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ESSAY

THE HANDICAPPING EFFECT OF JUDICIAL OPINIONS IN REPRODUCTIVE TORT CASES: CORRECTING THE LEGAL PERCEPTION OF PERSONS WITH DISABILITIES

KERRY T. COOPERMAN*

"Changes are necessary; but what they ought to be, what they will be, and how and when to be produced, are arduous questions."—John Jay (1786)[1]

I. INTRODUCTION

Over the past twenty-five years, progressive legislation and aggressive advocacy have generated policies under which people with disabilities could participate more meaningfully in America's social, political, and professional spheres. The Americans with Disabilities Act of 1990 (the "ADA")[2] codified the most comprehensive safeguards of civil rights since the 1960s and carried the hope that it would enable people with disabilities to engage equally in their communities.[3] A major player in the passage of the ADA,[4] the disability community continued to develop political footholds, spearhead local and national social movements, and insist on new statutory protections. But this initial momentum did not yield the

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1. WILLIAM JAY, II THE LIFE OF JOHN JAY 191 (1833).

2. 42 U.S.C. §§ 12101–213 (2000 & Supp. V 2005).

3. *See* Ann Hubbard, *The Major Life Activity of Belonging*, 39 WAKE FOREST L. REV. 217, 255 (2004) (stating that the ADA is "rich with proclamations of a national commitment to welcome persons with disabilities into all aspects of society").

4. *See* Deborah Kaplan, *The Definition of Disability: Perspective of the Disability Community*, 3 J. HEALTH CARE L. & POL'Y 352, 352 (2000) (noting that the disability rights movement "can claim primary political responsibility for the ADA").

substantive changes that many had anticipated.[5] Nearly a decade after the ADA's enactment, employees with disabilities lost over 95% of ADA cases;[6] the Supreme Court of the United States restricted the Equal Employment Opportunity Commission's power to construe the ADA's protections;[7] and prenatal genetic testing continued to spawn reproductive tort claims that negatively stereotyped persons with disabilities.[8]

Reproductive technology has become a double-edged sword for the disability community. Although genetic innovation promises new medical therapies,[9] it also breeds new litigation that etches false conceptions of disability, harm, and autonomy into the common law and the national consciousness. Alas, courts and legislatures often disregard the social messages that their laws fortify, and "surprisingly little legal scholarship" explains how reproductive tort claims affect people with disabilities.[10]

This Essay argues that courts should contextualize their views of disability, health, and legal harm by recognizing families' diverse circumstances and constrained choices, instead of propagating stigmatizing stereotypes about people with disabilities through an outmoded reproductive tort jurisprudence. First, this Essay shows why the conceptual framework through which courts decide reproductive tort claims conveys harmful messages about the value of persons with disabilities.[11] Second, it argues that judicial reasoning should embody more contextual, non-dichotomous solutions that protect the diversity of the sensitive interests at stake.[12] Third, it posits that a contextual jurisprudence will become increasingly vital as social, scientific, and legal forces continue to constrain parental reproductive choices.[13] Last, this Essay concludes that courts must consider the profound influence their jurisprudence has on societal views of

5. *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 923 (2003) (observing that the success rate for plaintiffs in ADA cases "is second in futility only to that of prisoner plaintiffs").

6. John W. Parry, *1999 Employment Decisions Under the ADA Title I—Survey Update*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 348, 348 (2000).

7. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999) (ruling that "no agency," including the Equal Employment Opportunity Commission, "has been delegated authority to interpret the term 'disability'").

8. *See infra* Part II.C.

9. *See, e.g.*, Edward J. Larson, *The Meaning of Human Gene Testing for Disability Rights*, 70 U. CIN. L. REV. 913, 913 (2002) (noting that the completion of the Human Genome Project and other related projects led researchers to isolate the genes that contribute to Alzheimer's disease, breast cancer, cystic fibrosis, Gaucher Disease, fragile X Syndrome, and Huntington's disease).

10. Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 144 (2005).

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part IV.

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the disability community and must adopt a contextual approach to combat prevalent social stereotypes.[14]

II. JUDICIAL OPINIONS IN REPRODUCTIVE TORT CASES CONVEY HARMFUL STEREOTYPES ABOUT PEOPLE WITH DISABILITIES BY REINFORCING THE MEDICAL MODEL OF DISABILITY, EMBRACING OUTMODED NOTIONS OF LEGAL HARM, AND USING STIGMATIZING RHETORIC

The disability rights movement seeks to propagate a more truthful perception of what it means to live with a disability.[15] But because notions of "disability" and "harm" are complex, controversial, and fluid, legislatures and courts rarely achieve consensus on definitions when drafting statutes and deciding cases, respectively.[16] Nor do these entities adequately evaluate the social forces and political ideologies that influence their decision-making.[17] Thus, legislative and judicial decisions frequently result in false dichotomies between healthy children and children with disabilities that perpetuate harmful and stigmatizing stereotypes.[18]

A. Complex and Varied Models of "Disability" and "Harm" Give Context to Reproductive Tort Claims, While Highlighting Underlying Moral Tensions

Disability policy scholars have developed three principal models of disability that give context to reproductive tort disputes. First, the "medical model" treats disability as a natural defect that causes incapacity, yields social isolation and economic dependence, and requires medical intervention.[19] Under this model, society need not alleviate the social disadvantages that arise from disability because nature, not society, causes disability.[20] Thus, social policy based on the medical model encourages people with disabilities to "approximate dominant physical standards as

14. *See infra* Part V.

15. Kaplan, *supra* note 4, at 352.

16. *See, e.g.*, Elizabeth A. Pendo, *Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation*, 35 U.C. DAVIS L. REV. 1175, 1189–91 & 1189 n.45 (2002) (noting that "the failure to develop a coherent and consistent theory of disability" has resulted in "inconsistent" judicial results); *see also infra* Part II.A. (examining various models of and approaches to "disability" and "harm").

17. *See infra* Part II.B.

18. *See infra* Part II.C.

19. *See* Hensel, *supra* note 10, at 146 (stating that under the medical model of disability, disability "results from the internal functional limitations of an individual").

20. *Id.* As a result, "any remediation society chooses to undertake [is] . . . charitable intervention . . . ." *Id.* at 147.

closely as possible" by using medical therapies to eradicate disability.[21] In contrast, the "socio-political model" (the "social model") deems disability to be a social construct arising from "environmental factors" such as culture, institutions, and private conduct.[22] Unlike the medical model, the social model imposes certain duties on society because communities transform people with functional impairments into people with disabilities (e.g., a man who cannot walk cannot live in an apartment that lacks an elevator because society did not fully contemplate the non-ambulatory).[23] Finally, the "minority group model" posits that disability is not only a social construct, but also one that creates a "discrete minority group" and "unified political body."[24] This model empowers people with disabilities to insist on the "eradication of exclusionary social practices . . . as a matter of civil rights."[25]

Like the meaning of "disability," the meaning of "harm" becomes more elusive in the tort context as medical science creates new occasions for negligence in prenatal genetic testing.[26] Under a lay definition of harm—in which harm equals physical ailment—injury and harm are effectively identical.[27] But in the reproductive tort setting, where families suffer a variety of physical and non-physical injuries, harm is more accurately "the thwarting, setting back, or defeating of an interest."[28] Further, the personal experience of harm can "both overlap and be quite distinct from legal conceptions of harm."[29]

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21. *Id.* (citation and internal quotation marks omitted); *see also* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 627 (1999) ("[A] disability studies lens may bring into focus how some legal decisionmakers continue to act on the assumption that biology *is* destiny when it comes to disability."); Hensel, *supra* note 10, at 146–47 (noting that the medical model "dominate[s] public thinking" and underlies global notions of disability).

22. Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 214 (2000).

23. *Id.* at 215–16.

24. Hensel, *supra* note 10, at 149.

25. *Id.* (citation and internal quotation marks omitted). *But see* Crossley, *supra* note 21, at 664 (noting that the social and minority-group models may not adequately account for the differences in the physical impairments and life-experiences among people with greatly varying disabilities).

