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WHEN A WRONG CREATES A LIFE: TORT RESPONSES TO CHILDREN BORN FROM INSTITUTIONAL SEXUAL VIOLENCE

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Today, the paradigm case of "wrongful life" involves a claim on behalf of a child—typically, a disabled child—who would not exist but for an act of negligent reproductive healthcare. Framed in this way, the tort of "wrongful life" is controversial, and rightfully so. This Article reminds readers that one of the nation's earliest reported "wrongful life" cases arose from a very different set of facts: Williams v. State*, filed in 1963 in New York City, stemmed from the alleged rape and impregnation of a patient at a large, state-run psychiatric hospital; through a guardian, the resulting child sought monetary compensation from the state for the disadvantages that flowed from these circumstances. Importantly, the lower court that initially considered this claim found it within the bounds of what tort law could and should provide. But a different interpretation prevailed at the appellate level, and, for historically contingent reasons,* Williams v. State *largely disappeared from view. Instead, cases involving medical negligence and disabled children came to dominate judicial discussions, and rejections, of the seemingly "new tort" of "wrongful life." This Article urges a reconsideration of* Williams v. State *and the sub-set of "wrongful life" cases that it represents—namely, cases involving (1) nonconsensual intercourse and impregnation in an institutional setting, resulting in a child, and (2) an institutional defendant that arguably violated a duty of care by allowing this sequence of events to occur. Such reconsideration is warranted for several reasons, including evidence that such incidents continue to occur in institutional settings (nursing homes, residential treatment facilities, prisons, etc.); post-*Dobbs *changes to state-level abortion laws, which may increase the number of pregnancies that*

* J.D., Ph.D. (History); Seaman Family Professor, University of Pennsylvania. This Article benefited from exchanges with Ashraf Ahmed, Mitch Berman, I. Glenn Cohen, Angus Corbett, Rebecca Crootof, Laura Dolbow, Doron Dorfman, Jasmine Harris, Liz Jackson, Leo Katz, Kierstan Kaushal-Carter, Serena Mayeri, Melissa Murray, Jennifer Rothman, Teemu Ruskola, Catherine Sharkey, Nathan Stenberg, John Fabian Witt, and Benjamin Zipursky, as well as with participants in the Clifford Symposium at DePaul University College of Law and the Faculty Workshop at Penn Carey Law. Law librarian Paul Reirmaier went above and beyond to track down valuable research materials. James Callison, Andra Metcalfe, Lolo Serrano, Caroline Shoaibi, and Ethan Swift supplied excellent research support.

lead to live births; and theoretical and doctrinal developments within tort law itself.

"The law of torts is anything but static, and the limits of its development are never set."

– William Prosser[1]

In July 1961, employees of the Manhattan State Hospital in New York City discovered that Lorene Williams, one of their patients, was pregnant.[2] By the time a gynecologist examined her, late the following month, she appeared to be six months along.[3] There was no doubt that impregnation occurred on the grounds of the hospital, where Lorene had lived since 1960.[4] Those grounds were patrolled by security guards and separated from the rest of the city by the East River.[5] It also seems unlikely that impregnation resulted from a voluntary, non-exploitive sexual encounter.[6] According to the director of the hospital, Lorene

1. William Prosser, Handbook of The Law of Torts 4 (3d ed. 1964).

2. Brief of Claimant-Appellant at 2, 5, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856). All the factual information in this paragraph is from Records & Briefs New York State Appellate Division, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856), available at https://www.google.com/books/edition/Records_and_Briefs_New_York_State_Appell/9H9M2mkZ3rsC?hl=en&gbpv=0 [https://perma.cc/AF75-EE5Y]. I use Lorene's real name here because it is a matter of public record, but I acknowledge her likely lack of agency in the way that public documents narrate her life and the nature of the information they disclose. I hope that this Article's critical reading of available sources invites readers to consider various ways of understanding Lorene's experience, while underscoring her humanity.

3. Record on Appeal at 7, Williams v. State, 30 A.D. 2d 611 (N.Y. App. Div. 3d Dept. 1967) (No. 43856).

4. Brief of Claimant-Appellant at 5–6, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856).

5. Respondent's Brief at 11–12, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856).

6. I use "unlikely" rather than "impossible" because there is much that my sources do not disclose about Lorene Williams's capacity and agency, and because historical work on race, gender, sexuality, medicine, and disability suggests the need to proceed with caution when drawing conclusions about members of marginalized groups. *See, e.g.*, Regina G. Kunzel, Fallen Women, Problem Girls: Unmarried Mothers and the Professionalization of Social Work, 1890–1945 3–4 (1993); Mary E. Odem, Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885–1920 6 (1995); Rickie Solinger, Wake Up Little Susie: Single Pregnancy and Race before Roe v. Wade 17–19 (1992); Paul A. Lombardo, Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell x, xiii (2010). Census records suggest that Lorene Williams was Black and that her family had limited economic resources. *Lorene Williams in the 1940 United States Federal Census*, Ancestry.com, https://www.ancestry.com/discoveryui-content/view/138139501:2442?_ [https://perma.cc/Y4VG-3Y9T] [hereinafter *1940 United States Census*]. In making this point, I also have in mind research by Michael Perlin, Alison Lynch, Michael Gill, Jasmine Harris, Natalie Chin, Robyn Powell, and others urging readers to question assumptions about the sexual desires of people with mental and intellectual disabilities; about what types of sexual activity ought to be regulated; and about how the framework of consent operates in this context. Michael L. Perlin & Alison J. Lynch, *"All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex*, 89 Wash. L. Rev. 257, 259–62 (2014); Michael Gill, Already Doing It: Intellectual Disability and Sexual Agency xvi–xvii (2015); Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. Rev. 480, 488–90 (2018);

had a significant intellectual disability—perhaps the most severe of any patient in residence.[7] Chronologically, she was in her early twenties, but the director pegged her "mental age" at four.[8] In addition, Lorene had been diagnosed with a psychiatric illness, and she had physical impairments that made her vulnerable.[9] During the period when impregnation occurred, Lorene resided in an all-female ward and was dosed with Thorazine[10] on those occasions when her caretakers permitted her to go to the store or the church (also on hospital grounds). Lorene carried the pregnancy to term and, on Christmas Day of 1962, gave birth to a child, Christine.[11]

This episode is known to history because roughly eight months later, with the assistance of up-and-coming trial lawyer Norman Roy Grutman,[12] Lorene's father commenced a lawsuit against the State of New York. As "Guardian ad Litem" for both Lorene and now Christine, Frank Williams alleged that the State had been negligent in the "care and supervision" that its employees provided to Lorene, especially with regard to "protect[ing] and safeguard[ing] her health and physical body from attack and harm from others." [13] He further alleged that as a direct

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Natalie M. Chin, *Group Homes as Sex Police and the Role of the Olmstead Integration Mandate*, 42 N.Y.U. Rev. L. & Soc. Change 379, 382 (2018); Robyn M. Powell, *Disability Reproductive Justice*, 170 U. Pa. L. Rev. 1851, 1856 (2022).

7. Transcript of Testimony, Witness for State at 133–34, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856).

8. *Id.* at 147. The "mental age" that authorities assigned to Lorene is some evidence of how she functioned in the world, but as Michael Gill has cautioned, "mental age" is a construct, which can "perpetuate assumptions about incompetence, childhood, and necessity for protection" and which also "prioritiz[es] professional medical authority" over other ways of knowing. Gill, *supra* note 6, at 38.

9. After Lorene contracted polio during her childhood, her left arm was weak, and she dragged her left foot when she walked. Transcript of Testimony, Witness for Claimants at 22, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856).

10. Memorandum Decision at 8, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856). Thorazine (chlorpromazine) is a psychotropic drug and a tranquilizer. Its side effects include dizziness, blurred vision, and sedation. During the 1950s and 1960s, Thorazine became a mainstay of the treatment and management of institutionalized patients. *See* Martin Summers, Madness in the City of Magnificent Intensions: A History of Race and Mental Illness in the Nation's Capital 247–49, 264–66 (2019).

11. Transcript of Testimony, Witness for Claimants at 20, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856).

12. Grutman's practice eventually included high-profile organizations (e.g., *Penthouse* magazine) and celebrity clients (e.g., televangelist Jerry Falwell, heiress and philanthropist Doris Duke, writer Jackie Collins). Eleanor Randolph, *PTL's Master of Legal Hardball*, Wash. Post (June 13, 1987), https://www.washingtonpost.com/archive/lifestyle/1987/06/13/ptls-master-of-legal-hardball/843fd3d3-f6e0-4640-bc13-c737e9c4dc2b/ [https://perma.cc/5RSF-GYA5]; David Margolick, *Roy Grutman Is Dead at 63; Lawyer for Celebrity Clients*, N.Y. Times (June 29, 1994), https://www.nytimes.com/1994/06/28/obituaries/roy-grutman-is-dead-at-63-lawyer-for-celebrity-clients.html. Frank Williams's legal team included others, too, but Grutman was the lawyer most visibly involved.

13. Notice of Appeal at 2, 4, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856). The original case caption identified Lorene as "an adult, not an adjudicated incompetent but who may be incapable of adequately protecting her rights." *Id.* at 2.

result of the State's negligence, Lorene was assaulted "and compelled to submit to . . . sexual intercourse, whereby she became pregnant with child."[14] For the suffering and physical injury that the assault caused to Lorene, Williams sought $50,000 dollars (around $480,000 in today's dollars).[15]

Separately, Frank Williams articulated a cause of action on behalf of the infant Christine, alleging that the State's negligence resulted in Christine "being conceived, being born and being born out of wedlock to a mentally deficient mother."[16] Williams sought $100,000 in damages (around $960,000 in today's dollars) for the disadvantages that naturally flowed from these events, including deprivations of "property rights," "a normal childhood and home life," "proper parental care, support, and rearing," and status (in that Christine would "bear the stigma of illegitimacy").[17]

The New York Court of Claims judge who initially considered this case did not have a special name for the type of claim that Frank Williams advanced on Christine's behalf, but very quickly, other judges and commentators separated it from the general category of negligence and placed it in the narrower category of "wrongful life."[18] Over time, courts also placed in this category claims by children—typically, disabled children—whose births would not have occurred but for negligent reproductive healthcare.[19] Indeed, these latter fact patterns are now emblematic of the tort of "wrongful life." As that tort took shape, however, it did not fare well. Today, only three jurisdictions explicitly allow children to recover damages for "wrongful life."[20] Claims of "wrongful birth," in which damages flow to parents, are more widely accepted, but may become less so as courts in anti-abortion states adjust to the overruling of *Roe v. Wade*.[21]

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14. *Id.* at 5.

15. *Id.*; U.S. Bureau of Lab. Stat., *CPI Inflation Calculator*, available at https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/XCF4-SKQG].

16. Notice of Appeal at 5, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856).

17. *Id*. at 6.

18. *See infra* Part I p. 628.

19. *See infra* Part II p. 629–34.

20. *See infra* Part II p. 634.

21. E. Travis Ramey, Wrongful Birth After Dobbs 77 (Nov. 3, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4263215 [https://perma.cc/34WT-SX85] (explaining that in jurisdictions that bar abortions, wrongful birth claims may now seem incongruous with "the jurisdiction's public policy" and therefore those jurisdictions may "cease to recognize (or elect never to recognize) wrongful birth"); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (finding that the Constitution does not confer a right to an abortion and overruling cases that held otherwise). Wrongful birth claims have tended to implicate abortion because, particularly in cases involving disabled children, they

> operate[] under the assumption that any pregnant person who discovers that the fetus will have a disability would naturally and by default opt to terminate the pregnancy even

This Article argues that there is reason to un-bundle the Christine Williamses of the world from children whose births may also have resulted from negligence but did not flow from nonconsensual sexual intercourse (i.e., the medical negligence cases), and to recognize that, at a minimum, the tort system ought to ensure that the former are adequately supported.[22] When referring to the "Christine Williamses of the world," this Article also contemplates redress *from a particular set of actors*. The paradigm case involves a child (1) whose conception resulted directly from nonconsensual sexual contact (2) under circumstances, such as institutionalization or incarceration, where a third party has a clear duty to prevent such contact.[23]

This category might strike readers as narrow and therefore not worthy of the legal disruption this Article proposes, but evidence suggests otherwise. Tens of thousands of women and girls reside in carceral settings.[24] Tens of thousands more live in non-carceral institutional settings, such as nursing homes (which are by no means limited to the elderly), mental health facilities, group homes, and residential schools for students with disabilities.[25] Further, governmental reports, court records, and investigative reporting show that sexual assault in these settings is common—and pregnancies do result.[26] Now consider the effects of *Dobbs v. Jackson Women's Health Organization*: many more pregnancies in the United States are likely to result in live births. Adding these factors together, there is good reason to reexamine this branch

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> if the pregnant person otherwise intended to carry the fetus to term and to become a parent to a child – that is, that the injury is denial of the opportunity (that is presumed would have been taken) to abort.

Lydia X. Z. Brown, *Legal Ableism, Interrupted: Developing Tort Law & Policy Alternatives to Wrongful Birth & Wrongful Life Claims*, 38 Disability Stud. Q., no. 2, 2018, https://dsq-sds.org/article/view/6207 [https://perma.cc/R88Z-DSCB].

22. In hiving off this group, I do not mean to suggest that other children might not also have compelling claims on actors who violated a duty of care and thereby contributed to the circumstances of their births. There is already a voluminous literature on this broader issue. *See* James A. Henderson Jr., *Things of Which We Dare Not Speak: An Essay on Wrongful Life*, 86 Geo. Wash. L. Rev. 689, 693–95 (2018) (summarizing the state of the field as of 2018). My claim is that there are analytical, jurisprudential, and perhaps moral reasons for attending separately to the claims of someone like Christine Williams.

23. Importantly, institutional care does not always imply a duty to prevent all sexual contact. Indeed, the law may require conditions in which an institutionalized person may exercise sexual agency. *See, e.g.*, Foy v. Greenblott, 141 Cal. App. 3d 1, 9 (1983) (rejecting a "wrongful life" argument that depended on the notion "that under no circumstances should a woman adjudicated as incompetent be permitted to bear a child" and, further, characterizing such an argument as eugenicist); Perlin & Lynch, *supra* note 6, at 271. Many institutions surely do, however, have a duty to prevent non-consensual sexual contact.

