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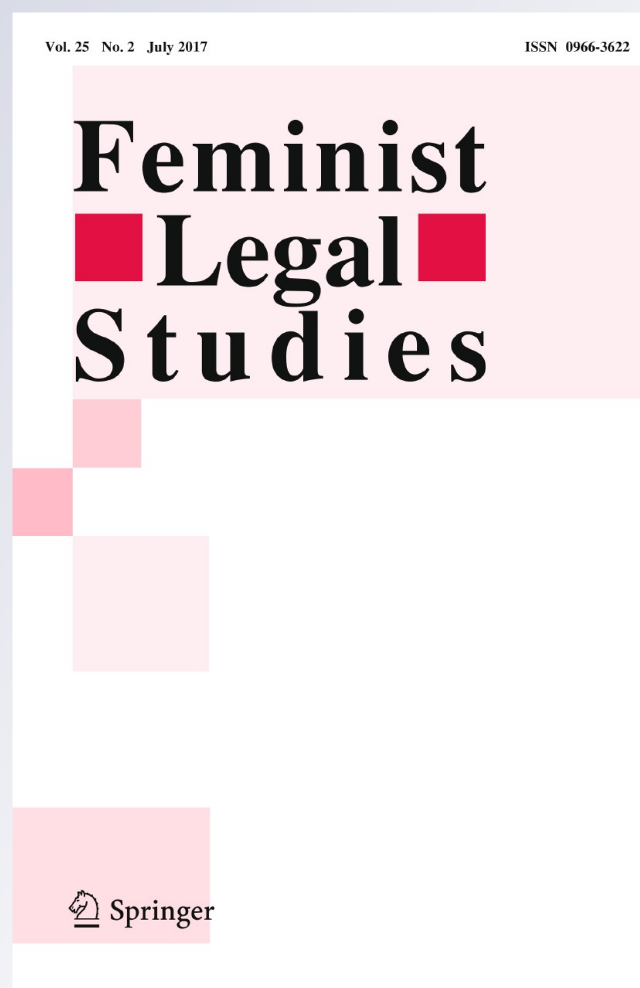

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'Wrongful' Inheritance: Race, Disability and Sexuality in *Cramblett v. Midwest Sperm Bank*

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Abstract In 2014 Jennifer Cramblett, a white lesbian, filed a Complaint for Wrongful Birth alleging that the Midwest Sperm Bank mistakenly provided sperm from an African–American donor. In this article, we trace the complex and overlapping lines of legal and social inheritance that have conditioned not only the possibility of such a lawsuit, but also the legal language and arguments within the Complaint itself. First, we trace the racial politics of homonormativity, which set the conditions of possibility for an out, white lesbian to bring this case forward. Second, we trace the inheritance of wrongful birth tort law, reviewing its prior race and disability-related uses, and its basis in feminist reproductive rights. Third, we trace how disability, race and sexuality interlock within the eugenic inheritance of both 'wrongful birth' and reproductive technologies. Finally, we follow traces of racial inheritance, namely, the loss of white property and proximity to whiteness.

Keywords Wrongful birth · Race · Whiteness · Homonationalism · Eugenics · Inheritance

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Introduction

In 2014 Jennifer Cramblett, a white lesbian living in Uniontown Ohio, filed a Complaint for Wrongful Birth and Breach of Warranty against the Midwest Sperm Bank (MSB).[1] The Complaint alleges that the defendant mistakenly gave her vials of sperm from an African–American donor even though she and her partner desired sperm of a white donor, "a donor with genetic traits similar to both of them."[2] Jennifer Cramblett was four to five months pregnant when she was informed about the mistake. She chose to take the pregnancy to term, giving birth to Payton in August 2012, "a beautiful, obviously mixed race, baby girl."[3] She was thus asking the court to recognise a claim to compensate her for emotional distress for having to care for a child who is racially different than the child she and her partner desired. The wrongful birth Complaint in *Cramblett* argues that the child's existence has caused "personal injuries, medical expenses, pain, suffering, emotional distress, and other economic and non-economic losses."[4] Heard in an Illinois Circuit Court, the judge ultimately dismissed the lawsuit in September 2015, stating that the plaintiff could file her claim again as a negligence claim (Bernabe 2016). According to newspaper reports, the attorney for MSB argued that Jennifer Cramblett's claim of wrongful birth "could not be legally sustained in a case where a healthy child was born," given that wrongful birth case law largely revolves around the birth of a child deemed to have a significant impairment (Associated Press 2015). The judge agreed and also dismissed the breach of warranty claim.

Not surprisingly, this lawsuit garnered widespread media attention and political commentary (Bernabe 2014; Davidson 2014; Jacoby 2014; Williams 2014; O'Neil 2015). Moreover, while *Cramblett* temporally precedes the political moment of #blacklivesmatter, we would contend that this movement has helped to condition the notoriety of the lawsuit. That a child's African–American heritage could be seen as a 'wrongful birth' is jarring, and runs counter to the #blacklivesmatter movement's positive affirmation of "Black folks' contributions to this society, our humanity, and our resilience in the face of deadly oppression" (#BlackLivesMatter 2016). Numerous popular responses to the Cramblett case have demonstrated surprise, dismay, or outrage over the notion that the race of a child could be legally put forward as a wrongful birth and cause of suffering (see, for example, Jacoby 2014; Polo 2014; O'Neil 2015). At the crux of this lawsuit, its dismissal, and the many popular discourses swirling around it, is the relationship between race and the tradition of wrongful birth lawsuits as they relate to disability. As Ki'tay Davidson (2014) insightfully writes, there appears to be very little corollary outrage by such writers about disabled[5] children being understood as an

[1] *Cramblett v. Midwest Sperm Bank*, LLC, No. 2014-L-010159 (Ill. Cir. Ct.), 2014 WL 4853400. Henceforth cited as *Cramblett*.

[2] *Ibid* at 3.

[3] *Ibid* at 6.

[4] *Ibid* at 7 and 8.

[5] We use a range of terms around disability in this article in order to represent the range of ways disability is framed by the scholars and lawyers being discussed. In our own discussions of disability, we

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inherent harm. We would take this observation further, arguing that part of the outrage over this case stems precisely from the idea that race could be understood as akin to disability. As law professor Alberto Bernabe (2014) writes "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."

Such reactions, we argue, demonstrate a need to think about this case as being deeply shaped by complex historical and contemporary relationships amongst race, disability and (homo)sexuality. Following in the long tradition of feminist scholarship that prioritises systems of power as interlocking and intersectional (Lorde 1984; Crenshaw 1991; Kafer 2013), we refuse the methodologically and politically flawed approach of theorising disability, race, and (homo)sexuality as discrete, separate and analogous effects of power. Such an approach flattens the complex and uneven materialisation/workings of systems of power, which "creates the conditions of our lives" (Combahee River Collective 1982, 13), and further effaces how such systems have been "historically codependent and mutually determinative" (McWhorter 2009, 14). Rather, our analysis of the Cramblett case will focus on the specific ways that homonormativity, ableism, and white supremacy intertwine in this wrongful birth lawsuit.