26. *See, e.g.*, NICOLETTE PRIAULX, THE HARM PARADOX: TORT LAW AND THE UNWANTED CHILD IN AN ERA OF CHOICE 4 (2007) ("The concept of 'harm', though seemingly self-evident, is thoroughly ambiguous."); *see also* Hensel, *supra* note 10, at 150 (suggesting that while genetic technology and scholarship have progressed, the common law of torts "has clearly lagged behind"); Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 134 (1993) ("[V]arious tort rules reflect the coolness of the developing tort law to psychiatry and psychology.").

27. PRIAULX, *supra* note 26, at 4.

28. JOEL FEINBERG, 1 THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 33 (1984).

29. PRIAULX, *supra* note 26, at 4.

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In her recent book on this subject, Professor Nicolette Priaulx states that "some kinds of harms are easily assimilated within the traditional corpus of law, [whereas] others do not lend themselves so easily to tortious characterisation [sic]."[30] So to determine how wrongful birth and wrongful life claims affect people with disabilities, one must ask what and whose interests tort law serves.[31] These questions raise others: Should courts apply a subjective or objective test to determine legal harm? Is the birth of a healthy, unwanted newborn a legal harm? Is the birth of a newborn with an expected disability a legal harm? Is a violation of parental autonomy with respect to the existence of a newborn a legal harm? Are a parent's financial burden and emotional trauma legal harms? Can healthy newborns cause more harm to parents than newborns with disabilities in certain circumstances? If so, are these harms different by type or degree?

The United Kingdom offers a useful body of case law that reveals the social backdrop of unsettled judicial perceptions of reproductive harm. British courts first evaluated reproductive harm in *Udale v. Bloomsbury Area Health Authority*,[32] where a woman conceived after undergoing a failed sterilization procedure.[33] Although the parents were entitled to certain prenatal damages,[34] the *Udale* court ruled, they could not claim that their child's birth was a legal harm because childbirth is "a blessing and an occasion for rejoicing."[35] Therefore, the costs of childbirth and childrearing were not compensable.[36]

Two years later, the *Thake v. Maurice*[37] court refused to follow *Udale*,[38] reasoning that "the birth of a healthy baby is not always a blessing" because (1) family planning is prevalent; (2) abortions and vasectomies are lawful and common; and (3) childrearing is costly.[39] That same year, the Court of Appeal of England relied on *Thake*'s principles in *Emeh v. Kensington*[40] to award childrearing costs to a single woman who

30. *Id.* at 4–5 (citation and internal quotation marks omitted).

31. *Id.* at 5.

32. (1983) 2 All E.R. 522 (Q.B.D.).

33. *Id.* at 523.

34. *Id.* at 527. These prenatal damages were for the costs of (1) the original sterilization and re-sterilization; (2) the shock, anxiety, and fear of pregnancy; (3) the thwarting of the couple's decision not to have more children; (4) the medical fees of pregnancy; and (5) the couple's loss of earnings for eleven months. *Id.*

35. *Id.* at 531.

36. *Id.* at 523–24, 531.

37. (1986) Q.B. 644 (Exeter).

38. *Id.* at 665–67.

39. *Id.* Notably, the court stated that "every baby has a belly to be filled and a body to be clothed" and that a healthy newborn is a blessing only when "born to the happy family life which we would all like a baby to have." *Id.* at 666.

40. (1985) 1 Q.B. 1012 (A.C.).

birthed a child with a severe congenital defect after a failed sterilization.[41] But fifteen years later, England's House of Lords returned to *Udale*'s reasoning in *McFarlane v. Tayside Health Board*,[42] deciding that a couple that had a "healthy" child after a failed vasectomy could not recover childrearing costs.[43] Deeming it "unrealistic" and "distasteful" to "place a monetary value on the birth of a normal and healthy child," the *McFarlane* court declared that (1) "the birth of a normal, healthy baby [is] a blessing, not [a] detriment"; and (2) this blessing outweighs the costs of parenting.[44]

These vacillating judicial decisions and diverse models of harm and disability highlight the moral tensions underlying reproductive tort cases. Even if a healthy child is a blessing, "invasive [contraceptive] medical procedures" signal that, to some couples, childbirth does not yield the "joy" that *McFarlane* describes.[45] Professor Emily Jackson emphasizes this, noting that one's "invasive surgery" to achieve infertility shows that childbirth is not always a blessing.[46] By ruling that healthy children are not legal harms, however, English courts suggest that ones with disabilities may be legal harms—a dichotomy with pervasive effects.

B. The Uncertain Propriety of Reproductive Tort Claims Has Forced Judges to Publicly Confront Difficult Existential Questions Involving the Cost and Value of Life with a Disability, Nonexistence, Parenthood, and Legal Compensation

Four main tort claims pressure judges to publicly assess the value and compensability of infants with disabilities: wrongful pregnancy, false representation, wrongful birth, and wrongful life.[47] Wrongful pregnancy was the earliest reproductive tort claim in the United States, arising when unwanted pregnancy resulted from a failed abortion or sterilization, or from a manufacturer's faulty contraceptive.[48] As of 2005, thirty-one states and the District of Columbia recognized this claim.[49] But like the *McFarlane* and *Udale* courts, most state courts prohibit childrearing damages and

41. *Id.* at 1015, 1021–22.

42. (2000) 2 A.C. 59 (H.L.) (appeal taken from Scot.).

43. *Id.* at 83.

44. *Id.* at 111, 113–14.

45. PRIAULX, *supra* note 26, at 4–6 (noting that the *McFarlane* court "erroneous[ly] and conveniently overlook[ed] the fact that . . . a 'blessing' has been forced upon" the couple).

46. Emily Jackson, *Conception and the Irrelevance of the Welfare Principle*, 65 MOD. L. REV. 176, 199 (2002).

47. Hensel, *supra* note 10, at 151, 153.

48. *See, e.g.*, Cowe v. Forum Group, Inc., 575 N.E.2d 630, 633 (Ind. 1991) ("An action for 'wrongful conception or pregnancy' refers to a claim for damages sustained by the parents of an unexpected child alleging that the conception of the child resulted from negligent sterilization procedures or a defective contraceptive product.").

49. Hensel, *supra* note 10, at 153.

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award medical and emotional distress damages only for costs relating to pregnancy and delivery.[50] The few courts that allow childrearing damages acknowledge the attendant public policy concerns, including newborns' "silent interests," "parent-child relationships,"[51] and the psychological harm to the child who is "branded" an "'emotional bastard.'"[52] Traditionally and still, "most jurisdictions" let plaintiffs seek damages for wrongful pregnancy[53] because, as the Supreme Court of Kentucky explained, to prohibit damages for this tort "would defy logic and be contrary to the concept of causation in tort."[54]

Parents also sue for false representation when pregnancy occurs after one wrongfully assures the other of infertility.[55] In *Moorman v. Walker*,[56] for instance, a woman falsely told her boyfriend she was infertile after he "made it very clear" he did not want children out of wedlock.[57] Rejecting the boyfriend's suit for false representation after the woman conceived, the court expressed its practical and moral concerns: (1) a court cannot decide whether "the monetary cost of [a] life is worth more than its value"; (2) this claim facilitates the "unseemly spectacle" of parents disparaging their children; (3) public policy forbids parents from maximizing their awards by claiming "in open court" that their child's existence is harmful; and (4) this claim "trivializes life itself."[58] Similarly, in *C.A.M. v. R.A.W.*,[59] a New Jersey appellate court affirmed that parents of a "normal, healthy child" may not recover compensatory or punitive damages for false representation.[60] Like *McFarlane*'s reasoning, *C.A.M.*'s emphasis on a normal, healthy child suggests that one with a disability may be compensable.[61] In fact, in *Szekeres v. Robinson*,[62] the Supreme Court of

50. *See* Anthony Jackson, *Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England*, 17 LOY. L.A. INT'L & COMP. L. REV. 535, 589 (1995) (stating that "of the thirty-six jurisdictions that allow wrongful pregnancy claims, twenty-eight deny damages for child-rearing as a matter of law").

51. Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 177 (Minn. 1977).

