.* at 5. This Article does not condone stereotypes about disabilities that leave parents recoiling at the thought of having a child with a certain diagnosis. However, it would be impractical to deny that most parents are products of a deeply ableist society in which health-care professionals and geneticists fail to provide balanced information about disability that would allow parents to act on knowledge rather than fear. Ferguson et al., *supra* note 219, at 86 ("Through anecdotal information and some research, it is our impression that many (though certainly not all) medical professionals and genetic counselors—not to mention bioethicists—are either unaware of what the research shows about family adaptation patterns and the experience of disability or have difficulty translating that awareness into a balanced presentation for parents.").

226. SOLOMON, *supra* note 115, at 363.

227. *Id.* at 6.

228. *Id.* at 47.

229. *Id.* at 6.

230. *Id.* at 357.

231. *Id.* at 357–60.

way of opening and touching people that we can't come near. That's part of our survival story—our marveling at how he has moved so many people.<sup>232</sup>

While lauding the discovery of love in unexpected places, Solomon emphasizes the importance of accepting parental ambivalence and resisting the temptation to idealize parental feelings:

No one loves without reservation, however, and everyone would be better off if we could destigmatize parental ambivalence. Freud posits that any declaration of love masks some degree of odium, any hatred at least a trace of adoration. . . . There is no contradiction between loving someone and feeling burdened by that person; indeed, love tends to magnify the burden. These parents need space for their ambivalence, whether they can allow it for themselves or not. For those who love, there should be no shame in being exhausted—even in imagining another life.<sup>233</sup>

Indeed, in response to the argument that raising a child with a disability imposes an “extra burden” on the family, disability rights advocate Adrienne Asch concedes that “society is not set up for disabled children; there is no support—financial or otherwise—for extra expenses disability entails for families.”<sup>234</sup> She argues that the “‘extra burden’ of raising a child who has a disability falls on family because the society still won't accept that children with disabilities are part of the human race and must be expected and planned for when we collectively create transportation, schools, housing, workplaces, or families.”<sup>235</sup> A focus on the social construction of disability can help to address parental caretaking hardships without stigmatizing people with disabilities.<sup>236</sup>

Ambivalent or paradoxical feelings generally have utility for mothers, and research confirms this to be true for mothers facing the challenges of raising children with severe disabilities.<sup>237</sup> Researchers have found that the “embrace of paradox”—loving the child as she is and simultaneously wanting to erase the disability—enables mothers raising children with severe disabilities to “regain[] a sense of control . . . [and] optimism in [their] maternal work.”<sup>238</sup>

In one study, a researcher interviewed mothers parenting “high burden” children with disabilities—that is, children with some combination of limited or absent self-care skills, severe cognitive disabilities, physical impairments,

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232. *Id.* at 360.

233. *Id.* at 21.

234. Adrienne Asch, *Why I Haven't Changed My Mind About Prenatal Diagnosis: Reflections and Refinements*, in *PRENATAL TESTING AND DISABILITY RIGHTS*, *supra* note 11, at 234, 249.

235. *Id.*

236. While embracing important ways in which disability is socially constructed, Solomon cautions that “at the far end of the disability spectrum” people may live with “agonizingly broken” bodies and suffer “debilitating pain, struggle with intellectual incapacities, and live in permanent proximity to death.” SOLOMON, *supra* note 115, at 32.

237. *See supra* Part II.B.1.

238. Elizabeth Larson, *Reframing the Meaning of Disability to Families: The Embrace of Paradox*, 47 *SOC. SCI. & MED.* 865, 865 (1998).

bowel and bladder problems, impaired communication skills, and severe behavioral problems.<sup>239</sup> Because of the severity of the children's disabilities, the researcher noted that they might never be independent or socially productive.<sup>240</sup> Meanwhile, the mothers linked "their own subjective well-being with their feelings of success in mothering and their child's progress."<sup>241</sup> The researcher wondered how these mothers reconciled their child's developmental reality with their own need to feel successful.<sup>242</sup>

The researcher found her answer in the mothers' embrace of paradox, which involves "holding two oppositional thoughts about the child, loving the child [despite the disability,] yet wanting to erase the disability, hoping contrary to the received opinion of others and recognizing there was no cure all the while seeking solutions to ongoing problems."<sup>243</sup> Instead of fully accepting the child's disability, these mothers energized their maternal work, by, for example, seeking solutions, orchestrating daily routines, and finding programs, through a tenuous balance between "their desires and the disillusioning predictions of health professionals and their own fears."<sup>244</sup>

While despair about their child's disability led to daily disengagement, "embracing the paradox of their child's disability was central to a return to a more positive conscious experience of their life."<sup>245</sup> Health professionals, frequently faulting mothers for their optimism about their child's future as "unrealistic and detrimental," have disregarded other research confirming that optimism bolsters subjective well-being and increases the likelihood of "engag[ing] in care for others, [being] motivated in daily tasks, and [being] persistent."<sup>246</sup>

Thus, paradoxical feelings that, to the casual observer, may appear a profound failure of these mothers to accept and love their child fully because of disability, in fact, can serve as an important coping mechanism and driving force behind difficult caretaking work. Theoretically, the same is true of mothers who bring wrongful birth suits in the name of securing resources for their child. Their legal pursuit may appear a wholehearted rejection of the child they have, or an attempt to remake a "flawed" person, when internally they may well be searching for a way to remain optimistic about their child's uncertain future.