24. *See infra* Part III p. 638–39 (citing statistics regarding prisons, jails, immigration detention facilities, etc.).

25. *Id.*

26. *Id.*

of "wrongful life" case law.[27] Perhaps there are even broader lessons regarding what justice requires when pregnancies are imposed on people without their consent. Should the costs remain where they currently fall, or are there reasons, in some instances, to shift those costs to others?

This Article proceeds as follows. Part I offers a fuller account of the *Williams* case and makes the point that, in the 1960s, Christine's claim was not as unpalatable as today's case law would make it seem. Nor was it apparently outside the bounds of a run-of-the-mill negligence claim. New York's highest court ultimately rejected Christine's claim, but not in a way that was obviously more correct than the lower court decision that would have allowed it to proceed. Unfortunately, however, the court adopted the name "wrongful life" for this type of action, which helped lay the groundwork for its bleak future. Part II briskly charts the developmental path of the tort of "wrongful life," showing that in the decades after the *Williams* case, the paradigmatic "wrongful life" case was not one like Christine's, but rather one in which alleged medical negligence combined with consensual sexual intercourse to produce a child with serious disabilities. Configured in this way, "wrongful life" claims received a cold reception from most of the jurisdictions that considered them. Part III argues that courts should reconsider their treatment of claims like Christine Williams's. Setting aside for now the various practical obstacles that such claims would face,[28] this Part takes on the strongest legal arguments against allowing recovery from institutional defendants—and contends that these arguments are less powerful than the weight of the case law suggests. Meanwhile, the policy arguments in favor of allowing recovery are strong. Part IV discusses some possible (non-doctrinal) objections, including the worrisome incentives that might flow from expanded liability (e.g., coercive administration of birth control, lack of respect for sexual agency).

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27. In urging such reexamination, this project takes inspiration from the work of Khiara Bridges, Ruth Colker, Dov Fox, Jill Wieber Lens, and others who have offered fuller and more nuanced pictures of the injuries that flow from interference with reproductive freedom. *See, e.g.*, Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 497–99 (2013); Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 158–61 (2017); DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW 6–7 (2019); Khiara M. Bridges, *Beyond Torts: Reproductive Wrongs and the State*, 121 COLUM. L. REV. 1017, 1020–21 (2021); Ruth Colker, *Uninformed Consent*, 101 B.U. L. REV. 431, 436–37 (2021); Dov Fox & Jill Wieber Lens, *Valuing Reproductive Loss*, 112 GEO. L.J. 61 (2023).

28. A fuller exploration of this topic would address immunity doctrines, procedural requirements, and would-be plaintiffs' ability to attract legal representation. The limited scope of this Article prevents me from delving deeply into these practical obstacles, but I recognize their importance for any real-world application of my arguments.

I. *Williams v. State*: From Negligence to "Wrongful Life"

There is much we do not know about Lorene Williams, whose pregnancy was at the center of *Williams v. State*. But because her case received an airing before a court of claims judge in New York City, we can glean insights about both her background and the circumstances that led to the lawsuit.

Lorene Williams was born in Columbia, South Carolina, in 1939.[29] Census records from 1940 list her father's and mother's occupations as "delivery boy" and "maid," respectively.[30] The census taker recorded the entire family as "Negro," a racial designation that almost certainly affected how people who interacted with Lorene interpreted her intelligence, potential, and sexual availability.[31] By 1961, when Lorene gave birth to Christine, she had already delivered two other children.[32]

These prior pregnancies appear to have triggered Lorene's institutionalization, first on a temporary basis and then more permanently.[33] At age sixteen, around the time she gave birth to her first child, she entered the care of the State Mental Hospital in South Carolina for three weeks.[34] In the fall of 1960, when the Williams family was living in New York City and Lorene was discovered to be pregnant once again, her parents took her to Bellevue Hospital, the public facility that was most accessible.[35] From Bellevue, she was transferred to Manhattan State Hospital, where she delivered her second child (in February of 1961) and became pregnant with her third (Christine).[36] Testimony suggests that Lorene's 1961 impregnation may have occurred during an

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29. *1940 United States Census*, *supra* note 6.

30. *Id.* For the rest of this Article, I refer to Lorene by her first name. I do so not to infantilize her or signal lesser status, but rather to avoid the potential confusion that would arise from referring to multiple people as "Williams."

31. *Id.* Historians and legal scholars have amply documented assumptions about Black women's sexual availability, from the time of slavery through the twentieth century. *See, e.g.*, Estelle B. Freedman, Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation 1–3, 20, 153, 259 (2013); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 Stan. L. Rev. 221, 223–25 (1999). There is likewise a voluminous literature on how race, gender, and ability intersected in modern U.S. history to inform perceptions about individuals' intelligence and behavior. *See, e.g.*, Khalil Gibran Muhammed, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America 1–2 (2010); Susan Burch & Hannah Joyner, Unspeakable: The Story of Junius Wilson 1–8 (2007); Keith A. Mayers, The Unteachables: Disability Rights and the Invention of Black Special Education 16 (2022).

32. Transcript of Testimony at 20, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856).

33. *Id.* at 18–19.

34. *Id.* at 18.

35. *Id.* at 19. The records do not disclose why the Williams family moved from South Carolina to New York City, but such a move is consistent with the historical pattern known as the "Great Migration," a mass movement of African Americans out of the South and into urban areas in the North.

36. *Id.* at 19–20.

outing to the church, which was about a ten-minute walk from her all-female ward.[37] During this time, Lorene would have been on hospital grounds and nominally supervised by two older patients from her ward but exposed to male patients and male employees.[38] No further explanation for Lorene's impregnation appears in court records.

Testimony from the court of claims also suggests that Lorene had moderate physical limitations (weakness in one arm and one leg) and more significant intellectual or cognitive ones.[39] Although she was in school prior to her admission to Bellevue, she could not read or write, nor did she appear to have "counting and calculation ability."[40] She could carry on a conversation, witnesses testified, but then could not recall what she had heard.[41] She apparently had enough practical intelligence to know when she was menstruating and to ask a hospital employee for pads.[42] But according to her parents, she was vulnerable when out in public on her own: "boys" would "bother[]" her.[43] A physician who examined Lorene in connection with the lawsuit described her as "childlike," with an "intellectual age . . . roughly between three and a half and four."[44]

Lorene may also have had a psychiatric disability or mental illness, but the evidence on this score is hard to interpret, especially given prevalent assumptions about people of Lorene's race and gender. Her hospital admission records included descriptors such as "hostile" and "aggressive," and recounted episodes of "hallucination" and "promiscuity" (a word that doctors at the time used to describe inability to control sexual impulses).[45] But people who cared for Lorene on a day-to-day basis described her as cooperative and congenial.[46] This could have been related to the Thorazine she was prescribed, but it might also have reflected a lack of any significant or lasting psychiatric impairment. This would align with Lorene's parents' testimony: they seemed to want her under hospital care not because of any psychosis, but because she was getting sexually exploited. "[S]he was a handicapped kid, and she didn't have no protection out here in the street," Lorene's mother testified.[47]

37. *Id.* at 47–48.
38. Transcript of Testimony at 47–48, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856).
39. *Id.*
40. *Id.* at 110.
41. *Id.* at 23.
42. *Id.* at 45.
43. *Id.* at 24.
44. Transcript of Testimony at 106, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856).
45. *Id.* at 77.
46. *Id.* at 41.
47. *Id.* at 21.

That Manhattan State Hospital likewise failed to protect Lorene was the basis for the claims that Frank Williams made on Lorene's behalf, as well as those on behalf of her daughter Christine.[48] For procedural reasons, those claims ended up getting adjudicated separately, but both eventually failed.[49] Lorene's claim went to trial in 1967, resulting in a judgment of no liability on the part of the State.[50] As Court of Claims Judge Ronald Coleman summarized the situation, the alleged negligence was "to allow [Lorene] to go to church and the store accompanied by at least two older patients who it was felt were capable of taking care of her," and this could only be seen as "an honest error of professional judgment made by competent and qualified persons" (i.e., it fell within the bounds of reasonable care).[51] The judge's reasoning left room for a different assessment had there been greater evidence of risk, but "we cannot find that the State . . . should have reasonably anticipated that the patient would be subject to harm."[52] An appellate court affirmed.[53] We do not know how Lorene felt about any of this, and there is an injustice in the record's silence. But for the law's purposes, the type of care she received was simply not injurious, or at least not injurious in a way that required redress.

Christine's claim followed a different path—eventually ending in dismissal, but only after reaching the highest court in New York state. Court of Claims Judge Sidney Squire was the first to grapple with the claim, in 1965 (i.e., before any consideration of the merits of Lorene's claim), in response to the State's motion to dismiss on the pleadings.[54] Judge Squire refused to grant that motion. He noted, first, that the claim was not as novel as the State suggested.[55] He *himself* had tried a case in which a child had been allegedly sexually assaulted in a state hospital, resulting in the birth of a baby, and the patient's father sued the hospital to try to receive compensation for the support costs he would bear.[56] Those claims did not ultimately succeed, Judge Squire recalled, but not because they were untenable as a matter of law.[57] Indeed, he seemed to find it straightforward to translate the facts alleged in the *Williams*

48. Notice of Appeal, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856).
49. *Id.*
50. *Id.*
51. Memorandum Decision at 9, Williams v. State, Ct. Cl. July 10, 1967 (No. 43856).
52. *Id.*
53. Williams v. State, 30 A.D.2d 611 (N.Y. App. Div. 1968).
54. Williams v. State, 260 N.Y.S.2d 953 (Ct. Cl. 1965).
55. *Id.* at 955.
56. *Id.* at 954.
57. *Id.* (citing Boykin v. State, 180 N.Y.S.2d 884 (N.Y. App. Div. 1958)). Judge Squire also articulated a dim view of arguments based on novelty alone. His priority was common sense justice. "Legal writings abound with glorious statements as to what the law is or should be. In simple paraphrase, 'The law is what the law should be.'" *Id.* at 955.

complaint into a judicially cognizable negligence claim, involving duty, breach, causation, and injury.[58]

The only argument that appeared to give Judge Squire pause was "that 'one who is not alive at the time of commission of a tort' cannot 'have a right of action for said tort.'"[59] But to this, he had a realist answer: "The damages sustained by the mother for the assault and pregnancy are obviously distinguishable and separate from those of the infant. If only the mother can receive damages, it is not sufficient to assuage or satisfy the child. Why should 'the law' be blind to this?"[60] He went on to cite examples from the past fifteen years in which New York courts had recognized liability to infants for prenatal injuries, going back to the moment of conception.[61] To sustain a pleading that located wrongdoing *at conception itself* did not seem a bridge too far. Indeed, this was exactly how the common law was supposed to work: it was an "evolution[ary]" process, Judge Squire explained, "whereby outmoded, contradictory and untimely pronouncements . . . yielded to and [were] replaced by more logical, felicitous, and liberal principles."[62]

The state appealed, and an appellate court reversed Judge Squire's decision.[63] This much shorter opinion—a mere two paragraphs—replaced Judge Squire's paeans to "common sense justice"[64] with concerns about conceptual difficulty. In the appellate court's view, adjudicating this kind of claim would require comparison of "the infirmities inherent in claimant's situation as against the alternative of a void, if nonbirth and nonexistence may thus be expressed."[65] Such a claim also seemed to require the court to imagine "a child or imagined entity in some way identifiable with [the] claimant but of normal and lawful parentage and possessed of normal or average advantages."[66] How could this be done "without incursion into the metaphysical"?[67]

The Court of Appeals (New York's highest court) agreed that the claim should be dismissed but offered yet another set of concerns. The biggest problem, from this court's perspective, was that "the stigma of illegitimacy" figured into the requested damages.[68] This seems to have caused the court to associate Christine's claim with one of the few

58. *Id.* at 963.
59. *Id.* at 960.
60. Williams v. State, 260 N.Y.S.2d 953, 960 (Ct. Cl. 1965).
61. *Id.* at 961.
62. *Id.* at 963.
63. Williams v. State, 269 N.Y.S.2d 786 (N.Y. App. Div. 1966).
64. Williams v. State, 260 N.Y.S.2d 953, 959 (Ct. Cl. 1965) (internal quotation marks omitted).
65. Williams v. State, 269 N.Y.S.2d 786 (N.Y. App. Div. 1966).
66. *Id.*
67. *Id.*
68. Williams v. State, 233 N.E.2d 343, 343 (N.Y. 1966).

comparator cases cited in the courts below: the Illinois case *Zepeda v. Zepeda* (1963).[69] That case began when a child sued his biological father for damages, arguing that the defendant father's promise of marriage induced the plaintiff's mother to have sexual relations and that, because the defendant was already married to someone else, the plaintiff was born an "adulterine bastard."[70] The framing of the alleged injury makes some sense, given the movement afoot to address the legal disadvantages that flowed from nonmarital birth,[71] but the *Zepeda* court saw only "a new tort" with "vast" legal implications and a potentially "staggering" social impact: the tort of "wrongful life."[72] Should the court legitimize such a tort, the *Zepeda* court predicted, it would provide encouragement to other "illegitimate children," a population that had grown significantly in recent years[73] and that people at the time often imagined as (1) non-white, and (2) a public burden.[74] As evidence of the magnitude of the problem, the court cited the "54,984 illegitimate children participating in the Aid to Dependent Children Program,"[75] the federal-state income-support program that media outlets and politicians in this era tended to portray as expensive, rife with fraud, and a haven for immoral, African American women.[76] Elsewhere, these concerns had prompted efforts to sterilize welfare recipients, or cap the amount of children in a single family who could receive public benefits. Here, they provided grounds for rejecting a claim of private responsibility.[77] But in doing so, the *Zepeda* court seemed to imagine it was conserving judicial resources. After all, the court explained, the logic of this "new tort" could easily extend beyond nonmarital children, to "all others born into the world under conditions they might regard as

69. *Id.*

70. Zepeda v. Zepeda, 190 N.E.2d 849, 851 (Ill. App. Ct. 1963).

71. *Id.* at 856 (cataloging some of the legal disadvantages of nonmarital children and noting legal reforms that state lawmakers had initiated in recent years); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 Calif. L. Rev. 1277, 1279–83 (2015) (describing "illegitimacy penalties" in American law, long-standing efforts to ameliorate them, and the increasingly child-focused reform arguments that emerged in the 1960s).