52. *See* Horace B. Robertson, Jr., *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1449 (quoting *Sherlock*, 260 N.W.2d at 173).

53. Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 654 (Ga. 1984).

54. Maggard v. McKelvey, 627 S.W.2d 44, 47 (Ky. 1981).

55. *See, e.g.*, C.A.M. v. R.A.W., 568 A.2d 556, 556 (N.J. Super. Ct. App. Div. 1990) (involving a father who falsely claimed he had undergone a vasectomy).

56. 773 P.2d 887 (Wash. Ct. App. 1989).

57. *Id.* at 888.

58. *Id.* at 889 (citations and internal quotation marks omitted).

59. 568 A.2d 556.

60. *Id.* at 563.

61. *Compare id. with* McFarlane v. Tayside Health Bd., (2000) 2 A.C. 59, 113–14 (H.L.) (appeal taken from Scot.) (declaring that parents of a "healthy" child may not recover childrearing costs because the "blessing" of a healthy child's birth outweighs the costs of "parenthood").

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Nevada announced that although a "*normal* birth is not a wrong, it is a 'right,'"[63] this conclusion applies only to healthy births and not necessarily to cases in which "medical negligence results in . . . genetic deformities and the like."[64]

Courts are generally inconsistent in their treatment of wrongful birth and wrongful life claims. While many courts disregard the benefits of rearing children with genetic defects, other courts recognize them.[65] In *Gleitman v. Cosgrove*,[66] a physician incorrectly assured a pregnant woman with rubella that the virus would not affect her developing fetus, and the child was born with "substantial defects" in sight, hearing, and speech.[67] Arguing that they would have considered an abortion, the parents sued for wrongful birth, on behalf of themselves, and wrongful life, on behalf of their child.[68] The *Gleitman* court rejected the wrongful birth claim, reasoning that judges cannot accurately weigh existential harm against the "complex human benefits" of parenthood and adding that "[a] child need not be perfect to have a worthwhile life."[69] The court also rejected the wrongful life claim, explaining that it could not weigh the child's life with defects against "the utter void of nonexistence."[70]

Ten years later, in *Becker v. Schwartz*,[71] a thirty-five-year-old woman who birthed a child with Down's syndrome sued for wrongful birth and wrongful life, alleging that her physician neither warned her of age-related pregnancy risks nor recommended an amniocentesis.[72] Like the *Gleitman* court, the *Becker* court rejected the wrongful life claim, declaring that only "the philosophers and the theologians" should decide whether nonexistence is better than life with "gross deficiencies."[73] But contrary to *Gleitman*, the

62. 715 P.2d 1076 (Nev. 1986).

63. *Id.* at 1078 (emphasis added).

64. *Id.* at 1078 n.3.

65. Hensel, *supra* note 10, at 154 (stating that courts' rationales in cases involving healthy children "stand in contrast" to the rationales courts invoke "in the context of a child born with a genetic defect").

66. 227 A.2d 689 (N.J. 1967).

67. *Id.* at 690. The plaintiff's expert testified that "women who have [rubella] in the first trimester of their pregnancy will produce infants with birth defects in 20 to 50 per cent of the cases." *Id.*

68. *Id.* at 691. In a typical wrongful birth claim, parents sue for injuries allegedly resulting from the birth, whereas in a typical wrongful life claim, parents sue on behalf of the child with a disability, alleging that he or she would be better off not having been born at all. Willis v. Wu, 607 S.E.2d 63, 66 (S.C. 2004).

69. *Gleitman*, 227 A.2d at 693. The court stated that "[t]he sanctity of the single human life is the decisive factor in this suit . . . . We are not talking here about the breeding of prize cattle." *Id.*

70. *Id.* at 692.

71. 386 N.E.2d 807 (N.Y. 1978).

72. *Id.* at 808–09.

73. *Id.* at 812.

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Becker court recognized the wrongful birth claim because the costs of childcare and treatment were calculable.[74] The *Becker* court refused to permit recovery for psychological harm, deeming this calculation "too speculative" and noting that "parents may yet experience a love that even an abnormality cannot fully dampen."[75]

In line with *Becker*, most states have recognized wrongful birth claims but not wrongful life claims.[76] In a precursor to wrongful life cases, *Dietrich v. Inhabitants of Northampton*,[77] Justice Holmes ruled that claims on behalf of children relating to prenatal injury were invalid because the unborn child was "part of the mother at the time of the injury, [and] any damage to it which was not too remote to be recovered for at all was recoverable by her . . . ."[78] Later, in *Walker v. Mart*,[79] a woman whose child had severe congenital defects sued her osteopathic physician for wrongful life for negligently performing prenatal tests to detect rubella.[80] Reasoning that children "have neither the ability nor the right" to decide existential questions, the *Walker* court rejected the wrongful life claim, adding that although an "overwhelming majority of jurisdictions" allow wrongful birth claims, only three allow wrongful life claims.[81]

Indeed, some states cite public policy and judicial unmanageability as prohibiting both wrongful birth and wrongful life claims. In *Schork v. Huber*,[82] for example, the Supreme Court of Kentucky ruled that "[t]he establishment of a cause of action based on the matter of wrongful conception, wrongful life or wrongful birth is clearly within the purview of the legislature only."[83] Likewise, some state legislatures prohibit all claims

74. *Id.* at 813.

75. *Id.* at 814.

76. *See* Lininger v. Eisenbaum, 764 P.2d 1202, 1208–09 n.9 (Colo. 1988) (noting the "overwhelming majority" of jurisdictions that recognize wrongful birth claims and citing various state cases and statutes in which courts have rejected wrongful life claims); *see, e.g.*, Smith v. Cote, 513 A.2d 341, 355 (N.H. 1986) (recognizing wrongful birth claims but refusing to recognize wrongful life claims); James G. v. Caserta, 332 S.E.2d 872, 881 (W. Va. 1985) (same); Naccash v. Burger, 290 S.E.2d 825, 830 (Va. 1982) (recognizing wrongful birth claims); *see also* Speck v. Finegold, 408 A.2d 496, 508 (Pa. Super. Ct. 1979) (rejecting a wrongful life claim, reasoning that to determine "[w]hether it is better to have never been born at all rather than to have been born with serious mental defects . . . would lead us into the field of metaphysics, beyond the realm of our understanding or ability to solve"), *rev'd on other grounds*, 439 A.2d 110, 112 (Pa. 1981).

77. 138 Mass. 14 (1884). *But see* Angelini v. OMD Corp., 575 N.E.2d 41, 44 (Mass. 1991) (noting that the Supreme Judicial Court of Massachusetts abrogated *Dietrich*'s rule in Keyes v. Construction Service, Inc., 165 N.E.2d 912 (1960), which established that the administrator of a deceased child's estate "could recover for wrongful death" in certain cases).

78. *Id.* at 17.

79. 790 P.2d 735 (Ariz. 1990).

80. *Id.* at 736.

81. *Id.* at 737 n.3, 738, 740.

82. 648 S.W.2d 861 (Ky. 1983).

83. *Id.* at 863.

asserting that "but for the negligent conduct of another," the person "would have been aborted."[84]

In limited forms, however, several states still recognize wrongful life claims.[85] In *Curlender v. Bio-Science Laboratories*,[86] a child born with Tay-Sachs disease sued a laboratory for wrongful life, alleging that it negligently failed to determine that both parents carried the mutation known to cause the disorder.[87] The intermediate appellate court recognized the claim, reasoning that (1) "eugenic abortion" controls the "increasingly large part of the overall national health care burden" that genetic defects cause; (2) tort law helps "to avoid genetic disaster"; and (3) newborns with disabilities suffer compensable harm.[88] Besides, the court added, tort law reflects the "basic changes in the way society views such matters."[89] In dicta, the court noted that its reasoning may support the claim of an "impaired infant" against her parents who, knowing of a prenatal defect, caused harm by allowing the child to be born.[90] Two years later, the California Supreme Court affirmed the general validity of wrongful life claims, allowing courts to award non-general damages to compensate a "severely handicapped or suffering child" for medical care.[91] New Jersey and Washington similarly allow wrongful life claims.[92]

One scholar, Professor Hensel, notes that the "novelty" of reproductive torts has recently "worn off" due to expanded abortion rights and better prenatal genetic testing.[93] Most states still allow wrongful birth claims to compensate for medical costs, deter medical negligence, and protect

84. *See, e.g.*, MINN. STAT. § 145.424 (2008); MO. REV. STAT. § 188.130 (2008); *see also* IDAHO CODE ANN. § 5-344 (2008) (prohibiting claims that "but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted").