### III. MITIGATING THE HARMFUL IMPACT OF WRONGFUL BIRTH CLAIMS ON MOTHERS AND CHILDREN

For parents bringing wrongful birth claims, as for all parents to one degree or another, love and labor go hand in hand. The question is how to enable

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239. *See id.* at 867.

240. *Id.* at 869.

241. *Id.* at 868.

242. *See id.* at 869.

243. *Id.* at 870.

244. *Id.* at 871.

245. *Id.* at 872.

246. *Id.* at 872-73.

mothers to maintain a healthy caretaker identity while pursuing the resources necessary to care for their children through a wrongful birth claim.

This Article proposes several reforms to wrongful birth jurisprudence, including: (1) broadening the emotional distress narrative to reflect and normalize, rather than condemn, mothers' paradoxical feelings about their children; (2) reframing the harm to mothers as a loss of reproductive choice rather than as the birth of a flawed child and, accordingly, expanding available economic damages to include plaintiff-mothers' unexpected childcare responsibilities; and (3) educating plaintiffs' attorneys to empathize with the emotional aspects of mothers' litigation experiences and to counsel mothers accordingly.

*A. Allowing Paradox in the Emotional Distress Narrative  
of Wrongful Birth Claims*

Interestingly, several courts have recognized that parents raising children with serious disabilities experience paradoxical feelings. However, instead of allowing a more expansive wrongful birth narrative in light of these complexities, various courts have punished plaintiff-mothers by labeling their emotional distress as “speculative” and barring such damages entirely. Arguably, in taking an all-or-nothing approach, these courts have squandered an opportunity to normalize maternal ambivalence—at least in the wrongful birth context—by inviting parents to share their more authentic, paradoxical experiences.

Besides normalizing maternal ambivalence, a more nuanced wrongful birth narrative would better serve the children at the center of wrongful birth claims by transcending stereotypes about living with disability. Disability rights advocates lament that prenatal testing and selective abortion depend on “a misunderstanding of what life with disability is like for children with disabilities and their families.”<sup>247</sup> Many widely accepted beliefs about what life with disability is like for children and their families are not based on data; they assume that “people with disabilities lead lives of relentless agony and frustration and that most marriages break up under the strain of having a child with a disability.”<sup>248</sup> If wrongful birth claims were reframed as a mother's pursuit of a better-supported life for her child, authentic wrongful birth narratives could help to deconstruct such stereotypes.

Bioethicist William Ruddick argues that we can avoid the misguided pursuit of the perfect child and the romantic ideal of the perfect mother by providing balanced information about the benefits as well as the burdens of rearing a child with significant disabilities.<sup>249</sup> Evidence suggests that trained genetics counselors and obstetricians do not always accomplish this—instead, they impose their own biases when discussing prenatal findings with parents.<sup>250</sup> Wrongful birth litigation is one space in which balanced

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247. Parens & Asch, *supra* note 23, at 20.

248. *Id.*

249. Ruddick, *supra* note 11, at 95–97.

250. Parens & Asch, *supra* note 23, at 6–7.

information may be disseminated in the name of enhancing the well-being of plaintiff-mothers and reducing the stigma on their children.<sup>251</sup> At first glance, this is surely counterintuitive to the adversarial system's reliance on extreme presentations of evidence. However, entrenched practices need to be reimagined to account for litigants' emotional experiences, as well as the social policy implications of our wrongful birth laws.

### 1. Assessing Damages Through Individual Accounts of Parental Experience and Disability

While successful wrongful birth claims commonly result in damages for the child's extraordinary long-term medical and educational expenses, courts are divided on whether plaintiff-parents should be able to recover damages for emotional distress.<sup>252</sup>

In his prominent torts treatise, Dan Dobbs argues that denying emotional distress damages for wrongful birth unjustifiably deviates from the norm in tort law.<sup>253</sup> He contends that wrongful birth is a personal injury tort because (1) it "inescapably involves the mother's body and intimate rights of autonomy"; and (2) when against the mother's physician, it involves "a direct duty on the part of the defendant to the mother herself."<sup>254</sup> Emotional harms should therefore be recoverable for wrongful birth, as they are in personal injury cases generally.<sup>255</sup> Courts that permit emotional distress damages in wrongful birth suits have generally held that such damages are a "direct and foreseeable result of the deprivation of [the] option to accept or reject a parental relationship with a child with severe birth defects."<sup>256</sup>

Courts prohibiting emotional distress damages for wrongful birth tend to do so on the theory that such damages are too speculative because parents experience not only anguish over the birth of a child with a disability but also love for the child.<sup>257</sup> Ironically, then, plaintiff-mothers are condemned by scholars and the media for allegedly failing to love their children enough, and simultaneously punished by some courts for loving their children too much.