We acknowledge that there is a viable negligence claim to be made as MSB provided a customer with the wrong sperm; moreover, we do not wish to dismiss the emotional pain and grief experienced by the two women resulting from this mistake. Our analytic focus, however, is not on individual emotions, motivations or assessments of liability. Instead, we employ a methodology that pays attention to particular lines of inheritance that create the conditions of possibility for this case, and its particular discursive logics and affects. Inheritance is a useful concept for our analysis because it brings into focus the interconnected registers of the biological, the familial, and the social: ideas that are repeatedly evoked throughout this wrongful birth lawsuit. Sara Ahmed (2006, 125) theorises inheritance in terms of our "point of arrival" into the familial and social order. Inheritance, she writes, "can be understood as both bodily and historical; we inherit what we receive as the condition of our arrival into the world, as an arrival that leaves and makes an impression." In this paper, we map "points of arrival", that is, the lines of inheritance that make the Cramblett case culturally legible. These include the racialised sexual politics of homonormativity, through which gay rights-seekers lay claim to values at the heart of heteronormative privilege, including domesticity, privacy, and consumption (Duggan 2002; Franke 2004); the eugenic governance of disability and race, aimed at 'improving' certain human populations by encouraging the reproduction of some while curtailing that of others (Snyder and Mitchell 2006; McWhorter 2009); and further, we map how these lines of inheritance intersect, at

Footnote 5 continued
use the politicised terminology of disabled person, in lieu of the American legal terminology 'person with a disability,' in order to emphasise the political processes through which disability is categorised, produced, and governed.

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points, with biological notions of race and the related loss of whiteness as property (Harris 1993).

The 'passing' of social and familial history—the inheritances we receive and that produce a 'we' in the first place—is "a material way of organizing the world that shapes the materials out of which life is made as well as the very 'matter' of bodies" (Ahmed 2006, 125). The Cramblett case, quite literally, centres on "the materials out of which life is made" (i.e., the father's sperm); a child's "point of arrival" into a particular(ly white) familial and social order, and the personal consequences of the (presumed biologically founded) race inherited by the child from her sperm-donor father. We thus mobilise the complexity of inheritance in order to undermine the naturalised idea that both race and disability are simply biological categories passed along through sexual procreation. We trace instead how laws, technologies and discourses around sexuality deeply inform the political histories and materialisation of race, disability, and homosexuality in North America.

We begin this paper by examining the legal inheritance of recent 'gay rights' victories and their related racial politics of homonormativity, which set the conditions of possibility for an out, white lesbian to bring this case forward. Second, we trace the legal inheritance of wrongful birth tort law, reviewing its prior race-related uses, its most common usage around disability, and its basis in feminist reproductive rights. Third, we trace how disability and sexuality interlock within the eugenic inheritance of wrongful birth and the reproductive techniques around which this case revolves. Finally, we turn to an analysis of the lawsuit's discourse of 'loss' in order to "follow the traces"[6] of racial inheritance, most notably, the loss of white property.

Lines of Inheritance: Homonormativity as Point of Arrival

The dramatically shifting landscape of lesbian and gay 'inclusion' into mainstream cultural and market registers, together with their enfoldment into law as citizens deserving of equal rights rather than as sexual deviants on the 'outside' of the nation, deeply informs the possibility of this particular wrongful birth case. The parental, reproductive, sexual, and basic citizenship rights of gays and lesbians have, historically, been so legally constrained, contingent and precarious that a woman explicitly claiming herself a lesbian within a law suit filed against a clinic that had supported her reproductive rights is almost unthinkable a few decades earlier. This is not to efface the very real and ongoing physical, legal and representational violences faced by many—in particular, racialised, gender-queer, and disabled–LGBTQ people in the United States. Liberal inclusion and its political values of tolerance and the right to privacy often *extend* military and policing violences of the racialised liberal security state, a process Chandan Reddy has termed "freedom *with* violence" (emphasis ours; Reddy 2011, 10; see also Puar 2007; Haritaworn 2015). In this section, we argue that a homonormative politics is *Cramblett*'s legal and activist inheritance, one that has created the conditions of

[6] We would like to acknowledge Kara Granzow for this turn of phrase and methodology.

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possibility—the point of arrival—for a cis-gendered, middle class, mid-western, white lesbian in a stable, domestic partnership to launch a wrongful birth lawsuit of this kind.

The conventional teleology of 'gay rights' in Canada and the U.S. is often narrated as a slow but sure progress, away from criminalisation of sodomy to marriage equality and full citizenship rights for lesbians and gay men. This progress narrative re-writes histories of criminalisation and pathologisation into traditions of Western friendliness and sexual freedom. This powerful progress narrative is hard to deny. In 2003, for example, the U.S. Supreme Court decriminalised same-sex sexual conduct nationwide in its landmark case *Lawrence and Garner v. Texas*.[7] Favoring fundamental liberty interest arguments, and specifically the right to privacy and intimate sexual conduct beyond the reach of the state, this decision was "an about-face in the Supreme Court's interpretation of the Constitution's application to the lives and practices of gay men and lesbians" (Franke 2004, 1401). The Court unequivocally repudiated its prior jurisprudence[8] in its declaration that sodomy laws violate the U.S. Constitution, and specifically violated a right to liberty. Some states, however, were far ahead of this federal case. In 1972, Ohio, where Jennifer Cramblett and her partner live, was the eighth state to repeal its sodomy statute. Six months after the *Lawrence-Garner* decision, the Massachusetts Supreme Judicial Court found that the State's refusal to license same-sex marriage was unconstitutional, and in so doing, relied heavily upon *Lawrence-Garner*'s recognition that homosexuals are rights-bearing subjects. In the year prior to *Cramblett*, "Lines of inheritance: wrongful birth" section of the federal *Defense of Marriage Act* (DOMA) was overturned in *Windsor v. United States*,[9] rendering it illegal for the federal Government to reserve the terms 'spouse' and 'marriage' for heterosexual couples only. In June 2015, less than a year after *Cramblett,* the U.S. Supreme Court ruled in *Obergefell v. Hodges*[10] that the state of Ohio (along with Michigan, Kentucky and Tennessee) could not deny same-sex couples the right to marry, or refuse to recognise their marriages performed elsewhere, effectively legalising same-sex marriage in those States and nationwide. One year thereafter, single, joint and step-parent adoption becomes legal for same-sex spouses in Ohio; parents have a same-sex option on the child's birth certificate, but only if they are married (equalityohio.org). In short, *Cramblett* emerges at the tail end of decades of legal

[7] *Lawrence and Garner v. Texas*, 539 U.S. 558 (2003). For a detailed examination of the case, see Carpenter (2012). The defendants in this case were Tyron Garner, a younger black man, and John Geddes Lawrence, an older white man. We follow Jasbir Puar's usage of both defendants' last names instead of the usage of the first litigant's familial name, typical in legal citation. Such a citational practice "accentuates the invisibility of Tyron Garner's blackness. Indeed, the historical documentation, official record, and scholarly exposition will ensure that this case goes down in history with the name of the white gay man involved." (Puar 2007, 119).