85. *See, e.g.*, Procanik v. Cillo, 478 A.2d 755, 762 (N.J. 1984); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 497 (Wash. 1983); Turpin v. Sortini, 643 P.2d 954, 965 (Cal. 1982) (in banc).

86. 165 Cal. Rptr. 477 (Cal. Ct. App. 1980), *overruled in part by Turpin*, 643 P.2d at 965 (affirming that a child with a disability may bring a wrongful life claim in California, but overruling the *Curlender* court's decision to allow that child to recover "general damages").

87. *Curlender*, 165 Cal. Rptr. at 480–81.

88. *Id.* at 487–88 (citation and internal quotation marks omitted). Several courts have invoked the third reason. *See, e.g.*, Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1254 (Ill. 1977) (noting the view that "the embryo, from the moment of conception, is a separate organism that can be compensated for negligently inflicted prenatal harm"); Watt v. Rama (1972) V.R. 353, 377 (Austl.) (stating, in dicta, that "[d]isease and trauma happening at any time from the womb to the tomb apparently can affect one's well-being and future health").

89. *Curlender*, 165 Cal. Rptr. at 487.

90. *Id.* at 488. The California legislature immediately passed a law to protect parents against such liability. CAL. CIV. CODE § 43.6 (WEST 2007).

91. *Turpin*, 643 P.2d at 961–62, 966.

92. *See, e.g.*, Procanik v. Cillo, 478 A.2d 755, 762 (N.J. 1984); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 497 (Wash. 1983).

93. Hensel, *supra* note 10, at 160.

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parental autonomy.[94] The opposing minority of states rejects these claims, often on grounds of institutional incompetence.[95] The Supreme Court of Georgia, for instance, explained that because the "problems presented by the concept of 'wrongful birth' actions can only become increasingly more numerous and more complex," only the legislature should tackle them.[96] For the same reasons, the Supreme Court of North Carolina ruled that "neither claims for wrongful birth nor claims for wrongful life are cognizable at law in this jurisdiction."[97] Besides, Professor Hensel argues, "wrongful birth and wrongful life actions result in equally anti-therapeutic consequences for people with disabilities."[98]

The jurisdictional splits, diverse legal concerns, and conflicting preferences that characterize American reproductive tort jurisprudence reveal the challenges that judges face when making legal decisions that are also declarations of moral policy.

C. Courts Perpetuate Stigmatizing Stereotypes by Sustaining False Dichotomies Between Healthy Children and Children with Disabilities

The underlying message of the judiciary and legislature reveals that society's "physiological model of 'normality'" still excludes people with disabilities, and that this model governs public discourse.[99] Despite the progressive ideas giving rise to the ADA, the disability rights movement, and the minority-group model of disability, the blessing-burden distinction persists. Lord Steyn, in *McFarlane*, ruled that the United Kingdom's "tort law does not permit parents of a *healthy* . . . child" to recover childrearing costs from a negligent physician.[100] The *C.A.M.* court ruled that the parents of a normal, healthy baby were not entitled to compensatory or punitive damages.[101] The *Szekeres* court "t[ook] the trouble" to declare that although a "normal birth is not a wrong," the birth of a baby with "genetic deformities and the like" may be legally compensable.[102] The *Curlender* court suggested that "defectively born" children are compensable "genetic

94. *Id.* at 160–61.

95. *See, e.g.*, Schork v. Huber, 648 S.W.2d 861, 863 (Ky. 1983) (refusing to recognize a wrongful birth claim, explaining that only the legislature can establish this cause of action).

96. Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 563 (Ga. 1990).

97. Azzolino v. Dingfelder, 337 S.E.2d 528, 537 (N.C. 1985).

98. Hensel, *supra* note 10, at 170.

99. PRIAULX, *supra* note 26, at 54.

100. McFarlane v. Tayside Health Bd., (2000) 2 A.C. 59, 83 (H.L.) (appeal taken from Scot.) (emphasis added).

101. C.A.M. v. R.A.W., 568 A.2d 556, 563 (N.J. Super. Ct. App. Div. 1990).

102. Szekeres v. Robinson, 715 P.2d 1076, 1078 & n.3 (Nev. 1986).

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disaster[s]" that burden the health care system.[103] As Professor Priaulx highlights, "disability seems to be all about real bodies that are physically, sensorily or intellectually different in *undesirable* ways."[104]

In light of these judicial proclamations, the financial benefits of reproductive tort claims[105] "come at great expense" to people living with disabilities for three reasons.[106] Principally, the rhetoric of litigation tends to ignore "attitudinal discrimination" and to characterize members of society as the "protectors, guides and spokespersons for disabled citizens."[107] First, a judicial opinion in a wrongful birth or wrongful life case is often a "community pronouncement, via a government institution," that an impaired life is worse than nonexistence.[108] This "state-sanctioned message" is an important policy declaration[109] and a "key societal signifier" because public perceptions of harm are "closely linked" to the law.[110] Thus, when *McFarlane* and *Curlender* announced that a healthy newborn is a blessing and an unhealthy one is a harm, they sanctioned society to do the same.[111] Insurance companies, health providers, and private enterprises, for example, could rely on these judicial messages to justify denying support to parents who refuse to abort fetuses with known genetic defects.[112] Second, de facto, reproductive tort claims compel parents either to deny themselves needed compensation or to "disavow [their children's] very existence in open court."[113] This non-choice raises broader policy questions:

103. Curlender v. Bio-Sci. Labs., 165 Cal. Rptr. 477, 487–88 (Cal. Ct. App. 1980).

104. PRIAULX, *supra* note 26, at 54 (citations and internal quotation marks omitted).

105. *See* Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 336 (2004) (noting financial support and deterrence of misconduct among these benefits).

106. Hensel, *supra* note 10, at 171.

107. *See* Harlan Hahn, *Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN'S STUD. 97, 106–07 (1994) (noting that courts have generally ignored harmful societal attitudes).

108. Hensel, *supra* note 10, at 173.

109. *Id.*

110. PRIAULX, *supra* note 26, at 38 (citation and internal quotation marks omitted).

111. *See* Hensel, *supra* note 10, at 174 (positing that "[j]udicial recognition" of wrongful birth and wrongful life claims "is akin to a state-sanctioned acknowledgement that [society] . . . may legitimately evaluate whether an individual with impairments has a rightful place in the community").

112. *Id.* at 180–81. Professor Hensel notes that, unlike non-reproductive tort rulings that favor plaintiffs, which all "in some respect endorse the value of the plaintiff's life," wrongful birth and wrongful life rulings "negate[]" the value of the plaintiff's life. *Id.* at 175–76.

113. *Id.* at 172. "The anti-therapeutic consequences" of this parental announcement in open court are "amplified, since the disparagement is voiced from within the community of people with disabilities and cannot be discounted by others as mere ignorance or prejudice." *Id.* at 173. Indeed, malpractice litigation is often "highly public." Edward A. Dauer, *A Therapeutic Jurisprudence Perspective on Legal Responses to Medical Error*, 24 J. LEGAL MED. 37, 38 (2003).