The denial of emotional distress damages as too speculative is illustrated in *Becker v. Schwartz*,<sup>258</sup> which was the next significant wrongful birth case decided by a higher court after *Gleitman* denied parents recovery and after

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251. With that said, it is arguably even more consequential to ensure that medical professionals provide balanced prenatal counseling so that stereotypes and bias do not drive abortion decisions in the first place.

252. Whitney & Rosenbaum, *supra* note 12, at 189; *see also* Bernabe, *supra* note 12, at 53–54; Caroline C. Owings, *The Right to Recovery for Emotional Distress Arising from a Claim for Wrongful Birth*, 32 AM. J. TRIAL ADVOC. 143, 165–66 (2008).

253. *See* DOBBS ET AL., *supra* note 29, § 370.

254. *Id.*

255. *Id.*

256. Whitney & Rosenbaum, *supra* note 12, at 189; *see* Owings, *supra* note 252, at 166–67.

257. Whitney & Rosenbaum, *supra* note 12, at 191; *see also* DOBBS ET AL., *supra* note 29, § 371; Owings, *supra* note 252, at 178–79.

258. 386 N.E.2d 807, 814 (N.Y. 1978).

*Roe v. Wade* granted women the right to choose.<sup>259</sup> Using pejorative language that is offensive to present-day sensibilities, the 1978 New York Court of Appeals denied emotional distress damages:

To be sure, parents of a deformed infant will suffer the anguish that only parents can experience upon the birth of a child in an impaired state. However, notwithstanding the birth of a child afflicted with an abnormality, and certainly dependent upon the extent of the affliction, parents may yet experience a love that even an abnormality cannot fully dampen. To assess damages for emotional harm endured by the parents of such a child would, in all fairness, require consideration of this factor in mitigation of the parents' emotional injuries. . . . [C]alculation of damages for plaintiffs' emotional injuries remains too speculative to permit recovery notwithstanding the breach of a duty flowing from defendants to themselves.<sup>260</sup>

As this language reflects, courts open or close the door to emotional distress damages based on assumptions about the parenting experience ("to be sure," "parents may yet," etc.), rather than on the basis of empirical research or even the real-life accounts before them. Accordingly, courts rejecting emotional distress damages do not do so in the name of reducing stigma; to the contrary, by relying on their own assumptions, they perpetuate stereotypes and deny plaintiff-mothers the opportunity to tell their story and to secure needed resources.

While shortsighted in their reliance on assumptions about the parental experience and their outright rejection of emotional distress damages as speculative, these courts are onto something in acknowledging that parents of children with disabilities experience positive feelings. The difficulties of caring for children with disabilities have long been recognized, but the pleasures have only recently been acknowledged, even by researchers.<sup>261</sup> Indeed, the prevailing research once portrayed such families as living in "chronic sorrow."<sup>262</sup> Perhaps, then, it is no surprise that commentators typically have not contemplated the complexity of parental emotions or that courts have shied away from unpacking those emotions.

The latest research is much more nuanced. Some researchers have found that raising a child with special needs is a universally acknowledged stressor and that more than a third of parents of children with special needs report negative effects on physical and mental health.<sup>263</sup> Others have found that parents report less stress than observers perceive.<sup>264</sup> In one study, 94 percent of parents of children with disabilities said they were doing as well as most other families without children with disabilities.<sup>265</sup> There is growing research that a significant number of parents report that there are numerous

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259. *See supra* Part I.B.3.

260. *Becker*, 386 N.E.2d at 814.

261. SOLOMON, *supra* note 115, at 23.

262. *Id.* at 365.

263. *Id.* at 23–24.

264. *Id.* at 366.