[8] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[9] *United States v. Windsor*, 570 U.S. (2013). This partial repeal of DOMA coincided with a ruling that severely curtailed the *Voting Rights Act* (VRA), a landmark civil rights piece of legislation that prohibits discrimination in voting. Amendments to the VRA could disenfranchise many voters throughout the U.S. (McCarthy and Moore 2013). In other words, depending on which state they live in, queer people of colour can get federal benefits when they marry but might not be able to vote.

[10] *Obergefell v. Hodges*, 576 U.S.____ (2015).

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battles that both construct and protect sexual citizens, like Jennifer Cramblett, both as victims of great injustice and as deserving of equal access to domestic partnership, family, and privacy.

The strategies taken up by lawyers and activists during these successive and seemingly-progressive legal battles, however, have further entrenched sexual and racial normativity. In her trenchant critique of *Lawrence-Garner*, legal scholar Katherine Franke (2004) argues that rather than articulating a robust conception of sexual freedom, the U.S. Supreme Court relies on a narrow version of liberty that signals a public tolerance of same-sex sexual behavior so long as it takes place in private and between two consenting adults in a relationship (1411). Franke contends that *Lawrence-Garner* "is a slam-dunk victory for a politics that is exclusively devoted to creating safe zones for homo- and hetero-sex/intimacy" (1415), thereby reinforcing a pull toward domesticity in current gay and lesbian organising that serves to further ostracise non-normative sex and kinship practices. This form of politics that Franke refers to is homonormativity, a form of neoliberal sexual politics that does not contest dominant heteronormative institutions but rather mobilises "a privatized, depoliticized gay culture anchored in domesticity and consumption" (Duggan 2002, 179). Homonormativity rhetorically re-codes key terms in the history of lesbian and gay politics: the 'right to privacy' no longer signifies the privacy-in-public claims championed by earlier gay liberation movements, but rather becomes domestic confinement (exemplified by the *Lawrence-Garner* case); 'freedom' becomes impunity for vast inequalities in economic and social life rather than a vision of collectivity and coalition; and 'equality' becomes recoded to signify narrow access to the military and marriage (Duggan 2002, 190). This form of neoliberal sexual politics comes to shape queer conduct towards heteronormative institutions and around affects of inclusion and belonging (see also Walters 2014). Legal struggles and public opinion campaigns centre lesbian/gay/queer subjects who are constructed as deserving of equality rights because they are *already* economically productive, middle-class citizens in monogamous partnerships who keep sexual acts within the privacy of their home. Not surprisingly, many of these features are emphasised in the two opening paragraphs of the Complaint in *Cramblett*: a stable, four-year relationship; a committed domestic partnership; a managerial job and university education; and further—due to experiences of sexual abuse—an emphasised desire to never even "think of sexual encounters" with males, even if this would make it easier and less expensive to "start a family."[11]

However, it is not simply the domestic, private, and (re)productive nature of Jennifer Cramblett that render her a legible homonormative subject, but also the fact of her whiteness: a whiteness that, until the birth/arrival of her daughter, was untainted, as referenced by descriptions of her "all-white community" and "all-white…family", both of which are presented as "racially intolerant."[12] We discuss more fully the ways in which whiteness operates as a structuring feature of this case later in the paper; here, we wish to reiterate the argument made by queer scholars of color who insist on attending to the ways in which white racial normativity is

[11] *Supra* n 1 at 2.

[12] *Supra* n 1 at 6.

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reproduced in homonormative political formations. In other words, the kind of sexual and familial privacy offered by a homonormative politics cannot be disaggregated from their nationalist, classist, and racist impulses. Jasbir Puar (2007) critically reminds us that the decision in *Lawrence-Garner* was handed down not even four months after the U.S. invasion of Iraq and less than two years after the passage of the USA PATRIOT Act of 2001. Puar argues that we cannot afford to separate the legalisation of sodomy from the politics of racism, empire and war mongering (117).

The gift of private liberty in *Lawrence-Garner* is a form of racial and citizenship privilege offered to certain citizens but withheld from many other citizens and noncitizens. It is a form of privilege that is unfathomable for those for whom being surveilled is a way of life (124–125). The shifting landscape of lesbian and gay inclusion is proclaimed as progress of sexual citizenship politics but rather is deeply embedded in a larger regression in racial politics (Haritaworn et al. 2008). This homonormative trajectory is not a sign or symptom of increased social justice in the U.S. Rather, it emerges out of the increased usefulness of white gay and lesbian subjects in contemporary imperialist and white supremacist projects, where queer subjects themselves are called into doing the violence and exclusionary work of modern nation-states (Puar 2007; Haritaworn et al. 2008; Reddy 2011; Haritaworn 2015).

These are some of the homonormative lines of inheritance that form the conditions of possibility for Jennifer Cramblett's claim. That is, the legibility of the lawsuit relies not only on various same-sex marriage decisions emerging in the wake of *Lawrence-Garner*, but is also conditioned by Cramblett's (self)-construction as an ideal homonormative citizen: a middle-class, (re)productive, university-educated white lesbian in a committed, monogamous, domestic partnership. It is, in particular, the racialised politics of homonormativity that both enables Jennifer Cramblett to safely assert her legal rights in this case, and potentially leads her to—quite correctly—imagine a future threat to her family's privacy, safety, and homonormative privilege due to the racialisation of her child. As we will argue in the following section, homonormative liberal inclusion in law is not the only legal precedence for this case. *Cramblett* is also conditioned by the legal precedence of race and disability-related wrongful birth tort law, and the reproductive freedoms and coercions upon which such laws are based.

Lines of Inheritance: Wrongful Birth

The *Cramblett* lawsuit is not the first wrongful birth case that has revolved around the question of artificial insemination, race, and non-desired sperm. In 1990, Julia Solnick, a 33 year-old white woman sued a Manhattan fertility clinic. Her lawsuit charged the clinic and the sperm bank with negligence and medical malpractice, claiming that they had mistakenly inseminated her with a black man's sperm, resulting in the birth of a mixed-race child. As Dorothy Roberts (2011, 214) argues, the genetic trait (or taint) of race seemed to have weakened the genetic tie between Solnick and her daughter: Solnick explained her demand for monetary damages for

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injury as arising out of the "unbearable racial taunting the child suffered because the mother and daughter looked so different from each other" (214). This story was complicated by the fact that Solnick desired a child with sperm from her husband, who later died of cancer. But as Roberts (2011, 214) writes, the perceived harm of receiving the wrong sperm was intensified by the clinic's failure to deliver a *white* baby.