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> Why should playmates' parents, the neighbors, or the schools change to incorporate existing children with disabilities if families and . . . government . . . work as hard as they do to avoid the births of people who will have these conditions? Where do we first learn justice, sharing, and cooperation, but in the family?[114]

Third, because parents must now decide both how many children they want and what kind of children they do not want, stereotypes that courts inadvertently reinforce affect whether people with disabilities are "born at all."[115]

Finally, judicial opinions may acutely affect adults living with disabilities and families raising children with disabilities. To many adults with disabilities, even non-tortious prenatal testing signals that "the world would be better off without [them] alive" and makes them "feel devalued as human beings."[116] Indeed, prenatal testing implies that society would rather "solve" disabilities than make society amenable to them.[117] In certain cultures, in fact, public positions regarding disability directly affect societal and familial well-being. For example, a British government program seeking to identify the carriers of Maple Syrup Urine Disease in a Bedouin tribe caused nearly every male to seek a wife outside the tribe, resulting in a population of unmarried Bedouin women.[118] One disability scholar declared that "[w]e in the disability rights community resist the notion that our humanness can be evaluated and then reduced to a flawed gene."[119] Thus, according to Professor Hensel, the legal recognition of wrongful birth and wrongful life claims is "akin to a public endorsement of eugenic abortion in lieu of . . . life with disabilities."[120]

Insensitive jurisprudence may also yield moral, emotional, and financial hardships for parents contemplating abortion. In *Curlender*'s jurisdiction, for example, parents who choose to have a child despite a genetic defect know they have legally harmed their child.[121] Indeed, the

114. Adrienne Asch, *Why I Haven't Changed My Mind about Prenatal Diagnosis*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 234, 251 (Erik Parens & Adrienne Asch eds., 2000).

115. Turpin v. Sortini, 643 P.2d 954, 961 (Cal. 1982) (in banc).

116. Marsha Saxton, *Why Members of the Disability Community Oppose Prenatal Diagnosis and Selective Abortion*, *in* PRENATAL TESTING AND DISABILITY RIGHTS, *supra* note 114, at 160.

117. Asch, *supra* note 114, at 240.

118. Mairi Levitt, *A Sociological Perspective on Genetic Screening*, *in* THE ETHICS OF GENETIC SCREENING 157, 160 (Ruth Chadwick et al. eds., 1999).

119. Saxton, *supra* note 116, at 161.

120. Hensel, *supra* note 10, at 177.

121. *See* Curlender v. Bio-Sci. Labs., 165 Cal. Rptr. 477, 488 (Cal. Ct. App. 1980) (identifying "no sound public policy which should protect those parents from being answerable for the pain, suffering and misery" they visit on their newborns); *see also* Adrienne Asch, *Reproductive*

Curlender court "did not merely hint" that these parents should be answerable,[122] morally and at law, "for the pain, suffering, and misery which they have wrought upon their offspring."[123] At least one scholar agrees with *Curlender* that "[i]n some cases it might be possible to say that the parents have made a 'poor' decision and have wronged the child" by carrying her to term.[124] Other cost-benefit scholars have weighed the price of state-wide genetic screening programs against the burden of raising children with impairments.[125] Even the National Institutes of Health has promoted "genetic counseling" to help solve the "problems" of genetic conditions.[126] Because these pronouncements deeply affect lives and reinforce controversial policies, courts should use restraint when drafting their judicial opinions.

III. JUDICIAL OPINIONS THAT PRESERVE TRADITIONAL TORT MECHANISMS WHILE ACCURATELY CONCEPTUALIZING "DISABILITY" AND "HARM" PROTECT THE LEGAL INTERESTS OF LITIGANTS AND PROMOTE A MORE TRUTHFUL PERCEPTION OF THE DISABILITY COMMUNITY

Some scholars argue that, due to the prohibitively high social costs of wrongful birth and wrongful life claims, "neither action should be recognized by state legislatures or the courts."[127] But the objective reasonably prudent person standard supporting these claims "is deeply ingrained in common law."[128] Because states are unlikely to abolish reproductive tort claims that deter medical negligence and compensate families, courts should take practical steps to write judicial opinions that reflect and promote an accurate understanding of disability.[129] In so doing, courts can compensate families and avoid perpetuating harmful false

Technology and Disability, *in* REPRODUCTIVE LAWS FOR THE 1990S 69, 88 (Sherrill Cohen & Nadine Taub eds., 1989) (stating that where genetic tests yield diagnoses of spina bifida, cystic fibrosis, or Down's syndrome, people generally believe that "failure to abort is cruel to the potential child, destructive to the family, socially irresponsible, and possibly immoral").

122. Hensel, *supra* note 10, at 177–78.

123. *Curlender*, 165 Cal. Rptr. at 488.

124. Alan J. Belsky, *Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?*, 22 U. BALT. L. REV. 185, 241–42 (1993).

125. *See, e.g.*, Gwen Anderson, *Nondirectiveness in Prenatal Genetics: patients read between the lines*, 6 NURSING ETHICS 126, 130 (1999).

126. *Genetic Disorders Causing Mental Retardation*, 23 NIH GUIDE, Feb. 18, 1994, *available at* http://grants.nih.gov/grants/guide/pa-files/PA-94-037.html.

127. *See* Hensel, *supra* note 10, at 144–45 (identifying the impaired psychological well-being of people with disabilities and the negative public image of disability as two social costs of reproductive tort litigation).

128. Mark A. Rothstein, *Legal Conceptions of Equality in the Genomic Age*, 25 LAW & INEQ. 429, 439 (2007).

129. *See infra* Part III.A.

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dichotomies,[130] while yielding net benefits to all parties involved in reproductive tort cases.[131]

A. Courts Should Contextualize Their Understanding of Disability and Harm to Accommodate Families' Diverse Experiences and to Convey Accurate Information About Litigants

Courts adjudicating wrongful birth and wrongful life cases should aggressively monitor the implicit messages their opinions send to litigants, neighborhoods, and families. Indeed, mere euphemisms for wrongful birth, which one court tried to implement, are insufficient.[132] Courts should instead avoid false bright lines between "healthy" and "disabled" by focusing on familial context, appropriate models of harm and disability, and the potential social effects of their rulings.

By relying on the rigid medical model of disability, some courts have perpetuated the belief that families of children with disabilities are crippled, whereas families of healthy children are blessed.[133] Just eight years ago, for instance, a British judge in *Lee v. Taunton*[134] announced that "I do not believe that it would be right for the law to deem the birth of a disabled child to be a blessing."[135] Likewise, in *Rand v. East Dorset Health Authority*,[136] the same court declared that the blessings and hardships of living with a substantially "disabled" child are "difficult to discern."[137] Despite these signals that health is the opposite of disability,[138] our experiences suggest otherwise.

Bright lines between health and disability generally obscure the diverse experiences of families, assume that disability connotes misfortune, and disregard the "distinct biographies [and] different social circumstances, priorities and emotional make-ups" of litigants.[139] Lord Justice Wallace of

130. *See infra* Part III.B.

131. *See infra* Part III.C.

132. *See* Garrison v. Med. Ctr. of Del., Inc., 581 A.2d 288, 290 (Del. 1989) (stating that a claim for medical malpractice for a negligently performed prenatal chromosome study "need not be characterized as 'wrongful birth' since it falls within the realm of traditional tort and medical malpractice law").

133. *See* PRIAULX, *supra* note 26, at 56 (noting courts' proclamations that "caring for a disabled child is harmful and sufficiently distinctive from the (judicially viewed harm*less*) experience of caring for a non-disabled child").

134. (2001) 1 F.L.R. 419 (Q.B.D.).

135. Nicolette Priaulx, *Health, Disability & Parental Interests: Adopting a Contextual Approach in the Reproductive Torts*, 12 EUR. J. HEALTH L. 213, 219 (2005) (citation and internal quotation marks omitted).

136. (2000) 56 B.M.L.R. 39 (Q.B.D.).

137. *Id.* at 49.

138. *See* PRIAULX, *supra* note 26, at 56.