265. *Id.* at 24; *see also* Ferguson et al., *supra* note 219, at 85.

benefits and positive outcomes for their families associated with raising a child with disabilities.<sup>266</sup> These benefits include adaptability, family cohesiveness, spiritual growth, shared parenting roles, and communication.<sup>267</sup> One study reported that 88 percent of parents of children with disabilities felt happy when they thought about their child, and a full 100 percent felt they had increased compassion for others due to their experience.<sup>268</sup>

Given the mixed findings, the most agreed-upon conclusion has been that family responses to disability are highly variable.<sup>269</sup> Growing research suggests that severity of the disability, chronic illness, and family structure are not as predictive of stress on the family as behavioral disruptions (e.g., sleep problems, self-injurious behavior) or family income.<sup>270</sup>

Inconsistent research findings reinforce the idea that courts should be evaluating plaintiff-mothers' individual experiences and circumstances rather than relying on generalizations. In listening to mothers' individual stories and establishing a framework that anticipates paradoxical feelings, courts could avoid pathologizing maternal ambivalence and expose themselves, lawyers, juries, and other members of society to truer, more varied, and therefore less stigmatizing narratives about disability. Moreover, because income impacts the stress of families raising a child with a disability, there is a need to lighten families' financial burden with additional damages.

Nonetheless, this Article cautiously approaches the proposal for courts to embrace a more nuanced emotional distress narrative. In the face of the lurking "good mother" ideal, plaintiff-mothers may feel harmed when relating ambivalence toward their children. Empirical research is necessary to shed light on this issue. In the meantime, it is worth exploring the possibility that courts and plaintiffs' attorneys could work together to normalize ambivalence and thereby reduce plaintiff-mothers' guilt and anxiety, certainly relative to what they likely experience otherwise.

Another concern is that the narratives that make it to court are the most extreme experiences of disability and therefore would continue to skew toward the negative societal impressions of living with disability. Nonetheless, infusing these narratives with paradox would tend to tell a more positive story than is typically told now within the limitations of this unique litigation context.

## 2. Using Tort Law's "Benefit Rule" to Expand the Emotional Distress Narrative in Wrongful Birth Cases

The *Daily Beast* journalist who profiled the Halls and is herself the parent of a child with a genetic syndrome opined that parents' paradoxical feelings

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266. Ferguson et al., *supra* note 219, at 85.

267. SOLOMON, *supra* note 115, at 24; Ferguson et al., *supra* note 219, at 85.

268. SOLOMON, *supra* note 115, at 24.

269. Ferguson et al., *supra* note 219, at 85.

270. *Id.*

about raising a child with a disability are no reason to deny emotional distress damages:

The original reasoning behind the inability for parents to sue for emotional distress seems to be that parents of children with disabilities often end up loving their kids anyhow. Of course this is true, but it hardly changes the fact that it can be extremely emotionally distressing to have a child diagnosed with severe disabilities, as those of us who adore our kids with disabilities will recognize all too well.<sup>271</sup>

Accordingly, the social science literature about mothers caring for children with serious medical or developmental conditions or severe disabilities has shown that “emotional labour as well as physical caring is an integral aspect of caring for such children.”<sup>272</sup> Mothers must contend with and manage their own emotional labor, as well as that of their children, without adequate societal support.<sup>273</sup>

While Sarah and Mark Hall adore their daughter, Ellie, they also report significant emotional distress in connection with caring for her. As Ellie’s therapies occupy much of the day, the intensity of caring for her has prevented them from completing their dissertations and has strained their friendships, professional lives, and marriage.<sup>274</sup>

In light of such paradoxical parenting realities, courts might weigh parental joy against emotional distress using the “benefit rule,” to which tort law is no stranger. This rule is expressed in the Restatement (Second) of Torts:

When the defendant’s tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.<sup>275</sup>

Thus, tort law anticipates circumstances in which a defendant’s tortious conduct causes plaintiff both harm and benefit, and the two need to be reconciled to calculate damages.

In several wrongful birth cases, courts have expressly or implicitly applied the benefit rule and have reduced emotional distress awards based on the benefits of having the child.<sup>276</sup> For example, in *Phillips v. United States*,<sup>277</sup> the court used parental love to offset emotional distress damages against a medical center for failing to advise, counsel, and test the plaintiff-parents for the risk of having a child with Down syndrome.<sup>278</sup> The court determined that the plaintiffs were entitled to \$500,000 in emotional distress damages because the mother experienced “anguish” due to “her child’s condition,”

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271. Picciuto, *supra* note 111.

272. Lupton, *supra* note 30, at 234.

273. *Id.*

274. Picciuto, *supra* note 111.

275. RESTATEMENT (SECOND) OF TORTS § 920 (AM. LAW. INST. 1979).

276. Gregory G. Sarno, Annotation, *Recoverability of Compensatory Damages for Mental Anguish or Emotional Distress for Tortiously Causing Another’s Birth*, 74 A.L.R.4th 798 § 14 (1989).

277. 575 F. Supp. 1309 (D.S.C. 1983) (applying South Carolina law).