In a second case, a married heterosexual couple attempted to facilitate fertilisation by artificial insemination using a combination of sperm from the husband and an anonymous donor.[13] The woman gave birth to triplets, yet shortly afterwards, it was determined that two of the children could not possibly have been the children of the husband or the anonymous donor. Similar to *Cramblett*, this Complaint argued that the defendant's mistaken use of the wrong sperm donor's sperm caused the plaintiffs "severe anxiety, depression, grief, and other mental and emotional suffering and distress."[14] The court dismissed the claim. Yet as Alberto Bernabe (2016, 57) remarks, while the court was unwilling to consider that the birth of three healthy children should give rise to a claim for emotional distress, it did hint that the outcome might have been different if the Complaint had been based on a "racial mismatch". This question of whether a racial mix-up could support a tort claim was addressed by the New York Supreme Court in a case[15] in which the plaintiffs, a married heterosexual couple, agreed to undergo in vitro fertilisation intended to fertilise the wife's eggs with the husband's sperm so "they could have a child who would be biologically their own."[16] According to the Complaint, the defendants negligently used someone else's sperm to fertilise the eggs, resulting in the birth of a daughter with "skin, facial and hair characteristics more typical of African, or African–American descent."[17] Thus, similar to *Cramblett*, the Complaint argues that personal injuries were caused by the birth of a healthy child not racialised as white. The court did not give much importance to the racial mix-up aspect of the claim because New York courts had already decided that the birth of a healthy child does not constitute a harm for which the law recognises a remedy (Bernabe 2016, 58).

The ways that race materialises in these cases and in *Cramblett* is largely inherited from a long tradition of wrongful birth tort claims about disability. Torts are civil 'wrongs' recognised by law as grounds for a legal action because they resulted in an injury or 'harm' that was avoidable and traceable to the defendant's actions or negligence (Chamallas and Wriggens 2010, 128–129). The focus of tort law is to provide remedies for the damages incurred and deter others from committing similar 'harms.' As a specialised area of tort, wrongful birth cases most commonly involve disability (Hensel 2005; Kumari 2009). In this kind of action, the plaintiffs –the parents of the child with a medical diagnosis—sue on the basis of misdiagnosis or a failure to detect or inform the parents of a so-called 'genetic

[13] *Harnicher v. Univ. of Utah Medical Center* 962 P. 2d 67 (Utah 1998); cited in Bernabe (2016, 56).

[14] *Ibid.*

[15] *Andrews. V. Kelz.* 838 N.Y.S.2d 363 (N.Y. Sup. Ct. 2007).

[16] *Ibid* at 365. Cited in Bernabe (2016, 58).

[17] *Ibid.*

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defect,' or even an increased 'risk' of 'having' certain 'disabilities', prior to birth. Plaintiffs often seek compensation for the emotional impacts of having a child who is understood as 'having a disability', but often also for significant medical expenses and costs related to caring for the child (Rinaldi 2009; Mor 2014). In Ohio, the jurisdiction in which Jennifer Cramblett and her partner live, the State Supreme Court has held that only pregnancy and childbirth costs are recoverable in a wrongful birth claim.[18] In contrast, in Illinois, the state where she filed her claim, courts have allowed the recovery of extraordinary economic costs of caring for a child's medical condition or needs during the child's minority (Bernabe 2016, 54). In her study of wrongful birth case law, Kumari Campbell (2009) cautions against imagining all plaintiffs as anti-disability. Indeed, many such claims may well trace back to contemporary climates of austerity and cuts to disability supports in most Western countries, leaving wrongful birth claims as one of the only ways to pay for life-enabling medical costs and supports (Rinaldi 2009).

Regardless of the plaintiffs' motivations, in order to be legible within tort law, one must draw from the legal inheritance, or precedence, of claiming wrong and harm. In wrongful birth cases across Australia, United States, United Kingdom, Canada, and Israel, scholars have found that "the 'wrong' or 'harm' is that the child herself constitutes a damage; in other words, the birth of the child is a form of physical injury" (Kumari 2009, 148; see also Hensel 2005; Rinaldi 2009; Mor 2014). The plaintiffs must assert that had they been given the proper treatment and/or information they would have terminated the pregnancy and thus, the child was 'wrongfully born.' As Wendy Hensel (2005, 172) argues, "no assistance will be extended to the family who would have chosen to embrace or simply accept the impaired child prior to his birth." In order to construct this harm, the plaintiff(s) and their lawyers must represent disability as inherently and entirely a negative, undesirable, and harmful experience (Rinaldi 2009).

Much of this representational work is accomplished through the seemingly-objective quasi-medical and legal terminology in the very definition of wrongful birth, such as having a disability or impairment, genetic defects, and risk (see Rinaldi 2009). The language of 'having a disability' or 'impairment,' for example, effaces the deeply political process through which humans demonstrating particular variations in form or capacity are categorised, medically objectified, problematised, and socially marginalised; a political process individualised as though it were something objectively problematic that an individual naturally possesses (Tremain 2006). This seemingly-objective language effaces massively contentious debates, for example: over whether auditory and cognitive variations are individual medical impairments, or desirous culturally-defining qualities (Kafer 2013) and value-neutral neuro-divergence (McWade et al. 2015) respectively; and over whether the most significant 'problem' of disability is in individual bodies (e.g., 'having a disability') or in the marginalisation and violence that people face as a result of the cultural devaluation of particular human variations (e.g., disabled by society) (Garland Thomson 2005; Withers 2012). Further, although the language around the

[18] See *Schirmer v. Mt. Auburn Obstetrics and Gynecological Assocs.*, Inc., 844 N.E.2d 1160, 1165 (Ohio 2006), as cited in Bernabe (2016, 54).

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'risk' of having a particular 'genetic defect' is widely used in scientific and legal scholarship, and in wrongful birth in particular, these terms are also only intelligible within a cultural frame that devalues particular human variations (Wolbring 2014). The language of genetic *probability*, *likelihood*, or *chance* of a particular *trait* or *variation* is reserved for culturally valued traits while *risk* and *defect* serve to objectivise the devaluation of a trait and its host, and render the host a legible target for medical and legal interventions.

This core quasi-scientific terminology is often accompanied by more explicitly negative and ableist terminology related to "'bearing the burden of affliction', 'suffering', and an 'arduous responsibility,'" in order to accentuate the harms being claimed (Kumari 2009, 157). So while it is worth noting that it was precisely the lack of claims around 'risk', 'defect', and 'disability' in this case that rendered it illegible as, and thus ineligible for, a successful wrongful birth claim, we also contend that it is crucial to understand the language of *Cramblett*—that of "medical expense, pain, suffering, emotional distress and other economic and non-economic losses"[19]—in the context of this ongoing legal inheritance that offers financial compensation under wrongful birth law "only to those willing to openly disavow [the child's] self-worth and dignity" (Hensel 2005, 177).

Wrongful birth cases draw not only on legal histories relating to disability, but also those relating to the control of female sexuality. Indeed, wrongful birth cases in the United States have been shaped significantly by *Roe v. Wade,*[20] the 1973 decision of the U.S. Supreme Court that afforded women a constitutional right to seek abortion during the early stages of pregnancy, even if this right remains financially inaccessible for many—disproportionately black women—who experience poverty. Indeed, only four years after *Roe v. Wade* ensured women's constitutional right to abortion, the Hyde Amendment was successfully introduced (1976), prohibiting both federal Medicaid and Indian Health Service coverage for abortion. The Hyde Amendment withholds federal Medicaid funding from abortion, except in cases of rape or incest, even when a woman's health is at risk. This has effectively prevented millions of low-income women from exercising their legal right to abortion.[21] To make matters worse, in January 2017, House Republicans passed the No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act (HR 7), a piece of legislation that not only makes the Hyde Amendment permanent, it would ban health facilities from offering abortion services and further prohibits abortion coverage from being offered in multi-state health insurance plans created under the Affordable Care Act.[22]

[19] See Complaint, *supra* note 1 at 7–8.

