

# WHEN A WRONGFUL BIRTH CLAIM MAY NOT BE WRONG: RACE, INEQUALITY, AND THE COST OF BLACKNESS

Kimani Paul-Emile\*

## INTRODUCTION

The year 2017 marked the fiftieth anniversary of the *Loving v. Virginia*<sup>1</sup> decision, in which a unanimous U.S. Supreme Court struck down as unconstitutional laws prohibiting interracial marriage. Today, when we consider interracial loving, we tend to envision romantic relationships. What is often overlooked, however, is the relationship between parent and child: among the most intimate of relationships. A primary reason for this oversight may be that we do not often conceptualize the parent and child relationship as an interracial space. Indeed, although most people select their romantic partners, few are afforded the opportunity to select their children outside of the contexts of adoption and assisted reproductive technology (ART). While there has been debate over the years about transracial adoptions,<sup>2</sup> there has been little controversy surrounding race selection in ART. This may be due to the fact that within the ART sphere, race, particularly the presumption of race concordance between parents and their children, is seen as neutral and natural: a biological imperative.<sup>3</sup> This assumption and the race selection that

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\* Associate Professor of Law, Fordham University School of Law, Associate Director and Head of Domestic Programs and Initiatives at Fordham Law School's Center on Race, Law and Justice. This Essay was prepared for the *Fordham Law Review* Symposium entitled *Fifty Years of Loving v. Virginia and the Continued Pursuit of Racial Equality* held at Fordham University School of Law on November 2–3, 2017. For an overview of the Symposium, see R.A. Lenhardt, Tanya K. Hernández & Kimani Paul-Emile, *Foreword: Fifty Years of Loving v. Virginia and the Continued Pursuit of Racial Equality*, 86 FORDHAM L. REV. 2625 (2018).

1. 388 U.S. 1 (1967).

2. Compare Elizabeth Bartholet, Opinion, *In Adoptions, Take Race out of the Equation*, N.Y. TIMES (Feb. 3, 2014, 12:30 PM), <https://www.nytimes.com/roomfordebate/2014/02/02/in-adoption-does-race-matter/in-adoptions-take-race-out-of-the-equation> [http://perma.cc/S6YH-VKDL] (“There is no evidence that transracial adoption hurts children . . .”), with Kevin Noble Maillard, Opinion, *In Adoption, Race Should Not Be Ignored*, N.Y. TIMES (June 10, 2014, 1:59 PM), <https://www.nytimes.com/roomfordebate/2014/02/02/in-adoption-does-race-matter/in-adoption-race-should-not-be-ignored> [http://perma.cc/SR55-W4TA] (promoting a view that the success of a transracial adoption is wholly dependent on a family's individual circumstances), and Twila L. Perry, Opinion, *In Adoption, Some Racial Biases Aren't Examined*, N.Y. TIMES (Feb. 3, 2014, 10:46 AM), <https://www.nytimes.com/roomfordebate/2014/02/02/in-adoption-does-race-matter/in-adoption-some-racial-biases-arent-examined> [http://perma.cc/FS4Q-HQ7U] (arguing that race matching should be considered in adoptions).

3. See Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 591–92 (2013).

occurs in ART are rarely questioned or interrogated.<sup>4</sup> This Essay disrupts these assumptions by using a recent case, *Cramblett v. Midwest Sperm Bank, LLC*,<sup>5</sup> as a point of departure for examining the meaning and operation of race in the United States.

### I. CRAMBLETT V. MIDWEST SPERM BANK

In September 2014, Jennifer Cramblett filed wrongful birth and breach of warranty lawsuits in federal and state courts, alleging that the Chicago-area fertility clinic (“Midwest”) where her daughter was conceived supplied her with the wrong sperm.<sup>6</sup> After requesting vial 380—the specimen of a white, blue-eyed, blond-haired donor—Cramblett underwent artificial insemination.<sup>7</sup> The clinic instead accidentally gave her vial 330, which contained the semen of a black man.<sup>8</sup> On August 12, 2012, Cramblett gave birth to Payton, “a beautiful, obviously mixed race, baby girl.”<sup>9</sup> Although Cramblett and her partner, Amanda Zinkon, assert that they bonded “easily” with Payton and profess to “love” their child, the couple sued Midwest seeking \$50,000 for “personal injuries, medical expense, pain, suffering, emotional distress, and other economic and non-economic losses” caused by Midwest’s error.<sup>10</sup>