278. *Id.* at 1311, 1319–20.

which required her to sit up with him at night when he would “turn blue around the lips,” watch him throw up three to four times a day, and caused her to feel upset “knowing that he’ll never be able to do the things that normal kids can do and not being able to do anything to change it.”<sup>279</sup> As a result, the mother “gave up all social activity, became nervous, and resorted to overeating.”<sup>280</sup> Additionally, the father described “feelings of anger, outrage, and disappointment, as well as gastrointestinal problems requiring medication.”<sup>281</sup>

The court balanced the mother’s “heartache”<sup>282</sup> against her admission that she loved her son and that he was “the sunshine of [her] life”<sup>283</sup> and reduced the emotional distress damages by 50 percent, to \$250,000.<sup>284</sup> Without providing a concrete rationale for the amount of reduction, the court reasoned that the benefit rule “should not improperly restrict the scope of permissible damages” and that, in accordance with traditional tort principles, any benefits from defendant’s negligence may offset the detriments.<sup>285</sup>

Theoretically, at least, such a balancing approach acknowledges and validates maternal ambivalence. It likely requires the plaintiff-mother to testify at deposition, trial, or both—not only about the emotional distress suffered from her child’s unexpected hardships, but also about her love for her child and the joys she experiences from the relationship. While a balanced narrative arguably would reduce a plaintiff’s damages, which runs counter to typical adversarial strategy, it is an improvement over the categorical denial of emotional distress damages. Additionally, such an approach could ultimately result in a better overall verdict, endearing the plaintiff-mother to a jury otherwise likely to judge her for appearing to denounce her child wholly.

Unfortunately, the *Phillips* example highlights some attendant risks to the benefit rule approach. First, the lurking “good mother” ideal could render paradoxical testimony unbelievable or unfavorable in the eyes of a jury and still be emotionally harmful to a mother. Thus, expert testimony on the typicality of maternal ambivalence could be important.

Second, in *Phillips*, the joyous aspects of the parent-child relationship are limited to vague descriptions of the plaintiff-mother’s “love” for her child. Meanwhile, the distressing aspects of the relationship—lips turning blue and daily vomit—as well as stereotypical fear that the child will never be “normal,” are detailed. In the end, the mother does not share a complete view of life with her child, nor does the public receive balanced information. More information about the joyous aspects of the relationship may be important to

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279. *Id.* at 1317–19.

280. *Id.* at 1317.

281. *Id.* at 1318.

282. *Id.*

283. *Id.* at 1319.

284. *Id.* at 1320.

285. *Id.* at 1319–20.

allow the mother to feel closer to her maternal ideal and to provide a balanced, stereotype-defying picture of life with a disability.<sup>286</sup>

Third, participants in the litigation process and members of the public might overextrapolate detailed negatives to all children with Down syndrome or whatever diagnosis is at issue. The answer to this problem may lie outside the courts, in the form of a public health campaign or the training of medical professionals to provide more balanced information about life with a disability. Allowing such a concern to dominate would improperly overwhelm the individualized litigation process.

*B. Not “Wrongful Birth” but “Deprivation of Reproductive Choice”:  
Replacing the “Harmful Child” with Loss of Autonomy and Control*

Reframing the plaintiff-mother’s harm entirely as an affront to procreative autonomy and control rather than as the existence of a child with a disability might further mitigate the emotional impact of bringing suit. Such an approach would not require a mother to testify that she would have aborted her child; that is, she would not need to amplify the “hate” portion of her ambivalence.<sup>287</sup> Rather, it would more directly answer criticisms that the wrongful birth claim inherently stigmatizes disability.

1. Reframing the Harm as Deprivation of Reproductive Choice

Courts have failed to recognize what some scholars have identified as the true harm underlying wrongful birth claims—a woman’s lost opportunity to make meaningful choices about whether to continue a pregnancy.<sup>288</sup> By requiring a woman to prove that she would have ended her pregnancy had medical professionals provided her with the appropriate information,<sup>289</sup> courts have missed “the distinct injury to [the woman’s] reasonable expectation of control over procreation—whatever its outcome.”<sup>290</sup> In missing this injury, courts have also missed the chance to spare plaintiff-mothers some of the anguish of bringing a wrongful birth suit.

Reframing the wrongful birth claim as a loss of choice and control over procreation could serve to mitigate the anti-therapeutic impact of existing wrongful birth standards on parents and children alike.<sup>291</sup> Rather than

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286. Moreover, given the power of stereotypes and parents’ limited information early on in the parenting experience, expert testimony that parental feelings are legitimate but that specific stereotypes are not could be helpful. However, this is likely not logistically or financially practical.

287. Harris, *supra* note 16, at 373 (“It is not necessary for parents to prove decisively that they would have aborted an unhealthy fetus because the crux of their claim is that the defendant’s negligence deprived them of the opportunity to make that choice.”).