[20] *Roe v. Wade* 410 U.S. 113 (1973).

[21] See "Abortion Access: Hyde Amendment": https://www.plannedparenthoodaction.org/issues/abortion/hyde-amendment?utm_source=tumblr&utm_medium=post&utm_content=hyde&utm_campaign=healthtumblr As Dorothy Roberts (1997, 229–232) argues, inadequate access to reproductive health services, including abortion, by poor and low-income women—who are disproportionately racialised women—is bolstered by constitutional jurisprudence of liberty and interference by the state.

[22] See "U.S. House Passes Bill to Deny Millions of Women Reproductive Health Care Coverage": https://www.reproductiverights.org/press-room/us-house-passes-bill-to-deny-millions-of-women-reproductive-health-care-coverage-0.

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Wrongful birth tort claims are a cause of action almost unthinkable without the legal decision in *Roe v. Wade*. Courts that allowed wrongful birth claims centered their analysis on the mother's right to reproductive choice and informed consent (Chamallas and Wriggens 2010, 133). In other words, courts felt bound by *Roe* to use tort law to protect a woman's right to terminate her pregnancy (Rinaldi 2009).[23] The reasoning is that if the mother had been properly counseled by her physician, she would have secured an abortion and would not have incurred the emotional and financial expenses of raising a disabled child. Kumari Campbell (2009) argues that both medicine and the courts have largely "conflated the use of prenatal tests with technologies of termination," (157); conflating also a woman's reproductive self-determination with ableist imperatives for in utero disability extermination (Rinaldi 2009; Kafer 2013). In this way, such decisions can be understood as constraining reproductive choice at the very moment of legally upholding it (Hensel 2005; Rinaldi 2009). This mobilisation of reproductive technologies and 'choice' to impose ableist—and racist—constraints on women's reproduction also has a distinct line of inheritance beyond wrongful birth law: in the larger socio-ideological project of eugenics.

Lines of Inheritance: Eugenics

In this section, we argue that the logics of race and disability, as well as many of the reproductive technologies, that are central to the wrongful birth cases discussed above have been inherited from the neo-Darwinian project of eugenics. Built on the notion that humans could influence their own evolution as a species, nineteenth and twentieth century eugenics was practised across North America and Europe as a series of publicly and privately-funded programmes, research projects, and information campaigns (McLaren 1990; Black 2003). These programmes, projects, and campaigns were aimed at 'improving' the racial make-up of a nation, a population, or all of humanity, by supporting the life and reproductive opportunities of certain 'desirables,' while curtailing those of 'non-desirables' (Ordover 2003; Withers 2012; Malacrida 2015). Who was desirable or not, within eugenic contexts, was determined through the logic of biological racism (Snyder and Mitchell 2006; McWhorter 2009).

Biological racism is a set of quasi-scientific ideologies based on the notion that all humans evolved from apes, but that some sub-groups of humans had evolved more than others (McWhorter 2009). This white supremacist theory held that light-skinned, upper class, Western European, heterosexual men were the most evolved physically, intellectually, aesthetically, and morally, and thus were the most desirable people to reproduce. Non-Europeans, in this model, were considered 'primitive' versions of Europeans, in various earlier stages of evolution (or sometimes devolution); it was believed that they had less ability to control their sexuality, and thus their rapid reproduction would lead to the degeneration of the

[23] See, for example: *Berman v. Allan*, 80 N.J. 421 (1979); *Spencer v. Seikel*, 742 OK 75 (1987); and *Liddington v. Burns*, 916 F. Supp 1127 (W.D. Okla. 1996).

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nation and the human race (McLaren 1990; Black 2003; McWhorter 2009). This theory of biological racism informed how eugenicists understood and treated a series of human variations, many of which we now categorise as disabilities, mental illnesses, and some of which we now consider sexualities and gender identities (Ordover 2003; Snyder and Mitchell 2006). Eugenicists widely discussed such people as 'the feeble-minded,' 'degenerates' or 'throwbacks' or "a reversion to an ancestral type of humanity when on its way up to civilization" (MacMurchy 1907, 10; see also McWhorter 2009; Withers 2012). When these forms of difference emerged in the children of Western Europeans, they were understood as a kind of tainted whiteness, akin to racialised people in both their capacities and their reproductive threat to the national 'breeding stock' (Stubblefield 2007; Kafer 2013). This conflation worked in both directions: many disabled light-skinned people were racialised (as, for example, 'mongoloid') and thus stripped of reproductive privileges; while the racial 'inferiority' of 'non-whites' were 'proven' by pathologising IQ tests and medical exams that proclaimed high rates of 'defectiveness,' disease, and disability (Snyder and Mitchell, 2006; Stubblefield 2007). In other words, ideologies and technologies of disability and race were interlocked within the logic of eugenics and white supremacy.

Because of eugenicists' concern with the passing on of 'racially degenerate' family traits, eugenic interventions often sought to control sexual reproduction. According to Ladelle McWhorter (2009), eugenics was comprised largely of "institutionalized mechanisms of sexualized, race-driven social control" (203). This included curtailing unwanted reproduction through, for example, racist immigration bans, life-long institutionalisation, and forced sterilisation (Black 2003; Malacrida 2015). It also involved programmes to encourage the procreation of white people, including: financial incentives to procreate, targeted maternal healthcare, and immigration incentives for Western European women (McLaren 1990).

These explicitly eugenic tactics became less popular in the United States after World War II, largely because of the German use of American eugenic discourses within the Holocaust (Snyder and Mitchell 2006; McWhorter 2009). In the words of prominent American eugenicist, Frederick Osborn, "eugenic goals are most likely to be attained under a name other than eugenics" (in Withers 2012, 29). Over a decade, dozens of major journals and foundations replaced the word *eugenic* in their names with terms like 'social biology,' 'population science,' 'genetics,' and 'family planning,' without significantly shifting editorial boards, mandates, or content (Withers 2012). Ladelle McWhorter (2009) further explains: "eugenicists dropped the talk about inferior and superior *races* altogether to speak only of superior and inferior traits in America's families" (249). These 'inferior family traits,' continue to refer to deeply white supremacist notions of what constitutes racial degeneracy, but have widely come to be articulated and governed through the 'post-eugenic' language of genetic defect, impairment, and disability: for a prime example, see the deeply ethnocentric use of IQ testing to objectify 'race-correlated defects' in supposedly post-racist contexts (Ordover 2003). In other words, many contemporary popular and scientific discourses around genetics, biology, family, race, blood, traits, and disability remain deeply informed by the ways that sexuality, race and disability intertwine within eugenic logics.