This is not the first time that a client has sued a fertility clinic for inadvertently providing the wrong sperm resulting in a mixed-raced child.<sup>11</sup> What makes this case unique is the approach taken by Jennifer Cramblett in her wrongful birth claim asserted against the fertility clinic.<sup>12</sup> The wrongful birth cause of action is a controversial tort claim that is typically reserved for

4. *But see, e.g.*, DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* 269–72 (1997); PATRICIA J. WILLIAMS, *THE ROOSTER’S EGG* 240–43 (1995); Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 64 (2003); Dorothy E. Roberts, *Race, Gender, and Genetic Technologies: A New Reproductive Dystopia?*, 34 SIGNS 783, 798 (2009).

5. 230 F. Supp. 3d 865 (N.D. Ill. 2017).

6. *See id.* at 867. *See generally* Complaint for Wrongful Birth and Breach of Warranty, *Cramblett v. Midwest Sperm Bank, LLC*, No. 2014-L-010159 (Ill. Cir. Ct. Sept. 3, 2015), 2014 WL 4853400.

7. Mayra Cuevas, *Ohio Woman Sues Sperm Bank After Racial Mix-Up*, CNN (Oct. 2, 2014, 3:25 PM), <http://www.cnn.com/2014/10/02/us/sperm-bank-race-lawsuit/index.html> [<http://perma.cc/326X-UAFB>].

8. Complaint for Wrongful Birth and Breach of Warranty, *supra* note 6, at 4–6.

9. *Id.* at 6.

10. *Id.* at 6–8. The federal case has been stayed while Cramblett’s state court appeal proceeds. *Cramblett*, 230 F. Supp. 3d at 874.

11. *See generally* Dov Fox, Essay, *Reproductive Negligence*, 117 COLUM. L. REV. 149 (2017) (discussing errors in the in vitro fertilization process).

12. Cramblett raised a wrongful birth claim in her initial complaint in state court. Complaint for Wrongful Birth and Breach of Warranty, *supra* note 6, at 7–8. She later amended this complaint to remove the wrongful birth allegation and did not raise the claim in her federal court complaint. *See Cramblett*, 230 F. Supp. 3d at 868; *see also* Plaintiff’s Complaint for Consumer Fraud, Common Law Fraud, Willful and Wanton Misconduct, Common Law Negligence, Breach of Contract and Breach of Warranty, *Cramblett*, 230 F. Supp. 3d 865, ECF No. 1.

the parents of children born with congenital or genetic disabilities.<sup>13</sup> The plaintiffs in wrongful birth actions allege that a physician or other health-care worker misdiagnosed or failed to detect or inform them of a fetus's genetic abnormality or the increased risk of the condition manifesting.<sup>14</sup> Successful plaintiffs may be awarded financial compensation to cover the cost of caring for the child, including tuition for special schools and remuneration for the emotional impact, mental stress, medical expenses, and other costs associated with bearing and raising a child who is understood as having a disability.<sup>15</sup>

To raise a wrongful birth claim, a plaintiff must articulate clearly the expenses imposed by the disabling condition. In her complaint, Cramblett maintains that due to Midwest's error and the resulting birth of her biracial child, she must now assume many costs, including the expense of moving from her "racially intolerant," "all-white environment" to a more racially mixed area.<sup>16</sup> Indeed, according to the complaint, "all of Jennifer's therapists and experts agree that for her psychological and parental well-being, she must relocate to a racially diverse community with good schools."<sup>17</sup> Thus, despite having "moved to Uniontown from racially diverse Akron because the schools were better and to be closer to family,"<sup>18</sup> Cramblett must now assume the financial burden of finding a new home for her family and a new school for Payton so as to protect her daughter's and her own emotional and psychological well-being.<sup>19</sup>

In addition to these expenses, Cramblett asserts that to get Payton's hair cut, she "must travel to a black neighborhood, far from where she lives, where she is obviously different in appearance, and not overtly welcome."<sup>20</sup>

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13. Wendy Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L.L. REV. 141, 152 (2005).