288. Fox, *supra* note 12, at 167–68 (wrongful birth involves “the distinct injury to [a woman’s] reasonable expectation of control”); Hensel, *supra* note 13, at 142–43 (“The injury identified in these cases is the parents’ lost choice over whether or not to carry an impaired child to term.”).

289. Fox, *supra* note 12, at 168.

290. *Id.* (emphasis added).

291. Hensel, *supra* note 13, at 164–65.

implying that they “do not want the child they now have or that they would have been better off had that child not been born,”<sup>292</sup> under this new framework, plaintiff-mothers could argue that “they have been denied the chance to decide whether to gestate or parent.”<sup>293</sup> There is significant potential benefit in a paradigm that spares plaintiff-mothers the need to highlight the “hate” aspects of their maternal ambivalence and mitigates the disparaging message to the disability community that existence with a disability is “wrongful.”

Elevating the importance of informed parental choice also would potentially shift the blame from plaintiff-mothers to health-care professionals whose negligence has been obscured by concerns about the wrongful birth claim.<sup>294</sup> Further, a focus on medical professionals’ duty to give parents choice and control over procreation could open the door to addressing the medical establishment’s failure to provide parents with balanced information about raising a child with a disability.<sup>295</sup> Without balanced information, true choice is an illusion.

Reframing the harm would, of course, go hand in hand with renaming the legal claim. After all, the language of “wrongful birth” emphasizes the flawed child—perpetuating stigma and pain—rather than the deprivation of a mother’s procreative choices.<sup>296</sup> The “deprivation of reproductive choice” would seem a more palatable cause of action than the “wrongful” birth of one’s own child.<sup>297</sup>

## 2. Damages for Deprivation of Reproductive Choice as Disrupted Family Plans, Unexpected Labor, and Associated Emotional Distress

Focusing on tangible harms, courts generally have tied wrongful birth damages to the costs of raising a child.<sup>298</sup> Such an approach is troublesome for implying that a mother does not want her child and, as discussed throughout this Article, for necessitating proof that the plaintiff-mother

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292. Fox, *supra* note 12, at 168–69; *see supra* Part I.

293. Fox, *supra* note 12, at 169.

294. *Id.* at 156–57.

295. Ferguson et al., *supra* note 219, at 86 (“[M]any (though certainly not all) medical professionals and genetic counselors—not to mention bioethicists—are either unaware of what the research shows about family adaptation patterns and the experience of disability or have difficulty translating that awareness into a balanced presentation for parents.”).

296. Michael Kelly, *The Rightful Position in “Wrongful Life,”* 42 HASTINGS L.J. 505, 506 n.4 (1991).

297. Dortha Biggs, previously Dortha Jacobs, a successful wrongful birth plaintiff in the landmark Texas Supreme Court case of *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975), has publicly expressed her aversion to the “wrongful birth” nomenclature. Gann, *supra* note 116. If she could rename the “horrible” claim, she would replace those two loaded words with something like “parental choice.” *Id.* Presumably, other plaintiff-mothers would also welcome the chance to bring an action for “deprivation of reproductive choice” instead of “wrongful birth.”

298. Fox, *supra* note 12, at 168. Ironically, courts rarely award basic child-rearing expenses, though they do award extraordinary expenses which arguably are also linked to proof that the plaintiff-mother would have aborted had she known about the expensive disability. Whitney & Rosenbaum, *supra* note 12, at 176–77.

would have aborted her pregnancy had it not been for the provider's negligence.<sup>299</sup> While a focus on lost reproductive choice requires embracing relatively intangible harms, these harms seem less of an assault on plaintiff-mothers' well-being.

Lost reproductive choice damages can be viewed in terms of the "objective harm that robs negligence victims of the capacity 'to determine [their] life's course.'"<sup>300</sup> Fox argues that prospective parents have an interest in selecting for offspring health because "a child with a genetic disease will predictably inform the sorts of experiences that raising him will involve, perhaps even for how long."<sup>301</sup> More specifically, having a child with or without certain characteristics can "facilitate parents' ability to support a partner or existing children or connect with familial or cultural histories that matter a great deal to them."<sup>302</sup> Thus, such an approach to damages focuses on the extent to which the defendant's misconduct can be expected to impair the plaintiffs' lives, given their own values and circumstances.<sup>303</sup>

While addressing plaintiff-mothers' harm in terms of so-called "objective" reproductive choice damages is not a panacea, it has advantages over the current approach to wrongful birth claims. Admittedly, such damages are arguably as intangible as emotional distress damages, which many courts have refused to calculate as too speculative. Indeed, "[d]ollars cannot restore the control that victims have lost over their reproductive lives."<sup>304</sup> While this poses a challenge, it is not dispositive, as illustrated by courts' frequent calculation of intangible damages for loss of life in wrongful death cases and loss of liberty in wrongful conviction and imprisonment cases.<sup>305</sup>