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There are numerous ways in which the *Cramblett* complaint betrays an inheritance of eugenic logic. First and foremost, many of the terms used to describe the harms at the heart of wrongful birth lawsuits are derived directly from this eugenic lineage, including: *family traits*, *genetic defects*, and *parentage* (Ordover, 2003). In *Cramblett*, this inheritance is most evident in discourses around the couple's desire "to find a donor with genetic traits similar to both of them", and in the explanation that "the thought, care and planning that she [Jennifer Cramblett] and Amanda had undertaken to control their baby's parentage had been rendered meaningless."[24] Such discourses have become the socially acceptable vocabulary through which to continue the eugenic project of supporting the reproduction of mostly affluent, middle class, non-disabled 'white' people while curtailing the reproductive opportunities of racialised and disabled Others (McWhorter 2009; Roberts 1997, 2011).

This eugenic inheritance can also be traced through the discourses and technologies at the heart of this case. Eugenicist Frederick Obsborne, started America's first "family counseling" clinic in order to "put pressure on carriers of defect to reduce their reproduction" (Withers 2012, 28). He and other proud eugenicists, such as Sheldon Reed and Lee R. Dice, helped to develop and refine a host of techniques for encouraging eugenic reproductive choices, such as parental genetic screening, prenatal testing, artificial insemination (and the genetic screening thereof), and genetic counseling (McWhorter 2009). Dice, the director of the University of Michigan's Institute of Human Biology, argues that "If there is known to be a high probability of transmitting a serious defect, it would be an abnormal person indeed who would not refrain from having children" (Dice 1952, 2). Dice's prediction has come true: regulatory structures require that sperm banks screen donated semen and eggs for conditions determined to be 'genetic defects,' even those like d/Deafness, which have no health consequences (Kafer 2013); semen selection by parents demonstrates significant preference for sperm from a 'white' donor with graduate level education at elite schools and high IQ scores (qualities that are tied deeply to biological notions of race in eugenic thinking) (Roberts 1997); fetal screening for potential genetic defects has become a state-supported norm in many countries, with abortion rates following positive prenatal tests for Down Syndrome and Cystic Fibrosis between 85 and 95% (Withers 2012). Further, successful wrongful birth law suits have resulted in increased pressure on sperm banks, reproductive clinics, and healthcare providers to increase the use of genetic and fetal screening for 'defects' and further, corollary wrongful life law suits open up the possibility of litigation against parents who choose not to get prenatal screening or not to abort a fetus 'at risk of impairment' (Rinaldi, 2009). Just like the more explicit eugenics of old, this contemporary, 'laissez-faire eugenics' (Black 2003) disproportionately targets the bodies, reproductive capacities, and reproductive choices of women (Roberts 1997; Malacrida 2015). For all the language around women's choice, in modern eugenics, discourses of familial and societal burden, financial repercussions in post-welfare states, regulatory and funding structures, issues around liability, as well as the power of medical authority are all incredibly

[24] *Supra* n 1 at 3 and 4–5.

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effective forces in persuading women to avoid, or abort, fetuses that are 'at risk' of having traits deemed undesirable in contemporary neo-eugenic contexts (Withers 2012; Kafer 2013).

The unequal distribution of choices is not only about which choices one is pressured to make, but also which *kinds* of subjects get to make *which* choices due to formal and informal structures that govern reproduction. As Dorothy Roberts (1997, 285) contends, "we live in a country in which white women disproportionately undergo expensive technologies to enable them to bear children, while Black women disproportionately undergo surgery that prevents them from being able to bear any." Roberts aptly demonstrates the racial bias of the new fertility technologies: how fertility clinics sell services to largely wealthy white women through the promise of the blue-eyed white skinned child, while Black women are largely punished for, or prevented from giving birth through various techniques. These techniques include: discourses and policies that construct Black women as bad mothers; the disproportionate sterilisation of Black women either without their knowledge or for conditions that do not require sterilisation; the fertility effects of environmental pollution and medical neglect which both disproportionately affect poor Black communities; lack of money or insurance to pay for fertility procedures; historically grounded reasons to mistrust doctors' intervention into their fertility; and the high incidence of doctors downplaying or denying fertility options to Black women (Roberts 2011). Many disabled women– particularly racialised disabled women—face similar barriers to reproductive technologies, including unnecessary or non-consensual sterilisation and birth control, systemic poverty, and the dissuasion from or outright refusal of reproductive support (Withers 2012; Kafer 2013).

Thus, although the word *eugenics* does not appear within the Cramblett Complaint, eugenic histories and logics deeply inform the existence of, and the deeply embedded racist and ableist logics of, the fertility technologies Cramblett used. It also informs the relatively easy access that two middle-class white women had to such technologies. Further, as one American judge noted, eugenics further informs the cultural devaluation of 'genetically defective' persons, and their construction as an inherent wrong within wrongful birth litigation,[25] thus eugenics is at the very heart of the defining features of wrongful birth law. Eugenic discourses further inform the specific language of genetic traits, family, and parentage within wrongful birth law suits, and within *Cramblett* in particular, as well as informing the larger historico-discursive framework within which race, disability, and reproduction are tied together through white-supremacist logics as threats to white family blood lines. It is within this neo-eugenic context that the birth of a 'non-white' child to a 'white family' through neo-eugenic reproductive technologies can be understood as such an unthinkable harm, and further, can be legally pursued through legal action designed to support parental rights to prevent disability, defect and (racial) 'degeneracy.'

[25] *Taylor v. Kurapati*, 670 Mich C.A (1999).

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Lines of (Lost) Inheritance: Whiteness as Property and Privilege

One striking element of this lawsuit is the multiple affects of loss that animate it. At a most obvious level of capitalist market exchange, there is the loss of particular property that was purchased (i.e., correct donor sperm). Further, as a wrongful birth case, the lawsuit draws on many of the negative affects that haunt its disability-related precedents, including the explicit or implicit use of disability-related loss. Drawing from José Esteban Muñoz, Alison Kafer (2013) argues that the figure of *the Child* is widely conceived as a personal and cultural symbol of hope and futurity, and that this Child is often presumed white and "always already healthy and nondisabled" (pp. 32–33). She argues that contemporary reproductive technologies mobilise this notion of the Child alongside eugenic logics of racial improvement: claiming to create *better* children and thus *better* collective futures. In many reproductive scenarios, but particularly in cases of assisted reproduction, fetal 'genetic defect' signals not only the loss of expected health and able-bodiedness, but also the loss of the (healthy, white, *better*) Child. This sense of loss is one among many affects relating to harm that circulate, more or less explicitly, in wrongful birth claims. Loss may be a more strategically useful discourse in claims where the alleged harm to be demonstrated is that doctors contributed to the medical issues at the heart of the claim (the loss itself), rather than that they failed to inform the parents of this loss in time for an abortion (see Rhinehart 2002 for distinctions). Thus, some of the articulations of loss in *Cramblett* may well be drawing on the discursive precedents of disabilty-based wrongful birth cases wherein the harm is a loss allegedly caused by the defendant.

However, given the case's racial resonances, we argue that the loss articulated in *Cramblett* is also a loss of *white* property. In this way, the case evinces what legal scholar Cheryl Harris (1993) has called a "property interest in whiteness." As a legacy of settler colonialism and slavery, "a ghost that has haunted the political and legal domains" (Harris 1993, 1791), whiteness became the quintessential property for personhood in a society, such as the U.S., structured on racial subordination (1730). In her extended theorisation, Harris argues that whiteness was an "object" over which continued control was—and is—expected. Drawing on the work of Margaret Radin, Harris contends that the protection of these expectations is central because: "If an object you now control is bound up in your future plans…and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations" (1730). In other words, the "settled expectations" of whites is built on the privileges and benefits produced by white supremacy, a dynamic that reinforces a property interest in whiteness that, in turn, reproduces Black (and Indigenous) subordination (1731).