72. *Zepeda*, 190 N.E.2d at 858.

73. *Id.*

74. Mayeri, *supra* note 71, at 1285 ("In the 1950s and 1960s, public discourse increasingly associated nonmarital childbearing with rising public assistance costs and with unmarried African American mothers.").

75. *Zepeda*, 190 N.E.2d at 858.

76. *See generally* Winifred Bell, Aid to Dependent Children (1965); Ellen Reese, Backlash Against Welfare Mothers: Past and Present 38 (2005); Molly C. Michelmore, Tax and Spend: The Welfare State, Tax Politics, and the Limits of American Liberalism 3 (2012).

77. Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 Wm. & Mary L. Rev. 1599, 1619–20 (2022).

adverse," such as "being born of a certain color" or "being born into a large and destitute family."[78]

With *Zepeda* apparently in mind, the Court of Appeals of New York described Christine Williams's claim similarly: as requiring the invention of "a brand new ground for suit," available anytime a woman was "permitt[ed] to be violated" and caused "to bear an out-of-wedlock infant."[79] From there, the court imagined the same opening-of-the-floodgates that *Zepeda* predicted, with incentives flowing to any child who might have preferred to be "born under one set of circumstances rather than another or to one pair of parents rather than to another."[80] Framed in "wrongful life" terms—which is not how Christine's guardian ever framed her legal injury—Christine's claim could not be allowed to proceed.

In describing what the court chose to emphasize, it is also worth noticing what the court did *not* discuss. It did not discuss the allegation that, because of the defendant's negligence, Christine was born to a mother who lacked the abilities to care for her and had reason to feel alienated from her. It did not discuss the fact that, even apart from any damages flowing from the "stigma of illegitimacy,"[81] Christine's existence would generate certain basic expenses—in food, clothing, housing, etc.—and that, because Christine's birth was unexpected, resources had not been accumulated on her behalf. Was it fair for Christine's relatives, rather than the defendant, to bear all of the direct and indirect costs of

78. *Zepeda*, 190 N.E.2d at 858.

79. Williams v. State, 223 N.E.2d 343, 344 (N.Y. 1966). The court of appeals may also have been swayed by how media outlets and law journals had framed the *Williams* case. *See Torts: The Rights of the Illegitimate*, TIME (July 9, 1965), https://content.time.com/time/subscriber/article/0,33009,833936,00.html [https://perma.cc/336X-AYCS] (describing Christine Williams's claim as seeking "to recover damages for the mental anguish of being born a bastard"); Maxine H. Linde, *Liability to Bastard for Negligence Resulting in His Conception*, 18 STAN. L. REV. 530, 530 (1966) (asserting that when the court of claims in the *Williams* case denied the State's motion to dismiss, "the court was acknowledging birth as an illegitimate child to be a tortiously inflicted injury"); Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 COLUM. L. REV. 127, 127 (1966) ("[N]ow a recent New York trial court decision [*Williams v. State*] has stated unequivocally that reparation for the illegitimate's injuries may be given in a court of law."); *The Infliction of Illegitimacy: A New Tort?*, 43 N.D. L. REV. 99, 99 (1966) ("A new tort allowing an action by an infant for damages for her negligently caused illegitimacy may have been created in the 1965 New York Court of Claims case of *Williams v. State*."). Other media coverage associated the *Williams* case with a different question, which might also have occurred to the judges on the court of appeals: would accepting Christine Williams's claim mean requiring provision of therapeutic abortions in cases such as this? Sidney E. Zion, *Child Born of Rape Wins Right to Sue for Fact of Birth; BABY IN RAPE CASE GETS RIGHT TO SUE*, N.Y. TIMES (June 26, 1965), https://www.nytimes.com/1965/06/26/archives/child-born-of-rape-wins-right-to-sue-for-fact-of-birth-baby-in-rape.html.

80. Williams v. State, 223 N.E.2d 343, 344 (N.Y. 1966).

81. *Id.* at 343.

child-raising?[82] The judges on the court of appeals were so fixated on the troubling idea of allowing recovery for the "disadvantages of illegitimate birth"[83] that they neglected those aspects of the case that were so moving to the court of claims—and that might move us still today.

II. The Evolution of "Wrongful Life": How Reproductive Negligence and Disabled Children Came to Dominate the Frame

As Christine Williams's claim wound its way through the New York court system, her attorney, Norman Roy Grutman, was representing another client with a similar (but distinct) claim.[84] Barbara Stewart and Robert Stewart were a married couple who sought, and were denied, a "therapeutic abortion" from Long Island College Hospital in 1964, leading ultimately to the birth of a daughter, Rosalyn.[85] (This was an era when abortion was illegal in New York State, save for abortions that doctors performed for life-saving medical reasons, after approval by a hospital board.)[86] The Stewarts loved their daughter, but they had not wanted to bring into the world a child with the kinds of limitations and health risks that Rosalyn turned out to have, including impaired vision and hearing, cardiac murmurs, intellectual impairment, and inability to communicate.[87] Indeed, they had given the matter great thought. Barbara Stewart had contracted German measles (rubella) in the first trimester of her pregnancy, at a time when this disease had reached "epidemic" proportions and its risk to developing fetuses was well documented.[88] This was why the Stewarts had sought an abortion in the first place, why their personal physician wrote to multiple hospitals in support of their request, why two doctors at Long Island College Hospital agreed that an abortion was warranted, and why hospital employees went so far as to prepare Barbara Stewart for surgery.[89]

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82. Other cases from this era suggest that it was by no means absurd for a caregiver to receive damages for the expense of raising a child that would not have existed but for a defendant's negligence. *See* Custodio v. Bauer, 59 Cal. Rptr. 463, 465, 477 (Ct. App. 1967) (holding that a pregnant woman and her husband were permitted to seek more than nominal damages from a defendant whose allegedly negligent sterilization procedure permitted the pregnancy); Troppi v. Scarf, 187 N.W.2d 511, 512, 518 (Mich. Ct. App. 1971) (rejecting the notion that a husband and wife should be unable to seek damages for the economic cost of rearing a child that allegedly would not exist but for their pharmacist's negligence in filling a birth control prescription).

83. *Williams*, 223 N.E.2d at 344 (N.Y. 1966).

84. In a conversation with reporters in June 1965, Grutman characterized the *Williams v. State* case as opening the door to suits exactly the ones described in this section. Zion, *supra* note 79.

85. Stewart v. Long Island College Hosp., 296 N.Y.S.2d 41, 42–43 (N.Y. Sup. Ct. 1968).

86. *See generally* Leslie J. Reagan, When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973 (1997).

87. Leslie J. Reagan, Dangerous Pregnancies: Mothers, Disabilities, and Abortion in Modern America 110 (2010).

88. *Id.* at 108, 110.

89. *Id.* at 107–110.

Ultimately, however, the hospital's director of Obstetrics and Gynecology refused to approve the procedure, for reasons that the Stewarts would not learn until months later.[90] At the time, they were told simply that the procedure was unnecessary, "that the baby would be all right," and that they should "not [] go to any place to try to have [an abortion]," as Barbara Stewart remembered it.[91] Barbara carried her pregnancy to term and give birth to a child that was far from the typically functioning child that she had been told to expect.[92] Two and a half months later, the Stewarts filed suit against the hospital, asserting claims on their own behalf as well as on behalf of their infant daughter Rosalyn.[93]

This fact pattern bears recounting in some detail because it is emblematic of what the tort of "wrongful life" would become. So, too, is the treatment that the Stewarts's claims received from the New York courts. After a jury returned a verdict in favor of the Stewarts and awarded damages (including $100,000 to Rosalyn),[94] a New York appellate court upheld the judgment in favor of parents Barbara and Robert, but ordered dismissal of the infant Rosalyn's claim.[95] Following the New Jersey Supreme Court, which had recently considered a similar case involving German measles and a child born with disabilities, *Gleitman v. Cosgrove*,[96] Trial Term Judge Charles Beckinella treated Rosalyn's claim as a legal impossibility.[97] The three relevant decisions that he identified (*Zepeda*, *Williams*, and *Gleitman*) convinced

90. *Id.* at 110. At trial, it emerged that this doctor viewed Barbara Stewart with suspicion, for reasons that historian Leslie Reagan has persuasively connected to race (Stewart was African American). The doctor was not persuaded that she had actually contracted German measles. *Id.* at 114–16.

91. *Id.* at 110, 116 (citing Marion K. Sanders, *The Right Not To Be Born*, Harper's Mag., April 1970, at 92–99).

92. *Id.* at 110.

93. Reagan, *supra* note 87, at 111.

94. Stewart v. Long Island College Hosp., 296 N.Y.S.2d 41, 48 (N.Y. Sup. Ct. 1968). In today's dollars, this would be over $800,000.

95. Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502, 503–04 (N.Y. App. Div. 1970).

96. Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967). *Gleitman* involved a woman who contracted German measles during her pregnancy and whose doctor allegedly misinformed her and her husband about the risks that this disease posed to a developing fetus. The Gleitmans did not seek a therapeutic abortion. The child that resulted from this pregnancy had serious impairments, affecting his ability to see, hear, and speak. *Id.* at 690; Reagan, *supra* note 87, at 118. In dismissing the claim of the child plaintiff, the New Jersey Supreme Court relied in part on *Zepeda* and *Williams*. *Gleitman*, 227 A.2d at 692 (describing these cases as "[t]he two cases from other states which have considered the theory of action for 'wrongful life'" and noting that "in both cases policy reasons were found to deny recovery"). Laying groundwork that Judge Beckinella would subsequently seize upon in *Stewart*, the *Gleitman* court also used the language of legal impossibility. *Id.* ("The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. . . . By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages . . . .").

97. Stewart v. Long Island College Hosp., 296 N.Y.S.2d 41, 44 (N.Y. Sup. Ct. 1968).

him "that there is no remedy for having been born under a handicap, whether physical or psychological, when the alternative . . . is not to have been born at all."[98] The upshot of this particular claim—that the defendant erred by not terminating the fetus that eventually became the plaintiff—struck Judge Beckinella as particularly absurd. (Recall that to perform an abortion in New York state was a crime at this time, absent exceptional circumstances and appropriate credentials.) To allow a child plaintiff to sue a defendant for "fail[ing] to consign the plaintiff to oblivion" would be "alien to our system of jurisprudence," he declared.[99] Two further appeals resulted in the same holding as to Rosalyn's claim—and, unfortunately for the Stewarts, a reversal of the parents' victory, as well.[100]

After the U.S. Supreme Court's landmark decision in *Roe v. Wade* (1973),[101] courts became more receptive to the idea of awarding damages to *parents* in cases where the defendant's negligent medical care resulted in: (1) an unwanted pregnancy (in the case, for example, of a botched vasectomy); (2) a failed termination of an unwanted pregnancy; or (3) a missed opportunity to terminate a pregnancy that *would have been unwanted* had the plaintiffs been properly informed.[102] The cases in which they did so speak to prospective parents' growing expectation of informed reproductive choice, as well as to Americans' dependency on medical professionals for reproductive healthcare, ranging from birth control to genetic counseling. When such professionals failed to fulfill their duties to patients, many courts were open to holding them accountable (to some degree) for the births, and the children, that resulted.[103]

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98. *Id.* at 46.

99. *Id.*

100. Stewart v. Long Island College Hosp., 313 N.Y.S.2d 502 (N.Y. App. Div. 1970); Stewart v. Long Island College Hosp., 283 N.E.2d 616 (N.Y. 1972).

101. Roe v. Wade, 410 U.S. 113 (1973).

102. *See, e.g.*, Ziemba v. Sternberg, 357 N.Y.S.2d 265, 269 (N.Y. App. Div. 1974); Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975); Stills v. Gratton, 127 Cal. Rptr. 652, 658–59 (Ct. App. 1976); Berman v. Allan, 404 A.2d 8, 14–15 (N.J. 1979). Some courts were also open to the idea of plaintiff parents receiving damages for child-raising expenses. *See, e.g.*, Jacobs v. Theimer, 519 S.W.2d 846, 849–50 (Tex. 1975) (allowing a suit involving German measles to move forward and suggesting openness to damages for the costs of child-raising, but holding that any such damages should be limited to ones relating to the child's disabilities); Stills v. Gratton, 127 Cal. Rptr. 652, 658–59 (Ct. App. 1976) (holding that, in California, the trier of fact was free to assign damages for child-rearing expenses, in accordance with "ordinary tort principles"); Robak v. United States, 658 F.2d 471, 477 (7th Cir. 1981); Schroeder v. Perkel, 432 A.2d 834, 841–42 (N.J. 1981) (allowing recovery of the extraordinary medical expenses of raising a child with a fatal genetic disorder); Kush v. Lloyd, 616 So. 2d 415, 423–24 (Fla. 1992).

103. Many scholars have commented on the historical circumstances that made "wrongful birth" and "wrongful life" claims imaginable, as well as the circumstances that invited new iterations of these claims over time. *See, e.g.*, REAGAN, *supra* note 87, at 106; Margaret J. Mullen, *Wrongful Life:*

But with several notable exceptions,[104] including an eventual change of course in New Jersey,[105] courts remained hostile to claims brought by, or on behalf of, *children*.[106] Picking up on the phrasing from the 1963 *Zepeda* case, courts also now increasingly referred to these latter claims as "wrongful life" actions (as distinct from the "wrongful birth" actions that their parents might bring).[107]

In the earliest rejections of "wrongful life," majority opinions tended to travel the path laid out in *Gleitman* and *Stewart*.[108] That is, they characterized the claims as somehow doctrinally or logically impossible. Tort law seemed to require an acknowledged wrongful state of being and a pre-tort, rightful state of being. But was being alive, even under unfortunate circumstances, a *wrong* if the hypothetical, pre-tort alternative was not existing at all? To the extent such a comparison was even possible, it was best left "to the philosophers and the theologians," New York's highest court declared in 1978.[109]

Birth Control Spawns a Tort, 13 J. Marshall L. Rev. 401, 404–05 (1980); Janet L. Tucker, *Wrongful Life: A New Generation*, 27 J. Fam. L. 673, 675 (1988); Barbara Pfeffer Billauer, *Re-Birthing Wrongful Birth Claims in the Age of IVF and Abortion Reforms*, 50 Stetson L. Rev. 85, 90–91 (2020). For a recent article in this vein, which also provides a helpful overview of both the current state of the law and caselaw trends over time, see Luke Isaac Haqq, *The Impact of Roe on Prenatal Tort Litigation: On the Public Policy of Unexpected Children*, 13 J. Tort L. 81 (2020).