In reality, reframing wrongful birth as an injury to reproductive choice and a mother's life course may be a difference only in semantics. Presumably, evidence of the extent to which the provider's negligence disrupted the plaintiff's life plans would look a lot like what a mother currently presents in a wrongful birth suit—how she previously envisioned her family life versus the various ways her child's disability has thwarted those expectations. Nonetheless, the rhetorical shift from a flawed child who should have been aborted to disappointed parental expectations could well improve plaintiff-mothers' emotional experience and reduce the stigma of disability. Rather than testifying that she would have aborted her child and broadcasting presumed feelings of "hate" for critics to exploit, a plaintiff-mother could provide matter-of-fact evidence of daily caretaking tasks and other challenges that impact her family in ways she had no opportunity to anticipate, consider, or prevent.

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299. *Id.*

300. Fox, *supra* note 12, at 168 (alteration in original) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting)).

301. *Id.* at 183.

302. *Id.* at 222.

303. *Id.* at 226.

304. *Id.* at 224.

305. *Id.*

Relatedly, since deprivation of reproductive choice is fundamentally about false expectations, a damages analysis might also focus on the mother's unexpected labor costs. Scholars have used the term "home healthcare work" to refer to "the unpaid labour that is undertaken at home to care for ill family members" and which is "overwhelmingly undertaken by women, is largely invisible, yet . . . is a fundamental part of healthcare in the community."<sup>306</sup> While the market compensates non-family members for gendered labor such as childcare, "when performed by family members, the monetary value of the work is . . . lost."<sup>307</sup>

The economic argument for securing unexpected labor costs for plaintiff-mothers could go something like this: (1) assuming proper prenatal care, the decision to be pregnant accompanies a certain anticipated degree of labor and associated economic burden; and (2) damages awarded for deprivation of reproductive choice should reflect a disruption of these economic expectations. Since much maternal hardship in raising a child with a disability involves life getting subsumed by various caretaking tasks, such tasks can be compensated so that mothers might secure caretaking assistance. The focus would be on the mother's material base, rather than on the idea of a child with a disability.

Damages for disrupting a mother's right to determine her life's course and for unexpected labor costs are arguably preferable to emotional distress damages on the theory that any acknowledgement of emotional distress in the face of raising a child with a disability is necessarily stigmatizing.<sup>308</sup> The risk of stigma is heightened by the fact that plaintiff-mothers are relatively new to parenting a child with a disability when they first bring suit, and therefore they may be relying on stereotypes as well as experience to support their emotional distress claim.

Despite this legitimate concern, a reframing of harm that forecloses access to emotional distress damages would miss an opportunity to do the critical work of normalizing maternal ambivalence, as proposed in Part III.A, presumably even while ambivalence implicitly would continue to animate testimony about lost reproductive choice. After all, with thwarted life plans and unexpected labor comes a mother's love, and failure to acknowledge the latter could return us to the same harmful place where we began.

A strong compromise might also involve viewing lost reproductive choice in terms of the more subjective emotional distress damages associated with

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306. Lupton, *supra* note 30, at 234.

307. Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 *CARDOZO L. REV.* 1027, 1093 (2015).

308. *See, e.g.*, Stein, *supra* note 23, at 1145 ("Awarding parents damages for emotional distress in wrongful birth suits stigmatizes disabled persons. . . . In granting emotional damages to parents in a wrongful birth suit, 'courts assume all parents will experience 'emotional anguish' caused by the 'apparent' complete tragedy of living with a child with a disability.'" (quoting Allan H. Macurdy, *Disability Ideology and the Law School Curriculum*, 4 *B.U. PUB. INT'L L.J.* 443, 451 (1995))). Of course, this Article's response to the preceding argument is that emotional distress damages should be awarded by using a case-by-case assessment of evidence rather than assumptions about what "all" parents experience. *See supra* Part III.A.

disrupted family plans and unexpected labor.<sup>309</sup> Pursuant to this approach, maternal ambivalence would remain an important framework for presenting emotional distress evidence in a manner most psychologically sound for plaintiff-mothers and less stigmatizing for people with disabilities.<sup>310</sup> More specifically, even if a mother would not need to testify that she would have aborted her child, asserting that she has suffered emotional distress because having a particular child disrupted her family plans and requires unexpected labor might call for balancing testimony about the unexpected joys the child also brings to the family.

*C. Representing Plaintiff-Mothers with Awareness and Empathy*

Finally, the most incremental, yet critical, way to address the well-being of plaintiff-mothers is to ensure that their attorneys are aware of the potential emotional impact of bringing a wrongful birth claim and can collaborate with and counsel mothers accordingly.