The Complaint in *Cramblett* is a disruption of "settled expectations" of the ability, literally, to control the whiteness of property. Upon learning of Midwest Sperm Bank's error, the Complaint states that "Jennifer was crying, confused and upset. All of the thought, care and planning that she and Amanda had undertaken to control their baby's parentage had been rendered meaningless."[26] The couple

[26] *Supra* n 1 at 4–5.

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explicitly desired a donor with "genetic traits similar to both of them"[27] as white women. Grief over the specific ways that their child was understood to be fundamentally dissimilar to her parents—even before she was born—is informed by a white supremacist logic that race is inheritable. In this Complaint, two "Caucasian"[28] women are imagined as more similar to each other—and more similar to an unknown 'Caucasian' sperm donor—because of their shared whiteness than they are to their child only because of an unknown black biological father. And this, even though the child always would have shared half of her genetic material with her biological mother, the other half with an unrelated male, and no genetic material with her second parent. Further, Payton's "differences" are contrasted with her mother's (homo)sexuality as "irrepressible":

One of Jennifer's biggest fears is the life experiences Payton will undergo, not only in her all-white community, but in her all-white, and often unconsciously insensitive, family. Despite her family's attempts to accept her homosexuality, they have not been capable of truly embracing Jennifer for who she is. They do not converse with her about her gender preference, and encourage her not to "look different," signaling their disapproval of her lesbianism. *Though compelled to repress her individuality amongst family members, Payton's differences are irrepressible*, and Jennifer does not want Payton to feel stigmatised or unrecognised due simply to the circumstances of her birth (emphasis ours).[29]

The analogising of race and sexuality works to separate one from the other as discrete, individual characteristics to be compared, so that Payton's race is constructed as a greater harm and disruption to Jennifer's all-white family than is Jennifer's sexuality. The child's race, here, is constructed as an inborn *biological* quality that signals a fundamental loss of whiteness which is seemingly harder to salvage through homonormative comportment, domesticated partnerships, and (re)productivity.

As discussed in the previous section, the notion of genetic racial difference is a direct historical and ideological outgrowth of eugenic ideas that not only posit race as biology but also secure notions of inherently inferior and superior races (McWhorter 2009). Theories of inheritability of the late nineteenth century posited that blood carried traits from one generation to another. With scientific advances and the falling out of favor of explicitly eugenic language, 'genetics' has largely been taken up as the essential marker of shared identity and attributes, although blood, as materiality and as metaphor, continues to function as code for race (see Dryden 2016). The slippage between genetics and blood is evinced in the Complaint at the point when the expressed desired to have a donor with genetic traits similar to both Jennifer Cramblett and her partner Amanda is immediately followed by the claim that the plan was for Amanda to "become inseminated with sperm from the same donor so that their children would be blood-related."[30] 'Genetic traits' and 'blood' find meaning in and through each other here as dense points of racial

[27] *Supra* n 1 at 3.

[28] *Supra* n 1 at 4.

[29] *Supra* n 1 at 6–7.

[30] *Supra* n 1 at 3.

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signification. Indeed, shared 'genetic traits', argues Ladelle McWhorter (2009), has become post-eugenic code for shared whiteness. Thus, in contemporary versions of biological racism, the language of 'similar genetic traits', as well as 'family traits' and 'blood relations,' often point to a series of nested attributes with historically racialised connotations (such as skin color, eye color, hair texture, intelligence, moral character, and robust health) that are understood as passed on through sexual reproduction, imagined as interlinked characteristics shot through one's ancestral line, and therefore conceptualised as producing a difference in kind: a distinct ancestral lineage or family line. In this way, as Sara Ahmed (2006, 122) argues, the family line establishes what could be called a racial line, one that "'directs' reproduction toward the continuation of that line. Such a direction means that the family line coheres 'around' a racial group, which becomes a boundary line: to marry someone of a different race is to marry 'out'."

While discourses of racial preferences are often read as eugenic and racist, the desire for continuing on 'family traits' and seeking out 'family and parental resemblances' are often de-politicised or even naturalised. This naturalisation of white supremacist desire for familial resemblance and for the inheritance of the property of and in whiteness makes legible the "pain and suffering" of loss experienced by Jennifer Cramblett. This pain and suffering began while still pregnant, before she could have known which particular genetic traits her daughter and her would or would not share. Importantly, not all shared 'genetic traits' are constructed as equally important or valuable. The specific nature of Payton's hair curls, for example, is problematised in the Complaint, but not the genetically shared (in)capacity, for example, to curl one's tongue. Payton's hair materialised as a highly legible cultural marker of familial (and thus racial) non-resemblance—the break in and to an "all-white" family, and in and to "small, homogenous (i.e., white) Uniontown" where Jennifer Cramblett and her partner live. Commenting on this case, legal scholar Patricia J. Williams (2014) writes that "Payton dispossesses her mother by being born, taking the space of a more qualified, more desired white candidate, erupting into the world as damaged goods—a neighbourhood defiled as well as a family disappointed." The Complaint alleges that getting Payton's hair cut will not be "a routine matter" for Jennifer "because Payton has hair typical of an African American girl. To get a decent cut, Jennifer must travel to a black neighborhood, far from where she lives, where she is obviously different in appearance, and not overtly welcome."[31] What we wish to signal here is the extent to which the language in this wrongful birth lawsuit naturalises racial 'kinds' through its appeal to the loss of 'shared genetic traits': Payton is described as "obviously mixed-race" and Jennifer Cramblett as "obviously different in appearance" from those in "black neighborhoods" where Payton may have her hair styled.

The affect of loss animating this wrongful birth lawsuit is not, we argue, only attributable to the loss and dispossession from the biological and familial whiteness Jennifer Cramblett expected to purchase. The lost white property of her child's body, symbolised perhaps most strongly by Payton's hair, also signifies the loss of a

[31] *Supra* n 1 at 6.

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constellation of privileges associated with whiteness. First, Jennifer Cramblett's expectation of convenient capitalist consumption within the comforts of her racially homogenous neighbourhood is disrupted. That she grieves having to *travel* outside of her community to find someone who can cut the hair of her child who does not read as white signals her now disrupted comfort in the histories of racial segregation and housing in the U. S. (Massey and Denton, 1998; Boustan 2011). Conditioning the affect of loss animating this wrongful birth lawsuit, Jennifer Cramblett's forced mobility also disrupts the "settled expectations" (Harris 1993) of middle class convenience and access to services within such segregated white communities—a convenience not shared by those living in many poor, racialised neighbourhoods.