139. Priaulx, *supra* note 135, at 229.

the Court of Appeal of England articulated these concerns through the following hypothetical in his dissenting opinion in a recent wrongful birth case.[140] Compare a healthy mother who has four children but no familial support to a mother "who is disabled" but who also has a loving and supportive husband, siblings, parents, and friends, "all willing to help."[141] "[O]rdinary people," Lord Justice Wallace submits, "would feel uncomfortable about the thought that it was simply the disability which made a difference."[142] One scholar echoes this point: "[o]ne set of parents may give birth to a perfectly healthy baby that ends up living a miserable life of depression and social ostracism, while another set may give birth to a disabled child who turns out to be the next Helen Keller, a figure of success and inspiration."[143] Besides, "the same [disabling] condition can be seen in one country as a curse and in another as a blessing."[144] Certain Southeast Asian cultures, for instance, believe that people with blindness "possess[] a certain valued insight," and the Tswana culture deems children with disabilities "gifts from God."[145] Plainly, every parent experiences hardships and happiness in different ratios and diverse ways according to their unique circumstances.[146]

But when judicial opinions become "constant reminders" that disabilities are actionable harms, courts risk causing "chronic sorrow" in families[147] and promulgating "pathologising assumptions" about the effects of disability.[148] To avoid an inaccurate "value-judgment . . . that the lives of the handicapped are worth . . . less than those of a 'normal' person [sic],"[149] courts should examine harm and disability in a familial and cultural context.

Particularly in reproductive tort cases, the importance of context and the danger of bright lines are even more acute and personal than Lord Wallace suggested. By rigidly defining disability and discounting "the

140. *See* Rees v. Darlington Mem'l Hosp. NHS Trust, (2003) 3 W.L.R. 1091, 1106 (H.L.).

141. *Id.*

142. *Id.*

143. Sophie Zhang, *The Morality of Having Children with Disabilities: A Different Perspective on Happiness and Quality of Life*, 8 MGGILL J. MED. 85, 87 (2004).

144. *Id.* at 85.

145. *Id.* (internal quotation marks omitted).

146. *See* Simo Vehmas, *Parental Responsibility and the Morality of Selective Abortion*, 5 ETHICAL THEORY & MORAL PRAC. 463, 472 (2002) ("When considering the parenting of a child with a cognitive impairment, people seem to forget the fact [that] *every* child is more or less a burden to her parents.").

147. *See* Margaret F. Copley & John B. Bodensteiner, *Chronic Sorrow in Families of Disabled Children*, 2 J. CHILD NEUROL. 67, 69 (1987).

148. PRIAULX, *supra* note 26, at 70 (stating that "the courts have . . . embraced a purely medical model of disability").

149. Jackson, *supra* note 50, at 607.

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context of family, community, and the individual as a whole person," many courts largely disregard the possibility that people with disabilities can lead happy, meaningful lives.[150] Specifically, when parents learn that their child will have a disability, the "ultimate impact" of the defect remains largely unknown.[151] The experiences of disability, even among those with the same condition, vary dramatically depending on familial support, financial resources, and unknown biological factors.[152] A child with cystic fibrosis, for instance, "might die from it, survive with physical disability, or suffer no noticeable impairment";[153] a child with Down's syndrome may suffer severe mental impairment or may sustain a job and meaningful relationships;[154] and a child with spina bifida may grow up crippled in a broken home or may lead a happy life.[155] An extraordinary example of the value of context to the judicial perception of disability is Alison Davis, who was born with Myelomeningocele Spina Bifida and explains:

> Despite my disability and the gloomy predictions made by doctors at my birth, I am now leading a very full, happy and satisfying life by any standards. I am most definitely glad to be alive. Yet, because handicapped people are now presumed by . . . doctors, [courts,] philosophers and Society in general to have the capacity only for being miserable and an economic burden on the community most of those who would otherwise grow up to be like me are now aborted or "allowed to die" . . . at birth.[156]

Elsewhere, Ms. Davis has stated that "I am an ordinary human being, who simply has disabilities which are more obvious than those of the majority. I believe my life . . . to be of infinite value, not valuable only if it achieves a particular 'quality.'"[157]

150. Hensel, *supra* note 10, at 182–83 (noting that notions of disability are "reduced to the least common denominator of organistic functioning and focus exclusively on internally rather than externally imposed barriers").

151. *See id.* at 183. Generally, at this time, only "the identification of the defect itself and its possible parameters" are known. *Id.*

152. *See* Zhang, *supra* note 143, at 86 (offering examples of people with severe disabilities who live happy and prosperous lives).

153. Larson, *supra* note 9, at 922.

154. Hensel, *supra* note 10, at 183.

155. Zhang, *supra* note 143, at 86 (describing the life of Alison Davis, who earned a university degree, married, became a well-known disability-rights activist and claims to have enjoyed a "full and happy life" despite suffering from a severe form of spina bifida that has left her incontinent and wheelchair bound).

156. Hensel, *supra* note 10, at 183–84 (quoting Alison Davis, *Yes, the Baby Should Live*, 31 NEW SCIENTIST 54 (1985)).

157. Alison Davis, A Disabled Person's Perspective on Pre-Natal Screening 9 (March 30, 1999) (unpublished manuscript, on file with the University of Leeds Centre for Disability Studies), *available at* http://www.leeds.ac.uk/disability-studies/archiveuk/Davis/A%20Disabled%20Person.pdf.

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In light of circumstances like those of Ms. Davis's, courts should replace their bright-line "categories of disability and health as indicators of harmful (or harmless) reproductive outcomes" with a non-dichotomous approach that considers lived experiences.[158] This approach should (1) consider the burdens that accompany all parenting; (2) reinforce the minority-group model of disability; and (3) emphasize that the "harm" of disability varies greatly depending on biological, familial, financial, attitudinal, and social factors. One judicial attempt to implement these features is the special-damages model, which the following section describes.

B. Courts Should Take Practical Steps to Implement a Contextual Reproductive Tort Jurisprudence that Compensates Families and Avoids False Dichotomies

To feasibly rid reproductive tort litigation of harmful dichotomies, contextualize judicial decision-making, and adopt the minority-group model, courts must not unrealistically weaken traditional tort processes. The reproductive tort cases of the United States, Great Britain, and elsewhere show "how far negligence law has come adrift of principle."[159] In fact, one scholar has called for "a much hoped for quiet u-turn with good grace and no loss of face" in the jurisprudence of reproductive torts.[160] But because states are unlikely to flatly eliminate wrongful birth claims and because a dramatic overhaul of the tort system is improbable, this Essay recommends restrained, incremental steps.

To accommodate reproductive tort claimants while avoiding stigmatizing dichotomies, courts should shift from blessing-harm dichotomies to analyses based upon causation and "the needs of the living."[161] A useful model for this approach is a 1984 decision from the New Jersey Supreme Court that validated a wrongful life claim but implemented a special damages scheme.[162] In *Procanik v. Cillo*, an infant sued for wrongful life, alleging that a doctor's negligent failure to diagnose his mother's rubella in the first trimester of her pregnancy caused his birth, which congenital rubella syndrome impaired.[163] Avoiding health-disability and blessing-harm dichotomies, the *Procanik* court adopted a "special

158. PRIAULX, *supra* note 26, at 70.

159. *See* Laura C.H. Hoyano, *Misconceptions about Wrongful Conception*, 65 MOD. L. REV. 883, 892 (2002).

160. Priaulx, *supra* note 135, at 232 (internal quotation marks omitted).

161. *See* Procanik v. Cillo, 478 A.2d 755, 763 (N.J. 1984) (deciding a reproductive tort case "predicated on the needs of the living").

162. *Id.* at 764.

163. *Id.* at 758.

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damages" approach to compensate the child for the "extraordinary medical expenses attributable to his affliction."[164] Recognizing that certain social factors were "beyond judicial competence" to evaluate,[165] the court refused to grant "general" damages for emotional distress or for an impaired childhood.[166] For five reasons, the court explained, this "special damages" rule was superior to traditional approaches: (1) both parents and children experience the burdens of costly medical care;[167] (2) the special damages approach recognizes that medical negligence "vitally affects the entire family";[168] (3) courts can readily calculate special damages;[169] (4) restricting damage awards to "special" damages avoids the "philosophical" problems posed by wrongful life claims;[170] and (5) a child's claim should not depend on whether his parents are available to sue.[171] Crucially, the court's decision "is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living."[172]

Procanik represents a vital shift in both premise and reasoning—a departure from the blessing-harm dichotomy and movement toward a contextual jurisprudence that accounts for the social, financial, and moral concerns of families, people with disabilities, and communities. Emphasis on the needs of the living, recognition that certain questions are not judicable, application of a creative damages scheme, and attention to context rather than "genetic disaster," are practical steps courts can take to revise their reproductive tort jurisprudence.