In the name of client-centered lawyering, which entails paying close attention to what the client says and assisting her in exercising her autonomy and sense of moral judgment,<sup>311</sup> plaintiffs' attorneys should engage with their clients about how they are experiencing the litigation process and its requirements and whether any adjustments in approach might make them more comfortable. Indeed, a client-centered lawyer does not "assume that the client wants to maximize [her] material or tactical position in every way that is legally permissible, regardless of non-legal considerations."<sup>312</sup> For instance, while a lawyer may worry that emphasizing the joy of parenting would undermine a mother's damages claim, the mother might be willing to risk a portion of damages in exchange for telling a more authentic story.

Relatedly, plaintiffs' attorneys should be educated about therapeutic jurisprudence and their potential role in mitigating the negative impact of the legal system on their clients. Relying on the tools of the behavioral sciences, therapeutic jurisprudence "sees the law and the way it is applied by various legal actors, including judges [and] attorneys, . . . as having inevitable consequences for the psychological well-being of clients."<sup>313</sup> By openly discussing the potential emotional ramifications of the wrongful birth claim with their clients, attorneys may help their clients process the experience more effectively and may be able to adjust strategy to improve the client's experience. For example, plaintiffs' attorneys should be familiar with the realities of maternal ambivalence, so that they can help plaintiff-mothers

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309. See Fox, *supra* note 12, at 171.

310. See *supra* Part III.A.

311. Monroe H. Freedman, *Client-Centered Lawyering—What It Isn't*, 40 HOFSTRA L. REV. 349, 350 (2011).

312. *Id.* at 350–51 (quoting MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 57 (1st ed. 1990)).

313. Bernard P. Perlmutter, *George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 579 (2005).

normalize any paradoxical feelings that emerge as they develop the case theory and prepare testimony together.

*D. Final Recommendations: Lost Reproductive Choice Through a Maternal Ambivalence Lens*

For the purpose of mitigating the psychological cost of bringing a wrongful birth claim, this Article recommends reframing the harm as lost reproductive choice. Even well-known disability rights advocates who are critical of selective abortion support access to information and choice for women.<sup>314</sup> For example, Adrian Asch wrote, “If parents can make their choices about selective abortion after information that helps them to imagine a worthwhile life for child and family, I support parents in the decisions they make.”<sup>315</sup> While plaintiff-mothers might still be blamed and shamed publicly for pursuing the right to choose, such discourse is at a level of abstraction that would not seem to challenge the maternal role quite so bluntly as current wrongful birth standards.

A reframing of the harm would go hand in hand with assessing damages in terms of disrupted family plans, unexpected labor costs, and associated emotional distress. In assessing all of these damages, and particularly emotional distress, courts could further promote plaintiff-mothers’ well-being by inviting them to testify about their paradoxical parenting experiences.

Since this approach would not require plaintiffs to prove that they would have aborted their child if given the chance, it would have spared the Halls and parents like them the unnecessary heartache of having to so testify repeatedly.<sup>316</sup> Moreover, this approach would encourage parents like the Halls to testify authentically, both about their struggles with their child’s disability and their deep love for their child, which would alleviate anxieties about betraying their child without compromising their lawsuit.

Regardless of the wrongful birth paradigm used, invaluable to a plaintiff-mother’s well-being is an attorney attuned to her plight, educated about the typicality of maternal ambivalence, and able to adjust case theory in light of her client’s varied concerns.

#### CONCLUSION

Given the limitations of the American health-care system, a political climate characterized by efforts to reduce access to health care, and the expense of raising a child with special medical needs, the wrongful birth claim remains an important means of securing resources for mothers who have a child with a disability following inadequate prenatal care. The problem is that the prevailing wrongful birth jurisprudence has significant negative externalities. By situating the child as the mother’s harm, wrongful

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314. Hensel, *supra* note 13, at 165; *see* Asch, *supra* note 234, at 253–54.

315. Asch, *supra* note 234, at 254.

316. *See supra* Part II.B.2.a.

birth litigation exposes plaintiff-mothers to public criticism for allegedly disavowing their children and falling markedly short of the “good mother” ideal. Mothers likely suffer a significant psychological cost as a result of pursuing wrongful birth claims.

In mitigation of these externalities, courts, juries, attorneys, media, scholars, and even plaintiff-mothers themselves must be educated about the universality of maternal ambivalence so that they can understand that a wish for the chance to abort a fetus with a genetic anomaly does not negate a mother’s love for her existing child. Moreover, reframing “wrongful birth” as “deprivation of reproductive choice” could shift the spotlight from flawed children and bad mothers to negligent medical providers who deny mothers their constitutional right to reproductive choice. In reducing mothers’ guilt and shame, these reforms would presumably enable them to fulfill their caretaking role more effectively.