14. This is in contrast to wrongful death, wrongful conception, and wrongful life causes of action. While not every jurisdiction recognizes each of these torts as distinct harms, they are technically separate. Wrongful death actions seek to determine the value of a lost life, while wrongful conception actions are brought by parents seeking to recoup the costs attendant to raising a healthy but unintended child born as a result of a negligently performed sterilization procedure. See Stephen Todd, *Wrongful Conception, Wrongful Birth and Wrongful Life*, 27 SYDNEY L. REV. 525, 526 (2005); Kevin Buchanan, Note, *Immunity from Wrongful Death Liability: How Mickels Fails to Compensate*, 82 MO. L. REV. 843, 843 (2017). Moreover, wrongful life actions are brought by children born with disabling conditions, who claim that they would not have been born had the defendant health-care workers informed their parents of their risk of disability prior to birth. See Todd, *supra*, at 526, 537–38.

15. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 158 (4th ed. 2010); DAN DOBBS, THE LAW OF TORTS 794 (2000); see also *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 707–08 (Ill. 1987) (holding that parents' recovery should be limited to the extraordinary expenses—medical, hospital, institutional, educational, and otherwise—that are necessary to properly manage and treat the congenital or genetic disorder until the age of majority). In Illinois, where Cramblett filed her lawsuit, her recovery could include "extraordinary economic costs of caring for a child's medical conditions or needs during the child's minority." Alberto Bernabe, *Do Black Lives Matter?: Race as a Measure of Injury in Tort Law*, 18 SCHOLAR 41, 54 (2016).

16. Complaint for Wrongful Birth and Breach of Warranty, *supra* note 6, at 6–7.

17. *Id.* at 7.

18. *Id.*

19. *Id.*

20. *Id.* at 6.

Cramblett also contends that she was raised in a “racially intolerant” area, “around stereotypical attitudes about people other than those in her all-white environment.”<sup>21</sup> One of her uncles, for example, “speaks openly and derisively about persons of color,” and Cramblett struggles with the fact that her family does not accept that she is a lesbian.<sup>22</sup> Cramblett felt “compelled to repress” her homosexuality around her relatives,<sup>23</sup> but observes that “Payton’s differences,” including her “hair typical of an African American girl” and the other indicia of her blackness,<sup>24</sup> “are irrepressible.”<sup>25</sup> Cramblett, worried about how her mixed-race daughter will be treated by her family and the broader society, now “lives each day with fears, anxieties and uncertainty.”<sup>26</sup>

Many commentators were troubled by Cramblett’s decision to raise a wrongful birth claim in her lawsuit.<sup>27</sup> To be sure, Cramblett’s efforts to obtain damages for emotional pain and suffering and her professed feelings of “anger, disappointment and fear” upon learning that she would give birth to a mixed-race baby are disturbing, notwithstanding her declared love for her child.<sup>28</sup> Much of the criticism leveled against Cramblett has also been based on the way her wrongful birth claim conflates blackness with disability.<sup>29</sup> Those who raise this critique are justified in doing so, however, they fail to engage the ways in which blackness can be disabling in the United States. Indeed, if we look to the purpose of the wrongful birth cause of action then we see how the claim, despite its unfortunate name, offers insight into the operation of blackness in this country. Wrongful birth is an amalgam of tort and disability law designed to identify and allocate costs. As such, the claim sheds light on the way blackness as a stigmatized status can function as a disabling condition that imposes costs on black people—costs that white people do not bear.

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21. *Id.*

22. *Id.* at 6–7.

23. *Id.*

24. *Id.* at 6.

25. *Id.* at 7.

26. *Id.* at 6.