C. Although a Contextual, Non-Dichotomous Approach to Reproductive Tort Jurisprudence May Undermine the Effectiveness of Claimants' Traditional Litigation Techniques, It Will Likely Yield Net Benefits to All Interested Parties

Although a jurisprudence that frames a "vision of justice" in "needs and realities" may avoid stereotypes,[173] it also may weaken parents' abilities to recover damages and may run counter to traditional adversarial

164. *Id.* at 757. The Supreme Court of California adopted a similar special damages approach in *Turpin v. Sortini* to avoid some of the policy concerns of traditional wrongful life jurisprudence. 643 P.2d 954, 965 (Cal. 1982) (in banc).

165. *Procanik*, 478 A.2d at 761.

166. *Id.* at 763.

167. *Id.* at 762.

168. *Id.*

169. *Id.* at 761.

170. *Id.* at 762–63.

171. *Id.* at 762 (citation and internal quotation marks omitted).

172. *Id.* at 763. The *Procanik* court announced that it seeks "only to respond to the call of the living for help in bearing the burden of their affliction." *Id.*

173. *See* PRIAULX, *supra* note 26, at 157–58.

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processes. If a mother does not testify in open court that her newborn with an unexpected genetic defect has caused "harm," will a jury award high damages? If a plaintiff's lawyer does not aggressively distinguish a healthy child from an impaired one, will the tort system adequately compensate the client? If parents do not highlight the heavy burdens that arise from children's disabilities, can reproductive tort claims address the needs of the living? Because tort practice is meant to summon the sympathy of jurors by drawing clear distinctions, replacing a dichotomous approach with a contextual one may correct social misperceptions at the expense of parents' financial needs.

Professor Priaulx notes that although a contextual approach is "essential if we are committed to embracing and responding to" families' "diverse experiences of reproduction," it is difficult to weaken dichotomies without weakening the adversarial process.[174] Although *Procanik* promotes a shift in judicial focus toward the needs of the living, Professor Priaulx doubts whether courts can construct a "linguistic framework of need" that is as viable as the linguistic framework of harm.[175] Unlike "rights" and "harms," which cause juries to assign responsibility, needs are "not straightforwardly *pre*scriptive."[176] Thus, while a contextual, needs-based approach may "sound less adversarial,"[177] it also may prevent plaintiffs from doing what is traditionally necessary to maximize damages: drawing bright lines between blessings and harms; showing the high financial costs of caring for ill children; and persuading the jury that your family is suffering with an imperfect child. Indeed, "[t]he scientific ability to draw fine distinctions among people based on genetic variation"[178] parallels a plaintiff's lawyer's ability to draw fine distinctions that vividly portray harm. Compared to the harm-based rhetoric on which reproductive tort claimants traditionally rely to sway juries, this language of needs "might . . . easily collapse."[179] So while a contextual, needs-based approach might "carry less . . . baggage" than a dichotomous, harm-based approach, a judicial shift that suppresses distinctions and trivializes harm could diminish damage awards.[180]

174. *Id.*

175. *Id.* Professor Priaulx asks, "How might our claim look? A right or responsibility to have one's need fulfilled? Or a need to have one's needs recognised [sic]?" *Id.* at 157. Professor Priaulx argues that although the needs-framework is "initially compelling," it does not "stand up to closer scrutiny." *Id.*

176. Jeremy Waldron, *The Role of Rights in Practical Reasoning: "Rights" versus "Needs,"* 4 J. ETHICS 115, 121 (2000).

177. PRIAULX, *supra* note 26, at 158.

178. Rothstein, *supra* note 128, at 435.

179. PRIAULX, *supra* note 26, at 158.

180. *Id.*

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Although a contextual approach may weaken claimants' persuasiveness and lessen monetary awards, it may have substantial net benefits. Given the diversity of sensitive interests at stake—families' financial needs, the social equality of the disability community, judicial administrability, etc.—courts must holistically evaluate the positive effects of a contextual approach. Under a special damages approach, for instance, wrongful birth claimants can leave the courtroom without the shame of having disparaged their newborns in open court. Lawmakers and community-members can witness or read about reproductive tort cases without receiving judicial messages that people with disabilities are less valuable. Insurance companies, local and national policymakers, employers, and service-providers may follow judges' leads and begin to better accommodate the disability community. Thus, while a non-dichotomous jurisprudence may slightly diminish damage awards, it may grant significant net benefits to all interested parties.

IV. BECAUSE LEGAL AUTONOMY IN REPRODUCTIVE DECISION-MAKING DOES NOT NECESSARILY YIELD ACTUAL PARENTAL REPRODUCTIVE FREEDOM, COURTS MUST CAREFULLY CONSIDER THE SOCIAL CONSTRAINTS ON PARENTAL CHOICE

The search for a reproductive tort jurisprudence that protects both the disability community and the tort system raises important questions about parental autonomy. Is the gap between legal reproductive autonomy and actual reproductive freedom growing? Are reproductive choices really free choices when society legalizes prenatal options but, de facto, embraces only one option? In addition to contextualizing their notions of harm and disability, judges should also contextualize their understanding of parental choice, especially in a social climate that practically limits that choice.

Simultaneously, new medical technology expands and constrains parental reproductive choices. On the one hand, contraceptive devices let women plan their pregnancies; genetic testing helps couples decide whether to abort their fetuses; alternative methods of managing labor and delivery give women a say in the birthing process; and in vitro fertilization, embryo transfer, and artificial insemination allow couples to "circumvent their infertility."[181] On the other hand, the effects of reproductive technologies are not understandable "in a vacuum."[182] Reproductive choice does not

181. Aila Collins & Judith Rodin, *The New Reproductive Technologies: What Have We Learned?*, *in* WOMEN & NEW REPRODUCTIVE TECHNOLOGIES: MEDICAL, PSYCHOSOCIAL, LEGAL, AND ETHICAL DILEMMAS 153, 153–54 (Judith Rodin & Aila Collins eds., 1991).

182. Barbara K. Rothman, *The Tentative Pregnancy: Then and Now*, *in* WOMEN & PRENATAL TESTING: FACING THE CHALLENGES OF GENETIC TECHNOLOGY 260, 264 (Karen H. Rothenberg & Elizabeth J. Thomson eds., 1994).

entail freedom of choice if new technologies, "subterranean political ideologies," and "hidden arguments" beneath the "surface language of neutrality"[183] in the medical, social, and legal communities heavily influence decision-making. Despite these "constraints on the choice" to use or not use prenatal testing, to have or not have an abortion in an "at risk" pregnancy,[184] and to sue or not sue for wrongful birth or wrongful life, judicial decisions tend to rely heavily on parents' reproductive decisions.[185]

A. The Social Origins of the Reasonable Person Standard, Sameness Model of Equality, and Increasingly Patriarchal Perception of Pregnancy Constrain Parents' Reproductive Choices

Parents must make reproductive decisions in the context of three categories of social constraint. First, reproductive decisions are "social decisions"[186] and judicial standards arise from those social standards. Specifically, the reasonably prudent person test—a "flexible, easily understandable"[187] standard meant to compensate reproductive tort victims, fairly allocate costs, and deter misconduct[188]—has substantial undercurrents of social context.[189] Professor Rothstein notes that this standard "reflects a pre-industrial, agrarian view that all men had a basic skill set," including the abilities to build homes, tend to animals, and respond to physical threats.[190] Thus, the reasonably prudent person is the "personification of a community ideal of reasonable behavior,"[191] which is likely why the *Curlender* court noted that tort law reflects the "basic changes in the way society views [reproductive tort] matters."[192] Because the reasonably prudent person standard seeks to approximate a singular behavioral ideal, courts use contextual, "individualized" standards infrequently—"only when the differences are obvious."[193] And since "[e]quality of opportunity" was not "part of the doctrinal development" of

183. TROY DUSTER, BACKDOOR TO EUGENICS 113, 129 (1990); *see also infra* Part IV.A.

184. Rothman, *supra* note 182, at 260.

185. *See infra* Part IV.B.