104. Speck v. Finegold, 439 A.2d 110, 112 (Pa. 1981) (per curiam) (affirming a lower court order rejecting the plaintiff infant's "wrongful life" but reflecting an even split among the justices as to the validity of such a claim); *id.* at 115–17 (criticizing those who would deny the plaintiff infant a remedy or ignore her obvious injury); Turpin v. Sortini, 643 P.2d 954, 966 (Cal. 1982) (concluding "that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child . . . may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment"); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 497 (Wash. 1983).

105. Procanik v. Cillo, 478 A.2d 755, 757 (N.J. 1984).

106. *See, e.g.*, Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 376 (Wisc. 1975); Becker v. Schwartz, 386 N.E.2d 807, 811 (N.Y. 1978). Well into the 1970s, however, there remained some confusion about these terms. *See, e.g.*, Slawek v. Stroh, 215 N.W.2d 9, 21 (Wisc. 1974) (referring to a claim on behalf of a child as capable of description as either a "wrongful birth" claim or a "wrongful life" claim); *Becker*, 386 N.E.2d at 811 (referring to a claim by "an illegitimate but otherwise healthy child" as the paradigmatic "wrongful birth" case). Since the 1970s, some courts and commentators have added a further refinement to the "wrongful birth" category, by drawing a distinction between cases of "wrongful conception" and "wrongful birth." *Id.* at 810–11.

107. *See, e.g.*, *Elliott*, 361 So. 2d at 547 (reporting that "[s]everal courts have addressed this issue and the vast majority have declined to recognize a cause of action for 'wrongful life' on behalf of a child"); Karlsons v. Guerinot, 394 N.Y.S.2d 933, 937 (N.Y. App. Div. 1977) ("Causes of action for 'wrongful life' have consistently met with judicial disapproval not only in New York State but in other jurisdictions as well.").

108. *See* Curlender v. Bio-Sci. Lab'ys, 165 Cal. Rptr. 477, 482 (Ct. App. 1980) ("[T]he reasoning and result in *Gleitman*'s majority opinion have been, in the main, followed (albeit blindly in our opinion) in other jurisdictions.").

109. *Becker*, 386 N.E.2d at 812; *see also Turpin*, 643 P.2d at 963 (discussing the difficulty of "the threshold question of determining whether the plaintiff has in fact suffered an injury by being born with an ailment as opposed to not being born at all"); Wilson v. Kuenzi, 751 S.W.2d 741, 747

The arguments against recognizing "wrongful life" expanded over time, in ways that all but doomed this "new tort" (despite some powerful dissenting arguments). One line of argument used language that evoked the anti-abortion side of post-*Roe* debates. Thus, in some jurisdictions, judges buttressed their rejections of "wrongful life" claims with rhetorical arguments about the inherent value of human life, however impaired or disadvantaged.[110] "Basic to our culture is the precept that life is precious," explained the Idaho Supreme Court, which means that "our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence."[111] To recognize a claim of "wrongful life" "would do violence to that purpose."[112]

In other jurisdictions, courts raised a related concern—about the value of *disabled* life, in particular, and the importance of not doing expressive harm to disabled people. This concern appeared to stem from greater societal acceptance of disabled people, from lawmakers' efforts to extend antidiscrimination protections to this population, and from the inroads that the disability rights movement had made by the late 1970s. Awareness of these developments is apparent, for example, in the New Hampshire Supreme Court's first consideration of a "wrongful life" claim in 1986.[113] In rejecting the claim, that court insisted that the judiciary "ha[d] no business declaring that among the living are people who never should have been born."[114] It also quoted with approval a student comment about the ways in which negative societal attitudes had "handicap[ped]" people with disabilities (an insight associated with

(Mo. 1988) (en banc) (Robertson, J., concurring) ("Wrongful life actions ask juries to tread where mortals cannot go, to weight the *cost* of life—even handicapped life—against the *benefit* of no life at all.").

110. *See, e.g.*, Berman v. Allen, 404 A.2d 8, 12 (N.J. 1979) (going beyond the damages-focused rationale of *Gleitman*, the landmark "wrongful life" precedent in New Jersey, to emphasize that in "our society," life "is more precious than non-life," even if that life is "experienced with . . . a major physical handicap"); Azzolino v. Dingfelder, 337 S.E.2d 528, 532 (N.C. 1985) ("[W]e conclude that life, even life with severe defects, cannot be an injury in the legal sense."); Phillips v. United States, 508 F. Supp. 537, 543 (D.S.C. 1980) (characterizing "the preciousness and sanctity of human life" as the fundamental policy consideration dictating its rejection of the tort of "wrongful life"). Ironically, judicial deployment of this argument has meant denying support for the life in question. *See* Blake v. Cruz, 698 P.2d 315, 329 (1985) (Bistline, J., dissenting in part) (critiquing the majority for citing life's preciousness as a reason for denying recovery to the plaintiff child). As evidence of what a change this was, consider the discussion of "wrongful life" in the 1963 *Zepeda* case. *See* Zepeda v. Zepeda, 190 N.E.2d 849, 855, 858, 859 (Ill. App. Ct. 1963) (making no mention of the notion that recognizing this cause of action would denigrate life).

111. *Blake*, 698 P.2d at 322.

112. *Id.*

113. Smith v. Cote, 513 A.2d 341 (N.H. 1986).

114. *Id.* at 353.

the "social model" of disability) and the danger of further denigrating this population by characterizing their lives as injuries.[115]

As of the time of this writing, only three U.S. jurisdictions explicitly allow recovery for "wrongful life," and recovery appears limited to exceptional (rather than standard) childrearing expenses.[116] Many other jurisdictions have explicitly refused to acknowledge "wrongful life" claims.[117] Meanwhile, the factual circumstances underlying *Williams v. State* have all but disappeared from how treatises and practice guides discuss this tort.[118] Indeed, as early as the mid-1980s, one can find courts defining "wrongful life" in ways that excluded the *Williams v. State* scenario altogether. As the North Carolina Supreme Court put it in a 1985 decision rejecting "wrongful life," the phrase "refers to a claim for relief by or on behalf of a *defective child* who alleges that but for the defendant's negligent treatment or advice to its parents, the child would not have been born."[119]

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115. *Id*. (quoting Geoffrey Disston Minott & Vincent Phillip Zurzolo, Comment, *Wrongful Life: A Misconceived Tort*, UC Davis L. Rev. 447, 459–60 (1981)); *see also* Kassama v. Magat, 792 A.2d 1102, 1123 (Md. 2002) (holding that "for purposes of tort law, an impaired life is not worse than non-life" and emphasizing that people with the plaintiff's condition of Down syndrome "can lead useful, productive, and meaningful lives"). Scholars have elaborated on these concerns. *See infra* note 171. Such arguments would likely carry even more weight today than they did in 1986, when *Smith v. Cote* was decided. *See* Jasmine E. Harris & Karen M. Tani, *The Disability Frame*, 170 U. Pa. L. Rev. 1663, 1681–83 (2022) (observing a surge in disability-linked argumentation and noting the rhetorical and strategic advantages of such argumentation).

116. Haqq, *supra* note 103, at 126 n.158 (identifying California, New Jersey, and Washington as jurisdictions that explicitly allow "wrongful life" actions). Tennessee also appears to allow pursuit of a "wrongful life"-type claim, but the key case is less than explicit on this point. *Id.* Courts in Massachusetts and Louisiana "have expressed willingness to recognize wrongful life if the right opportunity presented itself." *Id.* at 157.

117. *Id.* at 125 (illustrating the numerous jurisdictions in which "wrongful life" actions have been explicitly rejected).

118. *See, e.g.*, 62A Am. Jur. 2d Prenatal Injuries, Etc. § 43 (explaining that the term "wrongful life" "describe[es] the result of a physician's negligence" and is "essentially" a "medical malpractice action[]"). For some commentators, a case like *Williams v. State* would now be impossible to describe in "wrongful life" terms. *See, e.g.*, Shawna Benston, *What's Law Got To Do With It? Why We Should Mediate, Rather Than Litigate, Cases of Wrongful Life*, 15 Cardozo J. Conflict Resol. 243, 245 (2013) ("[B]abies conceived through rape are not what the term 'wrongful life' denotes. Rather, 'wrongful life' cases often emerge from an initially ideal conception: two potential parents in love seek medical guidance to prepare them for a consensual pregnancy, ultimately giving birth to a baby they hoped would be healthy and thriving.").

119. Azzolino v. Dingfelder, 337 S.E.2d 528, 531 (N.C. 1985) (emphasis added); *see also* Lininger *ex rel.* Lininger v. Eisenbaum, 764 P.2d 1202, 1214 (Colo. 1988) (Mullarkey, J., concurring in part and dissenting in part) ("The allegation which has come to characterize the tort of wrongful life . . . is that, if the physicians had properly diagnosed and advised the plaintiffs with respect to a genetic condition, the parents would not have conceived or borne the child."); Atlanta Obstetrics & Gynecology Grp. v. Abelson, 398 S.E.2d 557, 559–60 (Ga. 1990) ("An action for 'wrongful life' is brought on behalf of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant to its parents, the child would never have been born.").

This very erasure raises an interesting possibility, however. If "wrongful life" has become a cause of action that typically involves (1) consensual sexual intercourse; (2) some form of allegedly negligent reproductive healthcare; and (3) a disabled child, perhaps it is time to reconsider the *Williams v. State* scenario, which departs from all three prongs.[120] Indeed, when we reflect on why and how the tort of "wrongful life" developed in the first place—in tandem with evolving understandings of the rights of children, the scope of reproductive freedom, and the responsibilities of medical and other care providers—such a reconsideration seems overdue.

III. Reviving the Idea of Institutional Liability for a Wrongfully Created Life

"There is no necessity whatever that a tort must have a name," William Prosser once wrote.[121] There is likewise no requirement that we adhere to a name that does not capture the essence of the wrong we are trying to describe. Meanwhile, there is every reason, following feminist theorists of torts, to question the biases and perspectives that so often inform legal practices of naming.[122] This Part suggests that courts and commentators look with fresh eyes on factual situations like Christine Williams's and find for them a place in tort law that is distinct from the types of claims that have come to define the tort of "wrongful life." This is not to say that the typical "wrongful life" claim does not also merit a fresh look and perhaps a new name. It is to say that the claims of a Christine Williams are different, in ways that have historically mattered to tort law. After documenting the continued existence of people like Christine Williams (Section A) and explaining the importance of a claim that is attached to the child (rather than the parent) (Section B),

120. This possibility occurred to an Indiana appellate court in 1989, when it considered a case involving a child whose birth allegedly resulted from a private nursing home's negligence. Cowe *ex rel.* Cowe v. Forum Grp., Inc., 541 N.E.2d 962 (Ind. Ct. App. 1989). The child's mother, who had a significant intellectual impairment and could not walk or talk, relied on the nursing home for "complete" custodial care. *Id.* at 964. The appellate court decided to "expand the wrongful life cause of action" such that it

> include[d] a situation where . . . both parents are so severely mentally or physically impaired as to render them incapable of affirmatively deciding to have a child or to care for a child and where but for the custodian's negligent care of both parents, the child would not have been conceived.

Id. at 966. The Supreme Court of Indiana reversed. Cowe *ex rel.* Cowe v. Forum Grp., Inc., 575 N.E.2d 630, 637 (Ind. 1991). But the fact that the intermediate appellate court decided the case as it did reinforces my argument about the potential distinctiveness of what I refer to as the Christine Williams factual scenario.

121. Prosser, *supra* note 1, at 3.

122. *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3, 18 (1988).

this Part addresses the doctrinal obstacles that might appear to prevent tort law from providing a damage remedy and suggests an alternative perspective (Section C). (Keeping the proverbial horse in front the cart, this Article does not address the various practical obstacles that might confront a Christine Williams-type plaintiff today. But exploring these obstacles would be an obvious next step.) Settlement records, scant as they are, suggest that courts may already be doing some version of what this Article proposes (Section D).

A. Nonconsensual Impregnation and Birth in Institutional Settings: A Continued Problem

Williams v. State emerged from a historical context in which mass institutionalization of people with disabilities was common—much more so than it is today—and yet it would be a mistake to cast this phenomenon as a relic of the past.[123] Indeed, there are, signs of renewed enthusiasm for institutionalization, especially with regards to people with psychiatric disabilities.[124] Today, someone like Lorene Williams, whose most significant impairment appears to have been intellectual, might be an unlikely resident of a large, state-run psychiatric hospital. But she could well reside in a nursing home.[125] In 2019, the national population of "long-stay" nursing home residents included nearly 16,000 women under the age of fifty.[126] As compared to people on the elderly side of the age spectrum, these younger residents are more likely to reside in lower-quality and for-profit nursing homes.[127] A person like Lorene Williams could also reside in an "intermediate care facility," which would involve a lower level of skilled nursing care than a nursing home but would still provide custodial care. The Centers for Medicare and Medicaid Services estimate that over 100,000 people nationwide live in such settings.[128] People with disabilities also currently

123. Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 429–32 (2018); LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 1 (2020).

124. *See* Beatrice Adler-Bolton & Artie Vierkant, *Is Eric Adams Bringing Back the Asylum?*, THE NATION (Dec. 7, 2022), https://www.thenation.com/article/society/adams-forced-hospitalization/ [https://perma.cc/VM7N-B685].

125. *See* Appleman, *supra* note 123, at 458–60 (explaining the forces that have shifted residents out of large, state-run institutions and into nursing homes and group homes).