27. See, e.g., Jeff Jacoby, Opinion, *Wrong Sperm, Right Baby: So Why Sue?*, BOS. GLOBE (Oct. 9, 2014), <https://www.bostonglobe.com/opinion/2014/10/08/the-baby-was-wrong-color-but-that-reason-for-lawsuit/ZCxZswYITdM0mSEz1TkSbP/story.html> [http://perma.cc/AYG4-V49P]; Lonnae O’Neal, *Lonnae O’Neal: A Few Words About Suit for ‘Wrongful Birth’ of a Biracial Child*, WASH. POST (Sept. 10, 2015), [https://www.washingtonpost.com/2015/09/09/f9be4564-5705-11e5-8bb1-b488d231bba2\\_story.html](https://www.washingtonpost.com/2015/09/09/f9be4564-5705-11e5-8bb1-b488d231bba2_story.html) [http://perma.cc/Y3BR-AZK7]; see also Bernabe, *supra* note 15,

at 45; R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071, 2078–79 (2017). See generally Suzanne Lenon & Danielle Peers, *‘Wrongful’ Inheritance: Race, Disability and Sexuality in Cramblett v. Midwest Sperm Bank*, 25 FEMINIST LEGAL STUD. 141 (2017).

28. Complaint for Wrongful Birth and Breach of Warranty, *supra* note 6, at 5. Such sentiments are equally disturbing when raised in a traditional wrongful birth action.

29. See, e.g., Alberto Bernabe, *Final Thoughts on the Sperm Bank Case*, TORTS BLOG (Oct. 14, 2014), <http://bernabetorts.blogspot.com/2014/10/final-thoughts-on-sperm-bank-case.html> [https://perma.cc/DV3M-L3AK] (“I, myself, am the father of two ethnically mixed children and find it difficult to hear someone say that my children’s ethnicity should be considered to be the equivalent of a disability or birth defect . . .”).

## II. AN ACCOUNT OF BLACKNESS AS DISABILITY

In a recent article, I demonstrate the ways in which the stigma associated with blackness in the United States can work to disable black people.<sup>30</sup> I use the term “blackness” to refer to the specific combinations of particular physical, cultural, and linguistic features that Americans have been socialized to recognize and correlate with people racially designated in the United States as black. Blackness, of course, is not by itself an impairment. However, black as a racial classification was designed to be disabling.<sup>31</sup> Racial categories were created explicitly to serve as a caste system to privilege some and disadvantage others.<sup>32</sup> Within this system, racial minority status was devised to limit opportunity, participation, and achievement, and it continues to do so in many areas of social and economic life. This is particularly true for black people, whose racial status is disabling in myriad specific ways. To be black means to face increased likelihood, relative to whites, of living in poverty,<sup>33</sup> experiencing discrimination in housing,<sup>34</sup> being stopped by the police,<sup>35</sup> attending failing schools,<sup>36</sup> being killed during a routine police encounter,<sup>37</sup> being denied a job interview,<sup>38</sup> receiving inferior medical care,<sup>39</sup> living in substandard conditions and in dangerous and polluted environments,<sup>40</sup> being un- or under-employed,<sup>41</sup> receiving longer prison

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30. See generally Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293 (2018).

31. See generally *id.*

32. *Id.* at 331–38.

33. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014, at 51–53 (2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf> [<https://perma.cc/E9RC-6NNA>].

34. ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 222 (1st ed. 2006) (noting that, in the year 2000, “about half of all Black and Hispanic home seekers experience[d] discrimination in the housing market”).

35. See Paul-Emile, *supra* note 30, at 340–44.

36. See generally Sean F. Reardon et al., *The Geography of Racial/Ethnic Test Score Gaps* (Ctr. for Educ. Policy Analysis, Working Paper No. 16-10, 2016), <http://cepa.stanford.edu/sites/default/files/wp16-10-v201604.pdf> [<https://perma.cc/233J-U82K>] (examining racial and ethnic differences as the strongest links to academic achievement gaps among children).

37. See Paul-Emile, *supra* note 30, at 340–44.

38. S. Michael Gaddis, *Discrimination in the Credential Society: An Audit Study of Race and College Selectivity in the Labor Market*, 93 SOC. FORCES 1451, 1465 (2015); Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 777 (2009); see also Patricia Cohen, *For Recent Black College Graduates, a Tougher Road to Employment*, N.Y. TIMES (Dec. 24, 2014), <https://www.nytimes.com/2014/12/25/business/for-recent-black-college-graduates-a-tougher-road-to-employment.html> [<https://perma.cc/32A8-CQRT>] (examining the challenges that recent black college graduates face in seeking employment compared to their white counterparts).