Second, by having to travel to a space that is not "all-white", Jennifer Cramblett must now subject herself to deep racial discomfort in which her difference in appearance is assumed to be subject to hyper-visibility: a kind of visibility that her homonormative whiteness would, to some degree, protect her from within her all-white community. Her claim is not that she is overtly *un*welcome, as a black person would be in her all-white community, but rather that she is "not overtly welcome". White privilege is not only the lack of threat of surveillance and violence, but also the settled expectation of being welcomed wherever one goes. Further exemplifying the losses of racial comfort and racial homogeneity, the Complaint alleges that she did not know African Americans until college at the University of Akron. Because of her background and upbringing, she "acknowledges her limited cultural competency relative to African Americans, and steep learning curve, particularly in small, homogenous Uniontown, which she regards as too racially intolerant."[32] This statement announces the structural and psychic inheritances of the shape of proximities and intimacies of a society built on white supremacy. As Sara Ahmed (2006, 124) writes, to suggest that we inherit proximities is to point to how the past that is 'behind' our arrival restricts as well as enables human action: "if we are shaped by 'what' we come into contact with, then we are also shaped by what we inherit, which delimits the objects that we might come into contact with." The loss of Jennifer Cramblett's privilege is the specter of having to live in proximity to, and learn to interact with, those she imagines as different in kind, including, her daughter. Does she imagine her daughter to be so absolutely different from herself that she will not know how to parent? This wrongful birth lawsuit has inherited the logic of absolute difference that is so fundamental to white supremacy. This language of "cultural competency" replaces racism with culture—not cultural differences *per se* but effects of structures of white supremacy (i.e., segregation in housing and education).

Third, among that which Jennifer Cramblett grieves is the privilege of not being effected, or even affected, by the daily racism of her family and wider community. The Complaint alleges, for example, that Jennifer lives each day with fears, anxieties and uncertainty about her future and Payton's future. Jennifer admits that she was raised around stereotypical attitudes about people other than those in her all-white environment. Family members, one uncle in particular, speaks openly and derisively about persons of color.[33]

[32] *Supra* n 1 at 6.

[33] *Supra* n 1 at 6.

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Of note, the harm, in this case, is not constructed as the racism itself, but rather that Payton's racialised existence robs Jennifer Cramblett of the capacity to continue living comfortably, safely, and without fear and anxiety within this racist environment. Robin DiAngelo (2011, 57) theorises this as "white fragility", an affective state in which even a minimum amount of racial stress becomes intolerable, triggering a range of defensive moves including the outward display of emotions such as anger and fear. Tied in with this is, we argue, a loss of entitlement to pass along her white privilege to her daughter. This is evinced in anxieties over Payton's education:

> Jennifer's stress and anxiety intensify when she envisions Payton entering an all-white school. Ironically, Jennifer and Amanda moved to Uniontown from racially diverse Akron because the schools were better and to be closer to family.[34]

This description belies an understanding of how white supremacy structurally perpetuates itself. Cramblett acknowledges that her "all white" community will have better schools than "racially diverse" communities, and where a black child will not necessarily be granted safe access to these "better" schools or the communities that house them. As Robin DiAngelo (2011, 58) argues, one of the most profound aspects of white racial socialisation is not to feel any loss over the absence of people of color in their lives. In fact, it is this absence that defines schools and neighbourhoods as "good"; whites come to understand that a "good school"—in this case, a "better" school—is coded language for white (see also Johnson and Shapiro 2003), where the quality of space is in large part measured via the absence of people of colour (and Blacks in particular). Jennifer Cramblett and her partner's move back to Uniontown signals, then, an entitlement to take advantage of privileged education for their (then unborn/planned) white child. The loss, then, is not only a loss of quality education for her daughter, it is the loss of her entitlement to pass along the spoils and structural support of white supremacy down her family line. The intensity of white supremacist structures in Jennifer Cramblett's community have, according to the Complaint, led "*all* of Jennifer's therapists and experts [to] agree that for her psychological and parental well-being, she must relocate to a racially diverse community with good schools (emphasis in original)."[35] The implication here is that race, or more specifically white supremacy, *is* a barrier to equal access of opportunity, as argued by critical race legal scholars (Harris 1993; Williams 1997; Crenshaw 1988). As such, there are instances where we would want the courts to acknowledge the material inequalities that accrue to blackness in a society so thoroughly structured by white supremacy, even as it imagines itself as post-racial. In this particular case, however, this is not what is being asked of the court: it is not the homophobic, racist, and white supremacist violence of Uniontown which is constituted as the harm to be redressed by this lawsuit, but rather the way that Payton's presumed racial difference makes it

[34] *Supra* n 1 at 7.

[35] *Supra* n 1 at 7.

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less possible for Jennifer Cramblett to enjoy the spoils of these inherited structural violences.

Final Thoughts

In this article, we have shown that the negative language of harm and loss that commentators have found so disturbing in *Cramblett* has several specific lines of inheritance. We have traced intertwined white supremacist, (homo)normative, and (neo)eugenic relations of power that condition the possibility of an out, white, middle-class lesbian, from a purportedly all-white community in Ohio, to launch a wrongful birth Complaint against a sperm bank based on the undesired racialisation of her child. We argue that the use of wrongful birth tort law, the language used in the Complaint, and the affect of loss animating the Complaint are all conditioned by this complex web of inheritances. In so doing, we have aimed to contribute to discussions about *Cramblett* in three ways. First, we have introduced the racial logics of homonormativity into the conversation around *Cramblett*, a set of logics that are often missing from accounts of the case. Normative relations of privacy, domesticity, class, and (re)productivity deeply condition the lawsuit's arrival into legal and cultural arenas. More than this, however, the constellation of losses articulated in the Complaint reveal an unsettling of settled expectations understood to accrue to/with the whiteness at the heart of homonormative sexual politics. Second, we have refused a surface critique of the *Cramblett* case that distances race from disability and thus reinforces the devaluation of disabled lives. Instead, we have demonstrated that the logics of racism and ableism that were deeply co-constitutive in the white supremacist project of eugenics are not of the past but rather re-emerge in contemporary, particular reproductive, spheres. To challenge white supremacist logics contained within *Cramblett*, then, means not reinforcing neo-eugenic discourses and practices about disability in the process. Regardless of the intentions of the people involved, successful wrongful birth Complaints must trade in neo-eugenic arguments around the existence of the disabled child *as* a harm that both should and would have been aborted. These include discourses of suffering, pain, affliction, harm, burden, and also, at times discourses of loss. Wrongful birth coalesces around not only the loss of an able-bodied child, but also the undesired existence of the disabled child. Thus our third contribution has been to centre the discursive constellation of loss animating this wrongful birth Complaint, conceptualising it as a loss of the property in and of whiteness, both in biologically essentialist terms and in terms of the social proximities to whiteness.

In offering these three avenues of critique, we hope to demonstrate how *Cramblett* is not a strange, one-off story. Instead, the Complaint *reproduces and legitimises* its own troublesome lines of inheritance. What is at stake in this Complaint is not that it treats race as akin to disability. Rather, it is that the lawsuit leverages deeply racist, ableist, and neo-eugenic discourses to assert a white woman's homonormative entitlement to the familial inheritance of white property and white privilege. In other words, it is not Payton's birth that is wrongful; it is the case's very own conditions of possibility.

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