126. Ari Ne'eman, Michael Stein & David C Grabowski, *Nursing Home Residents Younger Than Age Sixty-Five Are Unique And Would Benefit From Targeted Policy Making*, 41 HEALTH AFFAIRS 1449, 1452 (2022).

127. *Id.* at 1449.

128. *Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs/IID)*, CENTERS FOR MEDICAID AND MEDICAID SERVICES, https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/ICFIID [https://perma.cc/9QRJ-AN8Z] (last modified

reside in mental health facilities and educational centers. A 2020 federal government survey (with an 89% response rate) found 121,404 people receiving 24-hour mental health treatment in an inpatient or residential setting (i.e., in a setting that implies some amount of custodial care and supervision).[129] Data on residential schools (many of which are specifically for children with disabilities) is harder to come by, but a government survey from the 2000s estimated that these schools serve 50,000 children nationwide.[130]

People with disabilities, especially intellectual disabilities, are at a high risk of sexual abuse when compared to the nondisabled population,[131] and institutions that house people with disabilities are known sites for such abuse. The same factors that cause people to reside in these settings (e.g., serious mental illness, paralysis, intellectual impairment, communication impairment) make them vulnerable to sexual exploitation. Predictably, unwanted pregnancies sometimes result from sexual abuse while under the care of these institutions.[132] For a relatively recent example, consider the physically

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Sept. 9, 2023); *see also* Chin, *supra* note 6, at 381 ("An estimated 184,699 intellectually disabled individuals live in a private group home setting.").

129. *National Mental Health Services Survey (N-MHSS): 2020*, Substance Abuse and Mental Health Services Admin. 1, 65 (Sept. 2021), https://www.samhsa.gov/data/sites/default/files/reports/rpt35336/2020_NMHSS_final.pdf [https://perma.cc/RD86-3J3Y]; *see also Desperation without Dignity: Conditions of Children Placed in For Profit Residential Facilities*, Nat'l Disability Rts. Network 15–16 (Oct. 2021), https://www.ndrn.org/wp-content/uploads/2021/10/NDRN_Desperation_without_Dignity_Final.pdf [https://perma.cc/A6YL-NSSC] (focusing on residential treatment facilities that house children and noting that a number of states "still rely heavily on congregate care.").

130. Annie Waldman, *Kids Get Hurt at Residential Schools While States Look On*, ProPublica (Dec. 15, 2015, 5:07 PM), https://www.propublica.org/article/kids-get-hurt-at-residential-schools-while-states-look-on [https://perma.cc/7J5U-6F6Q].

131. Erika Harrell, *Crime Against Persons with Disabilities, 2009–2019 – Statistical Tables*, Bureau of Just. Stat. (Nov. 2021), https://bjs.ojp.gov/content/pub/pdf/capd0919st.pdf [https://perma.cc/D8X6-VMKD] (documenting high rates of crime victimization among non-institutionalized people with disabilities, including rates of rape/sexual assault that far exceed those of the nondisabled population); Joseph Shapiro, *The Sexual Assault Epidemic No One Talks About*, NPR (Jan. 18, 2018, 5:00 AM), https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about [https://perma.cc/6V4E-HXAX] (documenting the high incidence of sexual victimization among people with disabilities, especially cognitive ones, and noting that these incidents often go unreported and unpunished); Emily Ledingham, Graham W. Wright & Monika Mitra, *Sexual Violence Against Women With Disabilities: Experiences With Force and Lifetime Risk*, 62 Am. Jur. Preventative Med. 895, 896 (2022).

132. Research is limited on the likelihood that a nonconsensual sexual encounter will result in pregnancy, but existing studies suggest a non-negligible risk. Kathleen C. Basile, Sharon G. Smith, Yang Liu, Marcie-jo Kresnow, Amy M. Fasula, Leah Gilbert & Jieru Chen, *Rape-Related Pregnancy and Association With Reproductive Coercion in the U.S.*, 55 Am. J. Preventive Med. 770 (2018) ("Almost 2.9 million U.S. women (2.4%) experienced rape-related pregnancy during their lifetime."); Melisa M. Holmes, Heidi S. Resnick, Dean G. Kilpatrick & Connie L. Best, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics From a National Sample of Women*, 175 Am. J. Obstet. Gynecol. 320 (1996) (estimating the "national rape-related pregnancy rate" at "5.0% per rape among victims of reproductive age (aged 12 to 45)"). It stands to reason that populations that

and mentally impaired Arizona woman who made headline news when she unexpectedly went into labor, triggering a discovery that she had been raped repeatedly during the two decades she resided at a long-term care facility.[133] Court cases[134] and settlement reports[135] suggest similar incidents all around the country.

Another institutional setting in which nonconsensual sexual contact occurs is in prisons, jails, and other carceral institutions. In the United States, these institutions confine almost two-million people, including an estimated 172,700 women and girls[136] (some of whom also have disabilities).[137] Sexual abuse in carceral settings is well documented.[138]

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tend to lack access to birth control, such as people with intellectual and development disabilities, may be at higher risk. *See* Powell, *supra* note 6, at 1872–73 (documenting the "range of barriers to contraception" that disabled women encounter and connecting these barriers to this population's "higher rates of unintended pregnancies," as compared to women without disabilities).

133. Vanessa Romo, *Disabled Woman Who Gave Birth At Care Facility May Have Been Impregnated Before*, NPR (May 23, 2019, 3:00 PM), https://www.npr.org/2019/05/23/726207219/disabled-woman-who-gave-birth-at-care-facility-may-have-been-impregnated-before [https://perma.cc/2CXV-485N].

134. *See, e.g.*, *In re* Guardianship of J.D.S., 864 So. 2d 534, 536 (Fla. Dist. Ct. App. 2004) (describing the rape and impregnation of a severely disabled woman in a Florida group home).

135. *See infra* Part III.D; *see also* "Negligence & Tort; Nursing Home - Sexual Assault of Comatose Patient - Baby Born With Brain Damage," 2002 Dolan Media Jury Verdicts LEXIS 2870 (documenting the settlement of a case involving alleged sexual assault and impregnation in a nursing home in Massachusetts); Maguire v. Montana, 88-C-459, JVR No. 75836, 1991 WL 447760 (Mont. Dist.) (Verdict and Settlement Summary); Roe v. Kodiak Island Borough, JVR No. 410456, 2000 WL 34248139 (Unknown State Ct. (Alaska)) (Verdict and Settlement Summary).

136. Alexis Kajstura & Wendy Sawyer, *Women's Mass Incarceration: The Whole Pie 2023*, Prison Pol'y Initiative (Mar. 1, 2023), https://www.prisonpolicy.org/reports/pie2023women.html [https://perma.cc/P3VY-QEV9].

137. Appleman, *supra* note 123, at 463–73 (noting the high rates of mental illness in carceral institutions and observing that "[p]eople with cognitive and developmental disabilities tend to interact with the criminal justice system at a disproportionately higher rate.").

138. Publications by the Department of Justice provide ample documentation. *See generally Sexual Victimization in Correctional Facilities (PREA)*, Bureau of Just. Stat. https://bjs.ojp.gov/topics/corrections/prea [https://perma.cc/PW4K-ZKHP]. Journalists, scholars, and incarcerated people have provided further documentation, continuing well after the enactment of the Prison Rape Elimination Act in 2003. *See, e.g.*, Elizabeth Budnitz, *Not a Part of Her Sentence: Applying the Supreme Court's* Johnson v. California *to Prison Abortion Policies*, 71 Brook. L. Rev. 1291, 1297–98 (2006); Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 Harv. C.R.-C.L. L. Rev. 45, 55, 70 (2007); Gary Hunter, *Sexual Abuse by Prison and Jail Staff Proves Persistent, Pandemic*, Prison Legal News (May 15, 2009), https://www.prisonlegalnews.org/news/2009/may/15/sexual-abuse-by-prison-and-jail-staff-proves-persistent-pandemic/ [https://perma.cc/BGZ5-Q568]; Rachel Culley, *"The Judge Didn't Sentence Me to Be Raped":* Tracy Neal v. Michigan Department of Corrections: *A 15-Year Battle Against the Sexual Abuse of Women Inmates in Michigan*, 22 Women & Crim. Just. 206, 207 (2012); Elizabeth A. Reid, *The Prison Rape Elimination Act (PREA) and the Importance of Litigation in Its Enforcement: Holding Guards who Rape Accountable*, 122 Yale L.J. 2082, 2085–88 (2013); Brenda V. Smith & Melissa C. Loomis, *Sexual Abuse in Custody: A Case Law Survey*, Nat'l PREA Resource Ctr. (Feb. 1, 2013), https://www.prearesourcecenter.org/sites/default/files/library/sexualabusecasescaselawsurvey.pdf [https://perma.cc/62DS-48BX] (summarizing numerous cases involving allegations of sexual assault in prisons and jails); J.K.J. v Polk Cnty., 960 F.3d 367, 386 (7th Cir. 2020); Val Kiebala, *'It's*

Data on impregnation in prisons and jails is harder to come by,[139] but anecdotal evidence suggests that it is not uncommon and, indeed, may be a known hazard in certain facilities. In 2012, the Equal Justice Initiative reported receiving "numerous complaints" over a five-year period from women inmates *at a single prison in Alabama* who were allegedly raped by male correctional staff and became pregnant.[140] Similar allegations have surfaced in Delaware,[141] Illinois,[142] New York,[143] Michigan,[144] and Washington.[145]

Pregnancies of this nature have a different valence after the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*. To be sure, the pre-*Dobbs* era was no panacea for people who became pregnant in institutional settings: realistically, they did not always have the option to terminate an unwanted pregnancy, because of poor healthcare provision and restrictions on their bodily movement.[146] But in the wake of *Dobbs*, pregnant people in some jurisdictions may

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an Emergency': Tens of Thousands Of Incarcerated People Are Assaulted Each Year, The Appeal (Apr. 18, 2022), https://theappeal.org/cynthia-alvarado-sexual-assault-in-prisons/ [https://perma.cc/ZBE5-JX5Z].

139. *See* Susan Hatters Friedman, Aimee Kaempf & Sarah Kauffman, *The Realities of Pregnancy and Mothering While Incarcerated*, 48 J. Am. Acad. Psychiatry & L. Online 1 (May 2020), https://jaapl.org/content/early/2020/05/13/JAAPL.003924-20 [https://perma.cc/B2J4-PWHJ] ("Correctional facilities are not mandated to track or report pregnancy-related data, and most facilities do not have any routine process for collecting such information.").

140. *Investigation Into Sexual Violence at Tutwiler Prison for Women*, Equal Just. Initiative (May 2012), https://eji.org/files/eji-findings-tutwiler-prison-investigation.pdf [https://perma.cc/RAS6-VX5V]; *see also* Washington v. Albright, 814 F. Supp. 2d 1317, 1319 (M.D. Ala. 2011).

141. Daniels v. Delaware, 120 F. Supp. 2d 411, 417 (D. Del. 2000).

142. Complaint at 3–4, Doe v. Denning, No. 1:08-cv-01265 (N.D. Ill. E. Div. Mar. 3, 2008), available at http://ia600402.us.archive.org/31/items/gov.uscourts.ilnd.217697/gov.uscourts.ilnd.217697.1.0.pdf.

143. Morris v. Eversley, 205 F. Supp. 2d 234, 236 (S.D.N.Y. 2002) (referencing "complaints lodged by [other] female prisoners and the incidence of pregnancies among inmates").

144. Culley, *supra* note 138, at 210 (referencing a prisoner's allegation that she "became pregnant as a result of sexual assaults by a male correctional officer" at a facility in Michigan).

145. Paul Wright, *The Cost of Running Washington's Rape Camps*, Prison Legal News (Oct. 2001), https://www.prisonlegalnews.org/news/2001/oct/15/the-cost-of-running-washingtons-rape-camps/ [https://perma.cc/D23H-JZAG] (reporting that in 1998, the Washington state Department of Corrections paid a former prisoner $110,000 to settle a lawsuit in which she claimed that a prison guard had raped and impregnated her).

146. Evelyn F. McCoy & Azhar Gulaid, *What Research Tells Us About Abortion Access for Incarcerated People*, Urban Inst. (May 6, 2022), https://www.urban.org/urban-wire/what-research-tells-us-about-abortion-access-incarcerated-people (documenting and explaining the limited access that incarcerated people had to abortion in the pre-*Dobbs* era); Carol Sanger, About Abortion: Terminating Pregnancy in Twenty-First Century America 41 (2017) (describing a (pre-*Dobbs*) landscape in which pregnant inmates' access to abortion varied from institution to institution, but in which barriers abounded); Alison M. Whelan & Michele Goodwin, *Abortion Rights and Disability Equality: A New Constitutional Battleground*, 79 Wash. & Lee L. Rev. 965, 987–88, 998, 1003–04 (2022) (documenting the "many direct and indirect mechanisms" that states used to restrict access to abortion in the pre-*Dobbs* era and noting how these restrictions particularly burdened people with limited economic resources, people with mobility restrictions, and people who relied on Medicaid for their health insurance).

face *no* realistic chance of terminating an unwanted pregnancy, meaning that more unwanted pregnancies will translate into live births.[147]

All of this is to say: the facts underlying *Williams v. State* remain relevant today—and become more so with every state-level abortion restriction that goes into effect. American practices of institutionalization and custodial care are leading predictably to nonconsensual sexual intercourse, leading to pregnancy, leading to children—children who will likely start life with an institutionalized mother, an unknown or otherwise unavailable father, few resources, and many disadvantages.

B. A Claim of One's Own

When an institutional defendant fails to take due care to prevent a person under their charge from being sexually assaulted, in a context in which both assault and pregnancy are foreseeable, why should that defendant not bear responsibility for the direct consequences, including the care and maintenance of the resulting child?[148] This Article contends that when we separate cases resembling the Christine Williams scenario from the medical negligence cases that came to dominate "wrongful life" case law in the 1970s and 80s, it becomes clear that tort law can and should provide redress to child claimants.[149] Before expanding on this argument, however, I address a preliminary point: given that many jurisdictions allow parents to pursue an action for "wrongful birth," why is it important that a child have a *separate* right of action?