39. See Christine Bahls, Health Policy Brief, *Achieving Equity in Health*, HEALTHAFFAIRS, Oct. 6, 2011, at 1, 2.

40. See David E. Jacobs, *Environmental Health Disparities in Housing*, 101 AM. J. PUB. HEALTH S115, S116 (2011) (“AHS data indicated that 7.5% of non-Hispanic Blacks reside in moderately substandard housing, compared with 2.8% of non-Hispanic Whites . . .”).

41. See Valerie Wilson, *Black Unemployment Is Significantly Higher than White Unemployment Regardless of Educational Attainment*, ECON. POL’Y INST. (Dec. 17, 2015), <http://www.epi.org/publication/black-unemployment-educational-attainment/> [<https://perma.cc/6CJV-DKU6>] (“Over the last 12 months, the average unemployment rate for

sentences,<sup>42</sup> and having a lower life expectancy.<sup>43</sup> These increased risks are not fully explained by income: the stigma associated with being labeled black in the United States has an independent disabling effect distinct from the effects of socioeconomic status.<sup>44</sup>

The doctrinal framework and normative commitments of disability law, notably the Americans with Disabilities Act, offers an analytical lens for examining race and a practical means for addressing discrimination and structural inequality.<sup>45</sup> This analysis is possible because disability law recognizes that disability does not necessarily stem from a medical condition but rather can result from a trait that creates disability when combined with an inhospitable social and physical environment.<sup>46</sup> This paradigm-shifting “social model” of disability, which is central to disability law, recognizes that society is not neutral and that biases are built into its very structures, norms, and practices, which can then produce disability. Thus, some conditions that we consider disabling are not inherent impairments but are instead just attributes that, when coupled with an unwelcoming social setting, can produce disadvantage.<sup>47</sup>

A disability-based model, with its embrace of this social understanding of disability, better captures the operation of blackness and more effectively advances efforts to achieve racial equality than equal protection jurisprudence and race-based antidiscrimination laws, such as the Civil Rights Act of 1964.<sup>48</sup> Traditional race jurisprudence, for example, typically requires plaintiffs to prove that the defendant acted with malicious intent.<sup>49</sup> It also mandates that remedies be colorblind, which means that government cannot take account of race even to make up for past, state-sanctioned, race discrimination.<sup>50</sup> Disability law, in contrast, does not require a showing of intent, is disability conscious, and more constructively speaks in the language of reasonable modification and balancing remedial justice against social and

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black college graduates has been 4.1 percent—nearly two times the average unemployment rate for white college graduates (2.4 percent) . . .”).

42. See, e.g., U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 108 (2012) (finding that prison sentences of black men were nearly 20 percent longer than those of white men for similar crimes between 2007 and 2011).

43. Paul-Emile, *supra* note 30, at 346–48.

44. *Id.* at 344–46.

45. See generally *id.*

46. *Id.* at 298; see also Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 430 (2000) (noting that when disability is understood as “arising primarily from the human environment, rather than from anything inherent in an individual’s physical or mental condition, it ‘becomes a problem of social choice and meaning, a problem for which all onlookers are responsible’” (quoting MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 119 (1990))).

47. *Id.* at 428–31.

48. See generally Paul-Emile, *supra* note 30.

49. *Id.* at 296. Even the disparate impact cause of action, although more expansive, does not effectively combat modern race discrimination, such as implicit bias and stereotyping. *Id.* at 324.

50. *Id.*

economic cost.<sup>51</sup> Thus, this legal framework allows for serious engagement with the reality of structural inequality, presents new possibilities for social reform foreclosed by current race jurisprudence, and suggests a meaningful legal path to advancing racial equality.