186. Rothman, *supra* note 182, at 267. In fact, Professor Rothman says that these decisions are "never 'medical' decisions." *Id.*

187. Rothstein, *supra* note 128, at 437.

188. *Id.* at 438.

189. *See id.* at 438–39. This standard, originally called the "reasonable man" standard, came about in nineteenth-century England. *Id.* at 437.

190. *Id.* at 438. Professor Rothstein notes that, as a result of these views, courts assumed there was "a narrow range of social variability among individuals," an assumption that is "no longer true." *Id.*

191. *Id.* at 437.

192. Curlender v. Bio-Sci. Labs., 165 Cal. Rptr. 477, 487 (Cal. Ct. App. 1980).

193. Rothstein, *supra* note 128, at 439.

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tort law,[194] courts often disregard it. Thus, both parental and judicial choices in reproductive tort claims are always strained through the sieve of a legal system that social factors heavily influence.

Second, contextualized notions of equality affect the reproductive choices of parents, courts, and communities. Professor Rothstein has recently assessed how the legal conception of equality might require change "as scientists perfect the ability to identify individual variations at the genetic level."[195] Currently, the law restricting *genetic* discrimination and the law restricting *other* discrimination are based upon opposing principles of equality. While the ADA is based upon a "'difference' model which requires an individualized determination of fitness,"[196] genetic nondiscrimination statutes are based on the "civil rights model of 'sameness.'"[197] This sameness model, some feminist scholars argue, uses the "lens of the dominant group"[198] and thus treats social minorities "as if" they were the majority.[199] Consequently, parents and courts must decide life-changing reproductive matters in the context of a sameness legal model that belies the reality of genetic diversity.[200] Recognizing this concern, one scholar advocates "replacing" the sameness model with one that respects "individual differences."[201]

Third, changing views of pregnancy may affect parental, judicial, and societal decisions regarding people with disabilities. Expressly, Professor Rothman points out, genetic technology "reconstructs pregnancy in men's image."[202] Professor Rothman explains that while pregnancy is a process of separation for women,[203] it is a process of delivery for men.[204] In two main ways, genetic technology advances this patriarchal, "outside" view of

194. *Id.* at 438. Professor Rothstein points out that tort law "does not consider minor variations" in peoples' character and capabilities. *Id.* at 437. Age, disability, "special talents," and "training" are some of the few "exceptions" that give rise to an individualized standard because, in those cases, the differences are overt. *Id.*

195. *Id.* at 455.

196. *Id.* at 447.

197. *See id.* at 456 (noting that this "sameness" model is inappropriate for genetic diversity).

198. *Id.* at 457 (citing MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 56 (1990)). Professor Rothstein notes that in the United States, this dominant group is "white males." *Id.*

199. *Id.* (internal quotation marks omitted).

200. *See id.* at 456 ("The civil rights model of 'sameness' and the fiction that 'all difference is irrelevant' are inappropriate legal models for genetic diversity."). Professor Rothstein adds that justifications for the sameness model are rapidly fading. *Id.* at 458.

201. *Id.* at 462.

202. Rothman, *supra* note 182, at 262. Professor Rothman asserts that "[g]enetic technology changes the very way in which we think about pregnancy." *Id.*

203. *Id.* at 262–63. Professor Rothman states that pregnancy is the process by which "part of [the woman] goes on to become someone else." *Id.* at 263.

204. *Id.* at 263.

pregnancy: (1) "[c]onceptually, the fetus becomes a potential patient to be tested"; and (2) "physically, a preimplantation diagnosis manipulates the material that will become the baby in a procedure conducted outside of the woman's body."[205] According to Professor Rothman, the effects of this patriarchal pregnancy model on women's reproductive choices "are now coming to haunt us."[206] In particular, genetic technology advances the notion that pregnancy is a "contractual agreement" between a woman and the "controllers" of the prenatal genetic material.[207] As society comes to view women as "site[s] for [fetal] implantation," women are increasingly "subjected to social control" by those with expanded access to and interest in prenatal genetic material.[208]

B. Judicial Decisions Give Heavy Weight to Parental Reproductive Decisions Even Though Social Factors Substantially Restrain Parental Freedom of Choice

In light of the social, political, and legal contexts of parental reproductive decision-making, Professor Rothman finds the "language of individual choice untenable."[209] Although genetic technology lets women "choose" whether to birth a child with a disability, women "are not given choices about the environment in which that child would live."[210] When a woman chooses to abort her fetus that has a genetic defect, she does so "in a world that sets the parameters of that child's life just as surely as genes do."[211] Other scholars agree that new genetic technologies "may serve to reduce choice" because (1) these technologies carry unanticipated emotional costs; (2) "the availability of prenatal testing" pressures women to "submit to screening"; and (3) the possibility of genetic abnormality "casts its shadow" over the early months of pregnancy.[212]

These facets of parental choice directly affect judicial decision-making in reproductive tort cases. In wrongful conception and wrongful birth

205. *Id.* As a result, the "technology we have developed and continue to develop reifies a male notion of pregnancy, of the making of babies." *Id.*

206. *Id.* at 263–64.

207. *Id.* at 264. These "controllers" may be the father, the government, the laboratory, or the potential adopters. *Id.*

208. *Id.*

209. *Id.* at 267.

210. *Id.*

211. *Id.* Notably, Professor Rothman states that abortion "can be the right choice, the moral choice, the only choice, but it, like birthing the child, is always *a choice in a context*." *Id.* (emphasis added).

212. Collins & Rodin, *supra* note 181, at 154–55. Professor Rothman has labeled the latter phenomenon the "tentative pregnancy." *Id.* at 154. Some scholars question these views, noting the distinction between a difficult choice and no choice at all. PRIAULX, *supra* note 26, at 153–54 (citation omitted).

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cases, for instance, courts typically "scrutini[ze]" the claimants' decisions and hold the claimants partly responsible for reproductive risks,[213] even if social pressures heavily influenced those decisions. Whether through "formal notions of causation, mitigation or not," Professor Priaulx argues, courts regard parental conduct as the "*prime mover*" in generating damages.[214] Professor Priaulx observes that "both abortion and adoption continue to be used as sociolegal tools" in judicial decision-making because courts fail to fully account for social pressures on reproductive choice.[215] Potentially, a shift in the legal and societal conceptions of tort, equality, and pregnancy would allow women's legal choices to better approximate their freedom of choice and would give courts a more sound conceptual context in which to decide cases.

V. CONCLUSION

Judges adjudicating wrongful birth and wrongful life claims must act deliberately to ensure that the persistent current of stigmatizing stereotypes about people with disabilities does not infiltrate their judicial opinions.[216] In adopting a more contextual approach, courts must carefully consider the substantial hardships that families of children with disabilities endure while resisting inaccurate notions of harm, disability, and autonomy.[217] Because judicial opinions influence societal views of the disability community and because the impact of negligent prenatal genetic testing is equally harmful, courts must always consider the variety of sensitive interests at stake.[218] Generally, the few scholars that have addressed these intricate concerns advocate "steps to help build social supports and attitudes that make it possible for a woman to go through a pregnancy even when the amniocentesis shows that the baby may carry a defect."[219] But until communities achieve this progress, courts that carefully account for the many social contexts in which genetic choices and reproductive disputes arise have an improved capacity to make sensitive and accurate decisions.[220]

213. PRIAULX, *supra* note 26, at 108. This often occurs through the mitigation doctrine. *Id.*

214. *Id.* Professor Priaulx notes that courts emphasize that "claimants could have chosen otherwise." *Id.*

215. *Id.* at 109. Professor Priaulx asserts that "neither abortion nor adoption constitute choices" in our current political, legal, and social climate. *Id.* at 137.

216. *See supra* Part II.

217. *See supra* Part III.

218. *See supra* Part III.

219. Collins & Rodin, *supra* note 181, at 156.

220. *See supra* Part IV.