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147. As of January 31, 2024, fourteen states ban most abortions and Georgia bans abortion at about six weeks of pregnancy, before many women know they are pregnant. Other states have pursued bans or gestational limits, some of which have been challenged in court. *Tracking the States Where Abortion Is Now Banned*, N.Y. Times, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (last updated Jan. 8, 2024, 9:30 AM).

148. Philip G. Peters, Jr., pursued similar questions in his 1992 article on the possibility of devising a form of supplemental or "backup" child support for the kind of children at the center of "wrongful life" litigation. Although he did not separate out what I have been calling the Christine Williams type of claims, he offered important arguments about the law's role in fairly apportioning support for children whose birth stemmed in part from tortious conduct by someone other than a parent. His proposed solution blended tort law with family law. Philip G. Peters, Jr., *Rethinking Wrongful Life: Bridging the Boundary between Tort and Family Law*, 67 Tul. L. Rev. 397, 399 (1992); *cf.* Seana Valentin Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 Legal Theory 117, 140 (1999) (arguing that mandatory child support laws are in some sense a recognition that imposing life on another is a form of harm and that it is fair to levy a duty of support on those responsible).

149. Some states have legislated in this area, making judicial reconsideration inappropriate. Note, however, that some state statutes prohibiting "wrongful life" are in fact confined to a narrower set of claims: ones that are based on the assertion that, but for the defendant's negligence, the plaintiff child *would have been aborted*. (Statutes in Indiana and Minnesota are good examples.) *See* Ind. Code § 34-12-1-1 (1998); Minn. Stat. § 145.424 (2005).

First, in those jurisdictions that allow "wrongful birth" claims, even successful parent claimants will probably not recover the full costs of child-rearing, either because courts limit damage awards to "extraordinary" child-rearing expenses or because they reduce damages to take account of the assumed benefits of parenthood.[150]

Second, the logic of many "wrongful birth" cases means that in anti-abortion jurisdictions, "wrongful birth" actions may soon be a relic of the past.[151] Recall that *Roe v. Wade* and the broader values it seemed to represent were crucial to some states' initial recognition of "wrongful birth" claims. Judges may view these claims differently if, under post-*Dobbs* state law, a pregnant person has no right to terminate a pregnancy and more limited rights to reproductive agency. In this configuration, an unwanted conception or birth may look less like a "wrong" and more like a personal misfortune, of the sort that many people must endure.

Third, a parent with a viable "wrongful birth" claim might not know that they have been legally wronged, or how to assert a claim in the appropriate and timely manner. Or they might have lost or surrendered their parental rights, leaving them no basis on which to claim child-rearing expenses.[152] These possibilities loom particularly large in the context of institutionalized and incarcerated parents.[153] If we believe that a child has suffered, or will suffer, on account of a defendant's wrongdoing, that child's rights should not depend on what happens with a parent's separate and distinct injury.[154]

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150. Peters, Jr., *supra* note 148, at 416.

151. *See* sources cited *supra* note 21.

152. Peters, Jr., *supra* note 148, at 417–18; *see also* Bonnie Steinbock, *The Logical Case for "Wrongful Life"*, 16 Hastings Ctr. Rep. 15, 19 (Apr. 1986) (describing a wrongful birth case in which the parents' decision to place their child for adoption imperiled their ability to collect damages).

153. Data on children born to institutionalized parents is sparse. But research on non-institutionalized, disabled parents suggests that they are often assumed to be unfit and that child welfare authorities remove children from such parents "with alarming frequency." *See* Nat'l Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children 15, 76 (2012). Research on children born to incarcerated parents suggests a substantial risk of long-term separation. *See* Friedman et al., *supra* note 139, at 6 (noting that prison mother-baby units "are severely limited in the United States," that children of incarcerated mothers "generally are placed either in kinship care . . . or in foster care," and that when kinship care is not an option, an incarcerated mother can quicky lose parental rights); Virginia E. Pendleton, Elizabeth M. Schmitgen, Laurel Davis & Rebecca J. Shlafer, *Caregiving Arrangements and Caregiver Well-being when Infants are Born to Mothers in Prison*, 31 J. Child & Fam. Stud. 1894, 1899 (2022) (finding that "[a]mong all the infants (N = 114) born to women incarcerated at [a large Midwestern women's] prison between May 2013 and December 2018, most (33%) were discharged from the hospital to grandparents, 17% were discharged to county CPS, and 15% were discharged to another family member.").

154. For similar reasons, lawmakers in England and Wales recently amended their Victims' Code to include people conceived through rape. Diane Taylor & Helen Pidd, *People Born of Rape Now Recognised in Victims' Code in England and Wales*, Guardian (Jan. 19, 2023) (explaining that

Fourth, and perhaps most important, if a child has resources set aside for their care and maintenance, a family member (e.g., a grandparent) is more likely to be able to provide adequate and stable care,[155] lowering the risk that the child will be immediately separated from family (e.g., via adoption) or eventually end up in the foster care system.[156] This concern has particular weight for children born to Black and indigenous mothers. Historically (continuing into the present), members of Black and indigenous communities have experienced family separation at disproportionate rates, and the U.S. foster care system has produced a cascade of negative consequences.[157]

C. Doctrinal Challenges and Opportunities

Turning to tort doctrine, there are at least two potential avenues for pursuing a Christine Williams-type claim against an institutional defendant. The first—which guardian ad litem Frank Williams brought on Christine's behalf—is a standard negligence claim (alleging that the defendant's negligent conduct caused an injury to the infant child). This Section asks readers to look at this kind of claim with fresh eyes and to imagine detaching it from the other negligence claims that courts have labeled as "wrongful life." The second avenue—which would only be available in a case where a defendant's employee or agent caused impregnation—is a vicarious liability claim, alleging that the defendant is legally responsible for the employee or agent's actions, even if there was no identifiable negligence on the defendant's part.

For the first type of claim (common negligence), existing "wrongful life" jurisprudence suggest some challenges, with the notion of *injury* presenting the most significant obstacle.[158] The problem stems from tort

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the legal change "will entitle individuals who believe that they were born as a result of rape to make a complaint to the police, in their own right" and to receive the same kind of "information and access support . . . as any other victim of crime").

155. *See* Pendleton et al., *supra* note 153, at 1895 (noting that "caregivers raising children as a result of a parent's incarceration report financial concerns as the most significant difficulty").

156. *See* Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World 273 (2022).

157. *Id.* at 263.

158. The other elements of a standard negligence claim are less problematic. As to duty, a number of courts have recognized a "preconception" duty of care to a child where the defendant had some kind of special relationship with the child's parent(s). *See, e.g.*, Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1255 (Ill. 1977); Walker v. Rinck, 604 N.E.2d 591, 597 (Ind. 1992); Lough *ex rel.* Lough v. Rolla Women's Clinic, Inc., 866 S.W.2d 851, 854 (Mo. 1993) (en banc); Lynch v. Scheininger, 744 A.2d 113, 126–27 (N.J. 2000). Only one U.S. jurisdiction has completely rejected this notion. Dan B. Dobbs et al., The Law of Torts § 368 (2d ed.) ("New York stands virtually alone as a clear authority for the complete rejection of a [preconception] duty of care."). Likewise, I do not see causation as a major issue. In "wrongful life" cases where the alleged injury was a *disabled* life, courts have sometimes flagged the illogic of the notion that a misdiagnosis or similar medical

law's heavy reliance on counterfactuals. When conceptualizing injury and also when thinking through causation, jurists have tended to imagine *what would have happened in the absence of the alleged wrongdoing* and anchored their judgments in that hypothetical world. If, in that counterfactual or hypothetical world, the plaintiff would have been just the same (i.e., non-negligent behavior on the defendant's part would have made no meaningful difference to the plaintiff's situation), this poses a problem for the plaintiff. So, too, if in that hypothetical world, the plaintiff would have been *worse off*—because then it is hard to see how, in the real-world scenario, the defendant's actions caused harm. "Wrongful life" claims have presented a version of the second problem: when we imagine a hypothetical world in which the defendant did no wrong and then ask what the plaintiff's status would be in this hypothetical world, the most obvious conclusion is that the plaintiff would not have been born.[159] This alternative position (non-existence) has seemed either (1) obviously worse than being alive (however disadvantaged), or (2) too tricky for a court to want to comment upon, lest they appear to devalue or disparage the real-world plaintiff before them.

But although tort law frequently resorts to counterfactual thinking, it has not tended to follow this style of thinking to ends that are unjust. Consider, for example, a situation of over-determined harm, where *A*, *B*, and *C* combine efforts to push *D*'s car over a cliff. In hypothetical world without *A*'s wrongdoing, *D*'s car may still have gone over the cliff (because of the combined efforts of *B* and *C*), but tort law does not allow *A* to escape liability for *A*'s real-world wrongdoing. In this scenario, tort law simply treats the counterfactual as non-determinative. Similarly, courts have long recognized that even if a defendant's wrongful conduct ends up *improving* the plaintiff's situation in some regard, or even overall (as in the case of an unwanted but health-enhancing

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error part was the factual cause of the plaintiff child's disabling condition. In the cases I have in mind, the injury occurs at the point of conception and the argument is that conception would not have occurred but for the defendant's negligence. Courts have sometimes raised concerns about the calculability of damages in wrongful life cases, but this concern is hardly unique to such cases and has not prevented damage awards in other difficult contexts. *Cf.* Phillips v. United States, 508 F. Supp. 537, 542 (D.S.C. 1980) ("If a claim is legally cognizable, mere difficulty in the ascertainment of damages should be insufficient to preclude the action.").

159. I use the phrase "most obvious" rather than "only" in order to recognize, and lament, the limits of our imagination vis-à-vis people with disabilities. We *could* imagine a world in which the defendant not only protected Lorene Williams against nonconsensual impregnation, but also provided her with a degree of care and support that might have enabled a planned and wanted pregnancy. Entrenched biases and deep traditions of dehumanization constrain our sense of what we could and should expect from each other.

surgery),[160] the plaintiff may still have a *legal* injury and thus grounds to seek redress.[161]

Courts have also sometimes avoided the injustices of counterfactual thinking by recharacterizing the injury at issue—trading on the fact that although injuries often seem self-evident, they are ultimately social constructions.[162] Consider, for example, what some judges have done in medical malpractice cases involving missed diagnoses, followed by patient death.[163] These are cases in which counterfactual thinking works against the wronged plaintiff—because in a world without the defendant doctor's negligence (i.e., in a world where the defendant made a correct and timely diagnosis), the plaintiff still very well might have died. To make the point starker, imagine that that the plaintiff always had a less-than-even chance of living, and that the effect of the doctor's actions was only to lower those odds. Because it seems both unjust and unwise to allow doctors to evade responsibility in these cases, some courts have chosen to construct the causal counterfactual with an eye not on death but on some other harm. They have noted that although a given patient may still have been fated for death in that hypothetical world without the doctor's negligence (there is no way to know for

160. The canonical example is Mohr v. Williams, 104 N.W. 12, 16 (Minn. 1905); *cf.* David Archard, *Wrongful Life*, 79 PHILOSOPHY 403, 416 (2004) (noting that, from the perspective of moral philosophy, "an action may wrong another" even if that action does not "harm" and "indeed may even benefit" that person). Along similar lines, consider a case in which a motorist in a desolate area picks up a critically injured person along the side of the road and transports the person to the closest hospital, thereby almost certainly saving the person's life. If, in the course of the transport, the motorist recklessly worsens the person's condition (e.g., by driving drunkenly into a tree and causing a debilitating spinal cord injury), tort law would hold the motorist responsible for that worsening—even though the person ultimately receives an overall benefit from the motorist's actions. *See* RESTATEMENT (SECOND) OF TORTS § 324, illus. 1 (AM. L. INST. 1965).

161. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 920 (AM. L. INST. 1979) (noting that, when assessing damages, it is appropriate to consider the benefits to the plaintiff that the defendant's tort has produced, *but only to the extent that this is equitable*); *Id.* § 920 cmt. f (elaborating on the idea of equity by explaining that the tortfeasor should not be allowed to force a benefit on the plaintiff against the plaintiff's will).

162. Michael McCann, David M. Engel & Anne Bloom, *Introduction* to INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS 1, 3, 12 (Anne Bloom, David M. Engel & Michael McCann eds., 2018). Societies decide (1) what conditions to categorize as injurious, (2) how to describe the injury, and (3) whether a societally recognized injury should receive *legal* recognition, as well. Moreover, these decisions are not static. *See* Anne Bloom & Marc Galanter, *Good Injuries*, *in* INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS 185–86 (Anne Bloom, David M. Engel & Michael McCann eds., 2018) (noting that a condition that appears "good" or at least acceptable in one era, such as bound feet or circumcision, might seem injurious in another, and vice versa).

163. *Cf.* Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 327–28 (2004) (citing "loss-of-chance methodology" as an example of tort law's "policy-based trend to create alternative theories of recovery where a strict adherence to common law doctrine would unjustly result in no remedy to innocent victims" and noting that "wrongful life jurisprudence departs from" this trend).

sure), the patient undoubtedly *had a better chance of a good health outcome*. This perspective helps us see that in the alternative (real life) scenario, where the doctor *was* negligent, the patient experienced a meaningful loss: a loss of a better chance.[164] To be sure, "loss of chance" is a less weighty injury than death, but it is an injury that legal decision-makers may recognize and redress, should they choose to.[165]

Tort law's flexibility in this regard—disregarding counterfactual thinking in some cases and reconceptualizing the injury in others—invites reconsideration of the Christine Williams-type of case. If we know that the real-world Christine Williams will suffer because of the defendant's conduct, perhaps it does not matter that the most obvious counterfactual state-of-being is non-existence.[166] Perhaps the goals of tort law—including not only correcting injustice, but also deterring wrongdoing, expressing societal values, spreading loss, and providing civil recourse against wrongdoers—override this apparent incoherence. And if we conceive of the injury not as "life" but as being denied the benefit of "wantedness," or of being born into circumstances that entail an unjust degree of hardship and familial disconnection, perhaps there is no incoherence at all.[167]

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164. *See* Matsuyama v. Birnbaum, 890 N.E.2d 819, 832 (Mass. 2008), *abrogated on other grounds by* Doull v. Foster, 163 N.E.3d 976, 991–92 (Mass. 2021).