### III. WHAT WRONGFUL BIRTH CAN TELL US ABOUT THE COST OF BLACKNESS

The wrongful birth claim, more so than race or disability antidiscrimination laws, surfaces the many ways in which being black in the United States can be disabling by making explicit the costs imposed by blackness. Although Payton is mixed race, it is her blackness that Cramblett finds most troubling. Cramblett's complaint makes clear that she is quite conscious of the costs attendant to Payton's blackness, which result from racial discrimination and structural inequality. For example, the "all white community" from which Cramblett and her family must now flee<sup>52</sup> is likely a result of structural discrimination—such as racial steering by realtors,<sup>53</sup> discrimination in home financing,<sup>54</sup> and the consequences of past<sup>55</sup> and ongoing<sup>56</sup> "redlining" practices that discriminate against black customers seeking to live in specific neighborhoods.<sup>57</sup>

Cramblett must also deal with the devastating effects of these structural impediments to residential integration, including the creation and

51. *Id.* at 297.

52. Complaint for Wrongful Birth and Breach of Warranty, *supra* note 6, at 6.

53. Carefully controlled audit studies show that when sent by the Department of Housing and Urban Development to visit homes for rent or sale, blacks were shown fewer properties than whites. U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012 xvii (2013). Realtors often refused "to show properties to black customers who were better qualified than whites, with higher incomes, better credit scores and more savings for down payments." Editorial, *How Segregation Destroys Black Wealth*, N.Y. TIMES (Sept. 15, 2015), <https://www.nytimes.com/2015/09/15/opinion/how-segregation-destroys-black-wealth.html> [<https://perma.cc/AH5F-6PKA>].

54. Blacks were "denied information about special incentives that would have made the purchase easier, and were required to produce loan pre-approval letters and other documents when whites were not." Editorial, *supra* note 53.

55. See MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 103–13 (2017). Between 1934 and 1962, of the \$120 billion in taxpayer funds used by the federal government to underwrite new houses, less than 2 percent went to nonwhites. See Ann G. Winfield, *Instituting a Hierarchy of Human Worth: Eugenic Ideology and the Anatomy of Who Gets What* 33 (Jan. 1, 2010) (on file with the Roger Williams University Libraries).

56. See Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau and Department of Justice Action Requires Bancorpsouth to Pay \$10.6 Million to Address Discriminatory Mortgage Lending Practices (June 29, 2016), <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-and-department-justice-action-requires-bancorpsouth-pay-106-million-address-discriminatory-mortgage-lending-practices/> [<https://perma.cc/9JNS-LUN9>]; see also George White, *Governments Cracking Down on Fraudulent Mortgage Practices*, NEW AM. MEDIA (Sept. 16, 2015), <http://newamericamedia.org/2015/09/governments-cracking-down-on-fraudulent-mortgage-practices.php> [<https://perma.cc/87R7-8HPW>] (describing the large settlements reached by banks and real estate companies for redlining practices and fraudulent activity against black customers who seek to live in specific neighborhoods).

57. See BARADARAN, *supra* note 55, at 107–09.

maintenance of racially segregated schools. Cramblett maintains that her “stress and anxiety intensify when she envisions Payton entering an all-white school” as she avers to be “well aware of the child psychology research and literature correlating intolerance and racism with reduced academic and psychological well-being of biracial children.”<sup>58</sup> Cramblett has good reason to be concerned. Data has long shown “that the experience of . . . race discrimination [and structural inequality] can cause race-related stress, which negatively impacts health, including the onset, progression, and severity of illness or disease.”<sup>59</sup>

The schools most likely to be attended by black children also tend to be racially segregated.<sup>60</sup> Cramblett’s stated aim of sending Payton to an integrated school, however, may be difficult to achieve as meaningfully integrated schools are few and far between,<sup>61</sup> despite data demonstrating that “diverse classrooms reduce racial bias and promote complex reasoning, problem solving, and creativity for all students.”<sup>62</sup>

Cramblett’s professed “biggest fear[] is the life experiences Payton will undergo.”<sup>63</sup> She is correct to worry about her daughter, who will not enjoy the privileges of whiteness that Cramblett sued to affirm.<sup>64</sup> Life will certainly also be more challenging for Jennifer Cramblett, who will have to contend with the bigotry and discrimination that Payton will undoubtedly face. Black parents talk openly about their fears, anxieties, and concerns about the challenges their children will experience growing up in America, including how their children will negotiate possible interactions with law enforcement and whether they will be judged by “the content of their character rather than

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58. Complaint for Wrongful Birth and Breach of Warranty, *supra* note 6, at 7.