165. *Id.*; *see also* Perez v. Las Vegas Med. Ctr., 805 P.2d 589, 590 (Nev. 1991); Smith v. Providence Health & Servs.—Oregon, 393 P.3d 1106, 1113–14 (Or. 2017); Alice Férot, *The Theory of Loss of Chance: Between Reticence and Acceptance*, 8 FIU L. Rev. 591, 610 (2013) (providing a fuller list of jurisdictions that have embraced the "loss of chance" theory).

166. I realize that some readers may not readily concede this point. *See* Shiffrin, *supra* note 148, at 117–18 (noting that "wrongful life" suits have "spurred considerable philosophical interest" and scholars have focused "primarily . . . on issues about the coherence of complaining about one's existence or its essential conditions"). For readers who believe that tort law cannot escape comparing the plaintiff child's actual state to a hypothetical state of non-existence, especially in cases in which the child *could not have existed in any state other than the actual state*, note that some scholars refute the notion that life is always preferable to non-existence. *See, e.g.*, David Benatar, *The Wrong of Wrongful Life*, 37 Am. Phil. Q. 175, 176 (2000) (arguing that if life entails very difficult conditions, non-existence may be preferable to starting such a life).

167. *See* Steinbock, *supra* note 152, at 19 (arguing that one need not "maintain that the child would be better off never having been born in order to claim that he or she has been wronged by birth."); *Id.* (arguing that one can identify "a wrong to the child" in being born under such conditions "that many very basic interests are doomed in advance, preventing the child from having the minimally decent existence to which all citizens are entitled"); Shiffrin, *supra* note 148, at 119 (suggesting "that it is possible that being created can benefit a person in part, or overall, should her life be sufficiently worth living, and that it is also possible that being created can harm a person"); Archard, *supra* note 160, at 416 (arguing that a child "has a right to be given the reasonable prospect of a life, one that is not just barely but is sufficiently worth living"; a child may be wronged when brought into the world under circumstances that a responsible party knows do not meet the threshold). Lest this idea provoke opening-the-floodgates concerns, note that to recognize this "injury" would not mean that any person born under disadvantaged conditions would have a viable cause of action. That would be akin to saying that every broken leg, or every emotional disturbance, amounts to a viable tort claim. As with other injuries, a defendant's liability would

To be sure, this reconceived type of injury might not be apparent from all situations that currently fall under the umbrella of "wrongful life," and I would not defend a broad application.[168] But it is a highly plausible characterization of the Christine Williams situation, involving nonconsensual and potentially traumatic sexual intercourse,[169] unexpected and nonconsensual pregnancy (which likely translates into an inability to muster the economic, social, and personal resources that would accompany an expected pregnancy),[170] and an institutionalized mother who is probably not in a position to provide adequate caretaking.[171]

We come now to a second potential concern: what kind of message will tort law send to child plaintiffs and others like them if it emphasizes their disadvantage and predicts a bleak future for them? Insights from disability studies and from the disability rights movement give these questions considerable weight.[172] But let's be precise about where such troubling messages come from: in my view, it is probably less from the way a "wrongful life" claim describes injury and more from a different facet of the claim—one that is not present in the Christine Williams scenario. In order to prove causation, the plaintiff in the typical "wrongful

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ultimately depend on multiple factors, including whether the defendant had a legal duty to the plaintiff, whether the defendant's actions caused the injury, and so on.

168. For example, I would be uncomfortable applying this framing to a case involving a pregnancy that was initially wanted and that ultimately resulted in a child with Down syndrome, but that the parents would have terminated had they received proper reproductive testing and counseling.

169. *See* ANDREW SOLOMON, FAR FROM THE TREE: PARENTS, CHILDREN, AND THE SEARCH FOR IDENTITY 536 (2012) (exploring the complex feelings that mothers of rape-conceived children have about those children and noting that that these children often do represent a type of injury); Elisa van Ee & Jorin Blokland, *Bad Blood or My Blood: A Qualitative Study into the Dimensions of Interventions for Mothers with Children Born of Sexual Violence*, 16 INT'L J. ENVIRON. RSCH. & PUB. HEALTH, Nov. 2019, at 12 (summarizing the existing literature on the risks and difficulties that accompany parenting a child "born out of the experience of sexual violence").

170. *See infra* notes 208–09.

171. *See* Danielle H. Dallaire, *Children with incarcerated Mothers: Developmental Outcomes, Special Challenges and Recommendations*, 28 J. APPLIED DEVELOPMENTAL PSYCH. 15, 16 (2007) (noting that "[c]hildren with an incarcerated mother are considered one of the most vulnerable and at risk populations"); Wendy Sawyer & Wanda Bertram, *Prisons and Jails Will Separate Millions of Mothers from Their Children in 2022*, PRISON POL'Y INITIATIVE (May 4, 2022), https://www.prisonpolicy.org/blog/2022/05/04/mothers_day/ [https://perma.cc/9R33-6F68] (linking to various reports and academic studies documenting the "known harms" to children of parental incarceration).

172. *See, e.g.*, Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 194–95 (2005); *see generally* Darpana M. Sheth, *Better Off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans with Disabilities Act*, 73 TENN. L. REV. 641 (2006); *see generally* Brown, *supra* note 21; *see also* Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 783–84 (2007) (cautioning that some types of damage awards send negative messages about disability); Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709 (2011) (providing a more general critique of tort litigation's "distorted perspective of disability").

life" case (one involving medical negligence) asserts that, "but for" the defendant's negligence, the plaintiff's parents would have used their reproductive agency to decide *not* to bring the plaintiff into the world; some other child, maybe, but not *this* child.[173] In the Christine Williams type of case, where there was no consent to even the barest possibility of impregnation (because there was no meaningful consent to intercourse), the causation element will be satisfied without a parent ever having to say, "I didn't want *you*, specifically."

Moreover, the claim's ultimate message is, in my view, more affirming than it is degrading. If tort law were to provide someone like Christine Williams with a cause of action against an entity like Manhattan State Hospital (and, again, we need not call this claim "wrongful life"), the message is that this child deserves a fair chance at a good life; we (society) value this child and will use the law's power to satisfy the child's basic needs.[174] This is not so different from the message of a paternity suit, a type of action that has long been a part of American law.

The analogy to a paternity suit is helpful in another regard: it helps explain why vicarious liability claims may be worth pursuing. In the United States today, it is widely understood that a person who impregnates another person may bear some financial responsibility for the resulting child. Assume now that the paternal actor is an employee or agent of a defendant jail, nursing home, group home, etc.; that the person whom the paternal actor impregnated was under the defendant's custodial care; and that impregnation occurred while the paternal actor was "on the job." If we follow the logic of respondeat superior—by which a defendant employer assumes responsibility for an employee's tortious actions—it would hardly be absurd to hold the employer liable for the costs of raising the resulting child.

Admittedly, this vicarious liability route comes with some obstacles. Most obviously, the theory of respondeat superior does not imply institutional responsibility for *every* tort that an employee or agent commits; the doctrine tends to limit liability to torts committed within the "scope of employment." And as Catherine Sharkey summarized in 2018, "the majority position" in U.S. jurisdictions is that intentional torts (e.g., battery, assault) "are only within the scope of employment when committed

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173. *See* Sheth, *supra* note 172, at 660 ("To establish causation for a wrongful birth or wrongful life claim, a mother must testify that she would not have chosen to carry the child to term if she had been informed of the defect in a timely manner."). Wrongful birth/life cases involving failed sterilizations and negligent birth control administration are slightly different, in that the parents demonstrably did not want *any* child. In this scenario, the message regarding the child plaintiff would be less pointed.

174. *But see* Brown, *supra* note 21 (noting that although such a suit could result in material support, the child at the center of the litigation might nonetheless "feel devalued" by the nature of the claim).

to serve the employer's interest."[175] In practice, this has posed a significant impediment to attempts to hold employers vicariously liable for sexual assaults perpetrated by their employees.[176]

Respondeat superior case law does, however, include room for argument. First, some courts that focus on an employee's "motive to serve" have been willing to find vicarious liability in cases of mixed motives—such as where a security guard's invasive, sexualized search of a twelve-year-old girl was performed in part to uncover stolen goods.[177] Second, some courts apply an interpretation of "scope of employment" that is inherently less restrictive than the "motive to serve" test: they ask whether a particular risk is "characteristic of [the] activities" of the enterprise; if so, an employee whose tortious activity falls within that risk is acting within the "scope of employment."[178] Applying this framework, the Supreme Courts of Oregon, Minnesota, Alaska, and California have found employers vicariously liable for sexual abuses committed by employees.[179]

Third, and perhaps most promisingly, a number of courts have applied "aided-by-agency" theory to find employer liability in cases where an employee was not acting within the "scope of employment" but was able to cause harm *because of* the employee's position as the employer's agent. The New Mexico Supreme Court, for example, used this theory to find a private prison vicariously liable for the sexual assaults that a prison guard committed against a group of female inmates.[180] Indeed,

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175. Catherine M. Sharkey, *Institutional Liability for Employees' Intentional Torts: Vicarious Liability as a Quasi-Substitute for Punitive Damages*, 53 VAL. U. L. REV. 1, 14 (2018).

176. Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 135 (2013) (noting courts' "decided tendency to rule against vicarious liability in the sexual misconduct context"). In some jurisdictions, this tendency is more like a rule. *See, e.g.*, Johnson v. Cook Cnty., 526 F. App'x. 692, 697 (7th Cir. 2013) (declining to rule inconsistently with Illinois courts' explicit declaration that "sexual assault *by its very nature* precludes a conclusion that it occurred within the employee's scope of employment under the doctrine of *respondeat superior*.") (citation omitted, emphasis in original).

177. *See* Chamallas, *supra* note 176, at 143 (citing Brown v. Argenbright Sec., Inc., 782 A.2d 752, 758 (D.C. App. 2001)).

178. *Id.* at 146–47.

179. *See Id.* at 144–45 (citing Fearing v. Bucher, 977 P.2d 1163, 1165, 1168 (Or. 1999); Fahrendorff *ex rel.* Fahrendorff v. N. Homes, Inc., 597 N.W. 2d 905, 912–13 (Minn. 1999); Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 348 (Alaska 1990); Mary M. v. City of Los Angeles, 814 P.2d 1341, 1342 (Cal. 1991)).

180. Spurlock v. Townes, 368 P.3d 1213, 1218–19 (N.M. 2016) ("Because Townes was aided in the commission of his intentional torts by the agency afforded to him by his employers, [the institutional defendants] are vicariously liable . . . for all compensatory damages Plaintiffs suffered from these assaults."); *see also* John C.P. Goldberg & Benjamin C. Zipursky, Sherman v. Department of Public Safety*: Institutional Responsibility for Sexual Assault*, 16 J. TORT L. (forthcoming 2024) (on file with author) (finding that of the eight state high courts that have directly considered the aided-by-agency theory, five endorsed it, two rejected it, and one was equivocal; of the two rejections, only one was in the sexual assault context).

the aided-by-agency theory is perhaps uniquely suited to the kinds of cases this Article contemplates: "'cases where an employee has by reason of his employment substantial power or authority to control important elements of a vulnerable tort victim's life or livelihood.'"[181]

Last, it is worth recognizing, as John Goldberg and Benjamin Zipursky have recently done, that when it comes to a defendant's vicarious liability for the acts of an employee or agent, respondeat superior does not represent the entire field. American courts have long recognized that some duties of care are "non-delegable"—meaning that the holder of the duty is ultimately responsible for the breach of that duty, however that breach happened to come about (i.e., whether or not "aided by agency" or "within the scope of employment").[182] The logic of the non-delegable duty cases could easily extend to the scenarios at issue here, involving institutional defendants that have taken charge of vulnerable people, exposed them to dangers, and denied them the ability to protect themselves.[183]

Importantly, Goldberg and Zipursky are not alone in their interest in this topic; they appear to be part of a scholarly movement urging greater recognition of vicarious liability for employees' intentional torts, including sexual assault. Recent scholarship in this vein draws on a range of disciplinary and methodological approaches, from economics,[184] to critical theory,[185] to close study of the common law.[186] This scholarship also finds support in the case law of other common law jurisdictions, such as Canada, England and Wales, and Australia, all of which have mechanisms for holding institutional defendants vicariously liable for sexual assault.[187] The more this avenue expands in the United States, the more plausible it will be to hold an institutional defendant responsible for the costs of raising an institutionally conceived child.

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181. *Spurlock*, 368 P.3d at 1217 (quoting Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183, 1199 (Alaska 2009)).

182. Goldberg & Zipursky, *supra* note 180.

183. *See id.*

184. *See* Sharkey, *supra* note 175, at 42–45 (advancing efficiency-based arguments).

185. *See* Chamallas, *supra* note 176, at 140, 151, 156–59 (drawing on insights from critical theory and advancing arguments based on fairness and justice).

186. Goldberg & Zipursky, *supra* note 180 (extracting theoretical insights from doctrinal analysis).

187. Jason W. Neyers & Jerred Kiss, *Vicarious Liability: The Revolution in Canada*, *in* VICARIOUS LIABILITY IN THE COMMON LAW WORLD (Paula Giliker ed., 2022); Paula Giliker, *Vicarious Liability in England and Wales*, *in* VICARIOUS LIABILITY IN THE COMMON LAW WORLD (Paula Giliker ed., 2022); Christine Beuermann, *Vicarious Liability in Australia*, *in* VICARIOUS LIABILITY IN THE COMMON LAW WORLD (Paula Giliker ed., 2022).

D. Settlements as a Proxy for Common-Sense Justice

In evaluating how tort law might better respond to a Christine Williams-type of claim, a final consideration is what the legal system has already allowed, even amidst apparent hostility to "wrongful life." Historically, when courts have contemplated shifts in doctrine, judges have treated this on-the-ground perspective as valid and helpful.[188] Some pertinent examples:

- In Virginia, two "female adults with special needs" who were employed at a "sheltered workshop" alleged that they were raped and impregnated at work by the same employee. They accused their employer of negligence. In 2020, they secured a settlement of $4.5 million, which included damages for the costs that their families would incur in raising the two children that resulted.[189] Virginia is a jurisdiction that does recognize suits for wrongful birth, but has not allowed parents in such suits to recover damages for normal child-rearing expenses.[190] It has not recognized suits for "wrongful life."
- In Montana in 2001, the adoptive parents of a disabled child secured what was then apparently "the largest settlement ever paid by the state"—$2.7 million—when they brought a lawsuit based on the state's allegedly negligent failure to prevent the rape of the child's mother, a patient in a state mental hospital, and sought compensation for the extraordinary costs of raising the child. (Years prior, the state had settled a separate suit involving the injuries to the mother, at a point at which she had already placed her child for adoption.) The judge in the adoptive parents' case refused to recognize that the child himself had a claim (this apparently sounded too much like "wrongful life"), and yet for purposes of deciding which statute of limitations to apply, he treated the claim as one that was "by or on behalf of a minor."[191]

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188. *See, e.g.*, Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (noting that if juries in products cases are, in fact, applying negligence doctrine such the result is strict liability, there is no reason that the law ought not be "open[]" about its preference for strict liability in this context); Li v. Yellow Cab Co., 532 P.2d 1226, 1243 (Cal. 1975) (arguing in favor of a shift to comparative negligence by noting that in jurisdictions that adhered to the all-or-nothing rule of contributory negligence, it was well known that jurors would apply comparative negligence in practice).

189. Doe 1 & Doe 2 v. Roe, Inc., 2020 Dolan Media Jury Verdicts LEXIS 297 (summarizing the allegations and noting that "[t]he settlement will allow both of the children to be raised within their families as opposed to a state agency.").

190. Miller v. Johnson, 343 S.E.2d 301, 307 (Va. 1986).

191. Carolynn Farley, *Judge: Couple Can Sue State for Care of Son*, Missoulian (Aug. 24, 2001), https://missoulian.com/judge-couple-can-sue-state-for-care-of-son/article_a23bc49e-d91e-

- In Arizona, in the previously mentioned nursing home rape case, the grandparents of the resulting child asserted claims against multiple defendants, including the nursing home, multiple doctors, and the state of Arizona (which contracted with the nursing home to care for patients covered by the state's Medicaid program). They brought claims on their daughter's behalf and on their own behalf.[192] They did not, as far as I know, file suit on their grandchild's behalf, but they made it known that they were assuming responsibility for him. As of June 2021, at least $22.5 million in settlement money is owed to the family.[193] Given that the fate of the child came up regularly in news coverage, it is difficult to imagine that his care costs were not a factor in these settlement negotiations, even if there was technically no legal basis for recovering them. By statute, Arizona bars both "wrongful birth" and "wrongful life" claims, except in a "civil action for damages for an intentional or grossly negligent act or omission."[194]

To be sure, this is hardly an overwhelming list, and the items on it may well be aberrations. But this list came together despite how difficult it is to learn *anything* about settlements (often settlements are kept private). Moreover, even a small number of examples supports this Article's overarching argument: it is not unthinkable—and, indeed, may be just—for an institutional defendant in a Christine Williams scenario to financially support the child, in a way that is separate from whatever may be owed to the child's mother.

IV. Troubling Incentives and Other Concerns

Although this Article has argued in favor of allowing institutional liability in Christine Williams-type cases, any effort to move in this direction must also acknowledge the potential dangers. This Part identifies

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5b94-965a-8092668c71e0.html; *State Pays Adoptive Parents of Autistic Child $ 2.7 Million*, 2002 Dolan Media Jury Verdicts LEXIS 3629.

192. Ashley Collman, *The Woman with Disabilities Who Gave Birth after Being Raped at an Arizona Nursing Facility May Have Been Pregnant Before, New Documents Reveal*, Insider (May 23, 2019, 1:04 PM), https://www.insider.com/hacienda-healthcare-patient-may-have-been-pregnant-before-2019-5 [https://perma.cc/7LLV-KA2U] (documenting the multiple claims that were part of the family's "notice of claim" to the state of Arizona).

193. *Judge OKs $15M Settlement Over Rape of Incapacitated Woman*, NBC News (June 16, 2021, 11:46 AM), https://www.nbcnews.com/news/us-news/judge-oks-15m-settlement-over-rape-incapacitated-woman-n1271031 [https://perma.cc/WCZ3-QQBL] (reporting a $15 million settlement agreement between the family and the estate of one of the nursing home's physicians and noting that the family had already entered into settlement agreements with the state of Arizona, for $7.5 million, as well as with the nursing home and with another doctor for undisclosed amounts).

194. Ariz. Rev. Stat. Ann. § 12–719 (2012).

several concerns and offers preliminary thoughts about how to evaluate them.

One danger is to the reproductive freedom of institutionalized people. Rather than take greater precautions to prevent sexual assault, institutional decisionmakers might instead focus on preventing *pregnancies*, through mandatory birth control or forced sterilization. These are not idle possibilities. According to the National Women's Law Center, thirty-one states and the District of Columbia have laws that allow forced sterilization.[195] And although it is difficult to estimate how frequently forced sterilization occurs today, the practice has a strong foundation in U.S. history.[196] There are, however, countervailing pressures, including procedural protections built into state sterilization laws,[197] federal laws that prohibit the use of federal funds for involuntary sterilization,[198] formal rejections by some state leaders of their states' eugenic pasts (including several state compensation funds for victims of involuntary sterilization),[199] public outrage upon discovering new incidents of sterilization abuse,[200] and the lingering shadow of the Supreme Court's holding in *Skinner v. Oklahoma*.[201] Given these countervailing pressures, I would hesitate to allow fear of reproductive abuse to prevent tort law from seeking to compensate victims of that abuse (and in doing

195. Nat'l Women's L. Ctr., Forced Sterilization of Disabled People in the United States (2021), https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC_SterilizationReport_2021.pdf [https://perma.cc/6CCK-T9MC]; *see also* Shilpa Jindia, *Belly of the Beast: California's Dark History of Forced Sterilizations*, The Guardian (June 30, 2020), https://www.theguardian.com/us-news/2020/jun/30/california-prisons-forced-sterilizations-belly-beast [https://perma.cc/YZY7-V9PL] (referencing the hundreds of involuntary sterilizations that reportedly occurred in the California prison system between 1997 and 2013); Corey G. Johnson, *Female Inmates Sterilized in California Prisons Without Approval*, Reveal (July 7, 2013), https://revealnews.org/article/female-inmates-sterilized-in-california-prisons-without-approval/ [https://perma.cc/SX7W-6KXU].

196. *See* Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 Wm. & Mary L. Rev. 1599, 1630–31 (2022) (documenting incidents of forced and coerced sterilization throughout the twentieth century).

197. *See* Nat'l Women's L. Ctr., *supra* note 195 (providing links to the text of state laws that allow sterilization).

198. Sonya Borrero, Nikki Zite, Joseph E. Potter & James Trussell, *Medicaid Policy on Sterilization—Anachronistic or Still Relevant?*, 370 New Eng. J. Med. 102 (2014).

199. Amanda Morris, *'You Just Feel Like Nothing': California to Pay Sterilization Victims*, N.Y. Times (Jul. 11, 2021), https://www.nytimes.com/2021/07/11/us/california-reparations-eugenics.html.

200. *See, e.g.*, Catherine E. Shoichet, *In a Horrifying History of Forced Sterilizations, Some Fear the US is Beginning a New Chapter*, CNN (Sept. 16, 2020), https://www.cnn.com/2020/09/16/us/ice-hysterectomy-forced-sterilization-history/index.html [https://perma.cc/KE68-B7EW]; Nicole Narea, *The Outcry Over ICE and Hysterectomies, Explained*, Vox (Sept. 18, 2020, 3:36 PM), https://www.vox.com/policy-and-politics/2020/9/15/21437805/whistleblower-hysterectomies-nurse-irwin-ice [https://perma.cc/HC66-GK6D].

201. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (explaining that to be subjected to state-ordered sterilization is to be "forever deprived of a basic liberty"). *But see* Buck v. Bell, 274 U.S. 200, 207–08 (1927) (upholding against constitutional challenge a state law allowing for eugenic sterilization).

potentially incentivizing greater care). But the issue deserves careful consideration—more than I can provide in this short Article.

A related concern is for the sexual freedom of people in institutional settings: with greater incentives to prevent sexual assault, institutional decision-makers might go too far and prevent all expressions of sexual desire among institutionalized populations. This would not only intrude on liberty but also further entrench what Michael Gill calls "sexual ableism."[202] Historically and continuing into the present, parents, caregivers, medical professionals, and legal authorities have behaved in exactly this way—prioritizing the real or imagined harms of sexual activity over the harms that can flow from sexual isolation and denial of bodily autonomy.[203] Current law may include enough safeguards to lessen this concern,[204] but it is nonetheless a valid and important consideration, deserving of further exploration.

A final concern relates to the controversial notion of "fetal personhood." Any kind of "wrongful life" claim implies that the defendant owed a duty of care to a fetus, which might further imply (at least, to some commentators) that a fetus is a legal person with a "right" to exist.[205] In light of anti-abortion activists' intense efforts to elevate the legal status of the "unborn,"[206] this opening is worrisome—for historically, such efforts have led to the harmful de-prioritization of the rights and wellbeing of pregnant people.[207] That said, a finding of liability in a Christine Williams scenario largely skirts this potential problem. These cases are not really about the duty owed in the weeks between conception and birth, or whether the fetus has a "right to life." They are about the quality of life that a child is owed once they enter the world.[208] The latter is a topic that probably deserves more, not less, attention.[209]

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202. GILL, *supra* note 6, at 3.

203. *See id.*; Chin, *supra* note 6, at 382; Harris, *supra* note 6, at 488–90; Powell, *supra* note 6, at 1856; Perlin & Lynch, *supra* note 6, at 259–62.

204. *See* Chin, *supra* note 6, at 382 (arguing that the integration mandate of the Americans with Disabilities Act encompasses sexual freedom); *but see* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (noting that, for purposes of the Constitution's equal protection guarantees, the differential treatment of people with disabilities is subject to only rational basis review).

205. *See generally* Bruce R. Parker, Thomasina E. Poirot & Scott C. Armstrong, *What's Unconstitutional About Wrongful Life Claims? Ask Jane Roe . . .* , 87 DEF. COUNS. J. 1, 17 (2020).

206. *See* JENNIFER L. HOLLAND, TINY YOU: A WESTERN HISTORY OF THE ANTI-ABORTION MOVEMENT, 6 (2020).

207. *See* Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781, 841 (2014).

208. *Cf.* Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1693 (2022) (drawing a clear distinction between "constitutional personhood" and other legal concepts or mechanisms that might recognize the value of fetal life).

209. *Cf.* Dana Goldstein, *In Post-*Roe *World, These Conservatives Embrace a New Kind of Welfare*, N.Y. TIMES (Feb. 10, 2023), https://www.nytimes.com/2023/02/10/us/conservatives-child-care-benefits-roe-wade.html (documenting a recognition by some conservative thinkers that greater

Conclusion

Children whose births were unwanted may face a particular set of hardships, especially if the circumstances that led to their conception were also unwanted. Often these hardships spring from inadequate or uncertain material resources—not only in the short term but also in the longer term, because of the ways that an un-anticipated child can constrain a parent's ability to accumulate wealth, pursue education, and gain access to higher-paying jobs.[210] To the extent a child's family experiences financial distress, a cascade of other difficulties are likely to follow, including housing insecurity and greater exposure to health risks. Children whose births were unwanted may also live under the shadow of their parents' trauma and attendant mental health challenges.[211] They may experience alienation of affection, or even physical separation, should a parent feel compelled (or be ordered) to absent themselves from their child's life. The consequences of such separation could be devastating, as Dorothy Roberts and others have documented.[212]

One way to think of these hardships is as costs—costs which tend to fall heavily on children themselves. This Article has asked whether we must always leave these costs where they land, paying particular attention to cases where the child's mother did not meaningful consent to sexual intercourse and where conception would not have occurred but for the failures of the mother's custodial caretaker. In this scenario, some cost-shifting seems entirely appropriate, and tort law has the theoretical and doctrinal resources to do so.

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restrictions on abortion necessitate a more robust system of public social support, but also noting the mismatch between this position and the welfare-state skepticism that has been a hallmark of conservative politics).

210. Advancing New Standards in Reproductive Health, U.C. San Francisco, The Harms of Denying a Woman a Wanted Abortion: Findings from the Turnaway Study (2021), https://www.ansirh.org/sites/default/files/publications/files/the_harms_of_denying_a_woman_a_wanted_abortion_4-16-2020.pdf [https://perma.cc/X5L5-GRCS]; Megan L. Kavanaugh, Kathryn Kost, Lori Frohwirth, Isaac Maddow-Zimet & Vivian Gor, *Parents' experience of unintended childbearing: A qualitative study of factors that mitigate or exacerbate effects*, 174 Soc. Sci. & Med. 133 (2017); Sarah Miller, Laura R. Wherry & Diana Greene Foster, *The Economic Consequences of Being Denied an Abortion* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26662, 2022), http://www.nber.org/papers/w26662 [https://perma.cc/74RA-WP2S].

211. *See* Solomon, *supra* note 169; Jenny A. Higgins & Pamela Herd, *Abortion Restrictions Purporting To Protect Women Ignore the Heavy Toll of Unwanted Pregnancy*, Health Affairs (June 9, 2016), https://www.healthaffairs.org/content/forefront/abortion-restrictions-purporting-protect-women-ignore-heavy-toll-unwanted-pregnancy; Zara Abrams, *The Facts About Abortion and Mental Health*, 53 Am. Pysch. Ass'n 40 (2022) (synthesizing the results of scientific studies on the mental health effects of unwanted pregnancy).

212. Roberts, *supra* note 156, at 35; Daniel L. Hatcher, The Poverty Industry: The Exploitation of America's Most Vulnerable Citizens 4 (2016) (detailing the myriad ways in which the foster care system treats children as resources to be mined for revenue).

Whether tort law is the *best* vehicle is not yet clear—a legislative or regulatory solution might be better—but at a minimum, tort law provides a much-need space for discussion. It is an area of law that, at its core, is about the kind of social world we want to inhabit, given the myriad ways can injure each other and also all the ways we might support human flourishing. By de-naming one tranche of "wrongful life," I hope to enrich future conversations about what conduct we should deem wrongful—and what quality of life we should claim.