59. Paul-Emile, *supra* note 30, at 347 & n.351 (collecting sources). In this article, I examine the health consequences of racism on minority populations, especially women of color. *Id.* at 347–48.

60. *Id.* at 352 (citing GARY ORFIELD ET AL., THE CIVIL RIGHTS PROJECT, UCLA, *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE* 18 (2014), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf> [<https://perma.cc/8UVX-J92A>]). For a more detailed discussion of racial disparities in school districts, see *id.* at 352–53.

61. Janie Boschma, *Separate and Still Unequal*, ATLANTIC (Mar. 1, 2016), <https://www.theatlantic.com/education/archive/2016/03/separate-still-unequal/471720/> [<https://perma.cc/A4JU-CRPB>] (“In all but five of the 95 largest cities by population for which data is available, more minority than white students attend public schools where most of their classmates qualify as poor or low-income . . .”).

62. Paul-Emile, *supra* note 30, at 352 (quoting Halley Potter & Kimberly Quick, Opinion, *The Secret to School Integration*, N.Y. TIMES (Feb. 23, 2016), <http://www.nytimes.com/2016/02/23/opinion/the-secret-to-school-integration.html> [<https://perma.cc/GV2Z-XH79>]).

63. Complaint for Wrongful Birth and Breach of Warranty, *supra* note 6, at 6.

64. For background information on white privilege, see Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, WELLESLEY CTRS. FOR WOMEN (1989), <https://nationalseedproject.org/white-privilegeunpacking-the-invisible-knapsack> [<https://perma.cc/2D7G-LB4G>]; see also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715–21 (1993).

the color of their skin”<sup>65</sup> in virtually every aspect of social and economic life. The price of bias and discrimination that Cramblett sought to recoup is an everyday reality for black people, who must absorb these costs. For black parents, these costs are privatized and normalized, which renders them invisible. This makes black people’s inferior socioeconomic status appear attributable to their private choices or aptitude rather than a consequence of broader social structural forces and a residual effect of the United States’ legacy of state-sanctioned, race-based discrimination. This harms black people by not only naturalizing their stigmatized social status but also by shifting responsibility for that status onto black individuals themselves and away from society at large.

While there are many reasons why parents seek to create racially concordant families through ART,<sup>66</sup> when we consider what might be motivating white parents, it is difficult to imagine that they are unaware of the cost of blackness. ART consumers, like most Americans, care about race,<sup>67</sup> which they typically rank first or second in importance when selecting a donor, eclipsed only sometimes by intelligence.<sup>68</sup> The gamete market upon which ART relies is stratified by race with white sperm<sup>69</sup> and eggs valued more highly than the gametes of other groups.<sup>70</sup> For example, the eggs of a white, blond, highly educated donor can command as much as \$100,000.<sup>71</sup>

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65. Martin Luther King, Jr., “I Have a Dream . . .,” Address to the March on Washington (Aug. 28, 1963), in NAT’L ARCHIVES (1963), <https://www.archives.gov/files/press/exhibits/dream-speech.pdf> [<https://perma.cc/FTS6-RGPF>].

66. Camille Gear Rich, Contracting Our Way to Inequality: Race, Reproductive Freedom and the Quest for the Perfect Child 5 (unpublished manuscript) (on file with author) (observing that parents may want to “have genetic children that look like [them]”; “hide[] the fact of the ART procedure”; and “forestall[] questions about family integrity”).

67. Some donors rank race as the most important trait that they must select. Hawley Fogg-Davis, *Navigating Race in the Market for Human Gametes*, HASTINGS CTR. REP., Sept–Oct. 2001, at 13, 15.

68. Rich, *supra* note 66, at 11 n.48 (observing that “it is typically one of the introductory informational items requested on a donor form,” that “[o]ther forms request that donors identify the ‘ethnicities’ in their families,” and that “[t]he sperm or egg bank then sorts them into racial categories as it defines those categories” (citing Fogg-Davis, *supra* note 67, at 13, 17)).

69. Martha M. Ertman, *What’s Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 27 (2003) (attributing to consumer demand a sperm bank’s decision to maintain a sperm reserve that was nearly 70 percent white).

70. Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks and the Medical Market in Genetic Material*, 72 AM. SOC. REV. 319, 336–37 (2007) (describing race’s effect on pricing).

71. See, e.g., Sharyn Alfonsi, *Inside Egg Donation: More Money For Blondes?*, ABC NEWS (May 11, 2010), <http://abcnews.go.com/WN/egg-donation-agencies-paid-money-favored-attributes/story?id=10614326> [<https://perma.cc/HC3K-M5AA>]; Marilee Enge, *Ad Seeks Donor Eggs for \$100,000, Possible New High*, CHI. TRIB. (Feb. 10, 2000), [http://articles.chicagotribune.com/2000-02-10/news/0002100320\\_1\\_egg-donor-program-infertile-ads](http://articles.chicagotribune.com/2000-02-10/news/0002100320_1_egg-donor-program-infertile-ads) [<http://perma.cc/R5F8-YCE5>]; Clara Moskowitz, *Egg Donors Offered up to \$50,000: Fees Far Exceed Recommended Guidelines, Study Finds*, NBC NEWS (Mar. 26, 2010, 9:26 PM), [http://www.nbcnews.com/id/36057566/ns/health-womens\\_health/t/egg-donors-offered/](http://www.nbcnews.com/id/36057566/ns/health-womens_health/t/egg-donors-offered/) [<https://perma.cc/4JQL-KLJS>]; Clara Moskowitz, *Exorbitant Fees Offered to Human Egg Donors, Study Finds*, LIVE SCI. (Mar. 26, 2010, 6:58 AM), <https://www.livescience.com/8171-exorbitant-fees-offered-human-egg-donors-study-finds.html> [<http://perma.cc/89GP-LSRB>].

Moreover, there are significantly fewer nonwhite gametes available.<sup>72</sup> While these market realities may influence the choices of white, prospective parents, they may also simply reflect these parents' preexisting conceptions of the value of blackness.<sup>73</sup> White parents may intuitively understand that race matters, and they may therefore make particular choices about racially concordant families because they realize that there is a privilege that accompanies whiteness and a cost that attends to blackness.

My goal, despite the title of this Essay, is not to endorse Cramblett's decision to raise the wrongful birth claim. Rather, I seek to show how the claim offers an often unarticulated way of thinking about the operation of blackness in society. The wrongful birth claim made explicit the ways in which what we may think about as private choices are shaped by structural forces that work to disable certain populations. In so doing, the claim allows us to acknowledge, and perhaps address, the social causes and consequences of racial inequality.

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72. See Rich, *supra* note 66, at 14–15 (noting that “while only 60% of America racially identifies as white, 80% of sperm and eggs available in the United States come from ‘white’ donors”); see also Ertman, *supra* note 69, at 27–28 (evaluating a sperm bank and finding that only 4 percent of its sperm reserves were from black donors); Arlett R. Hartie, *Where's the Black Sperm?*, YOUTUBE (Apr. 9, 2015), [https://www.youtube.com/watch?time\\_continue=31&v=DSCUX6srY\\_w](https://www.youtube.com/watch?time_continue=31&v=DSCUX6srY_w) [<https://perma.cc/RUY8-EWXF>] (discussing difficulties replicating her phenotype due to small number of black samples); Sohmakun, *Has Anyone Ever Used a Donor of a Different Race?*, MOTHERING.COM (Jan. 18, 2009, 7:38 PM), <http://www.mothering.com/forum/438-multicultural-families/1032432-has-anyone-ever-used-donor-different-race.html> [<http://perma.cc/Z47V-Y47Q>] (illustrating challenges posed by the fact that the site maintained just one or two black samples); Brittney Thornburley, *Aspiring Queer Mom Seeks Black Sperm Donor, Can't Find Too Many*, AUTOSTRADDLE (Apr. 20, 2017, 11:00 AM), <https://www.autostraddle.com/aspiring-queer-mom-seeks-black-sperm-donor-cant-find-too-many-375953/> [<http://perma.cc/N97Q-592Z>].

73. See Rich, *supra* note 66, at 15 (observing that “[c]linics justify these racially-tilted stocking decisions based on customer demand”).