

# I Paid for a *White* Baby: How Assisted Reproductive Technologies Reproduce White Supremacy

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“The white genetic tie—if free from any trace of blackness—is an extremely valuable attribute entitling a child to a privileged status.”

—Dorothy Roberts, *Killing the Black Body: Race, Production, and the Meaning of Liberty*<sup>1</sup>

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## INTRODUCTION

In 2012, Jennifer Cramblett and Amanda Zinkon brought home their healthy baby girl Payton. However, Payton was not the baby the couple paid for—Payton was not white. The lesbian couple employed a sperm bank to fulfill their desire

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1. DOROTHY ROBERTS, *KILLING THE BLACK BODY* 269 (2014).

to have genetically related offspring. The sperm bank mistakenly inseminated Cramblett with sperm from *black* donor #330 instead of their chosen *white* donor #380.<sup>2</sup> Instead of the white baby that the couple carefully selected, the couple received “a beautiful, obviously mixed-race, baby girl.”<sup>3</sup> So they sued.

To be sure, Cramblett had a legitimate basis for a negligence claim as well as a breach of contract claim: The sperm bank failed to inseminate her with sperm from her selected donor. A medical service provider should be held accountable for avoidable human errors and patients should be able to recover when they are the victims of such errors. The Midwest Sperm Bank kept handwritten, not electronic, records; smudged handwriting accounted for 380 looking like 330.<sup>4</sup> Beyond alleging negligence or breach of contract, however, Cramblett alleged wrongful birth.<sup>5</sup> The application of the tort of wrongful birth to the facts of the *Cramblett* case is novel because wrongful birth claims are generally limited to cases in which children are born with chronic diseases or severe disabilities.<sup>6</sup> By suing for wrongful birth, Cramblett alleges that she was legally harmed because her child was born black. For Cramblett, it was not only the sperm bank’s mix-up that constituted the harm, but also that the mix-up had racial implications.<sup>7</sup>

Looking beyond the suit’s moral “ick” factor, *Cramblett* illuminates a larger truth underlying the American assisted reproductive technology market. Assisted reproductive technologies (“ARTs”) promise “infertile parents [the ability] to reproduce biologically in ways that create biogenetic ties while seemingly ensuring racial purity.”<sup>8</sup> The Midwest Sperm Bank provides prospective parents with donor profiles organized by race for selection because the sperm bank is responding to its market; Cramblett and Zinkon limited their pool to and selected from the white donors because the couple wanted a white baby. This Note argues that Cramblett’s stated desire to have a child with similar genetic traits and the legal action following the birth of her mixed-race child speaks to a greater truth about ARTs: the longstanding American obsession with preserving genetic ties between white parents and white children promotes, at least partly, the widespread use of ARTs in the United States.

The racial critiques of assisted reproduction are manifold.<sup>9</sup> However, this Note focuses exclusively on cases in which parents claim their racially mixed child as a legal harm. Importantly, this project does not condemn the individuals or couples using ARTs or the private decisions to create racially-matched children. Rather, this Note

2. Complaint at 16, *Cramblett v. Midwest Sperm Bank, LLC*, No. 2014-L-010159 (Ill. Cir. Ct. Sept. 29, 2014), 2014 WL 4853400 [hereinafter *Complaint*].

3. *Id.* at 22.

4. *Id.* at 21.

5. See generally *Complaint*, *supra* note 2.

6. See generally Elizabeth Weil, *A Wrongful Birth?*, N.Y. TIMES (Mar. 12, 2006), <https://www.nytimes.com/2006/03/12/magazine/a-wrongful-birth.html> [<https://perma.cc/EB48-CSKR>].

7. See also R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071, 2074 (2016); see generally, ROBERTS, *supra* note 1.

8. Seline Szkupinski Quiroga, *Blood Is Thicker than Water: Policing Donor Insemination and the Reproduction of Whiteness*, 22 HYPATIA 143, 148 (2007).

9. See, e.g., Aziza Ahmed, *Race and Assisted Reproduction: Implications for Population Health*, 86 FORDHAM L. REV. 2811 (2018).

critiques the ways in which the ARTs market very literally reproduces white supremacy. Part I will provide an overview of assisted reproductive technologies in America. Part II will present three instances of sperm donation mix-ups. Part III will examine the role of race and genetic inheritance through the lens of racial sperm donation mix-ups. The Conclusion leaves open the subversive potential of racially-motivated wrongful birth suits.

## I. ASSISTED REPRODUCTION IN AMERICA

### A. *Assisted Reproductive Technologies in 21<sup>st</sup> Century America*

Today, assisted reproductive technologies encompass almost all infertility services, including artificial insemination, egg donation, egg and embryo freezing, surrogacy, in-vitro fertilization (IVF), and pre-implantation genetic diagnosis.<sup>10</sup> As of 2015, there had been more than one million babies born in the United States using ARTs;<sup>11</sup> 76,930 ARTs babies were born in 2016 alone.<sup>12</sup> Approximately 1.7 percent of babies born annually in the United States are conceived through assisted reproduction.<sup>13</sup>

In the United States today, individuals and couples use assisted reproduction to address both medical and social infertility.<sup>14</sup> A 2013 National Survey of Family Growth report by the Centers for Disease Control and Prevention (“CDC”) found that married black women are nearly twice as likely to be medically infertile than married white women.<sup>15</sup> However, the same report found that white women are most likely to seek medical help to get pregnant: 15 percent of white women have sought medical help for infertility compared to 7.6 percent of Hispanic women and 8 percent of black women.<sup>16</sup> Explanations of this racial disparity in those who seek

10. *Types of Assisted Reproductive Treatment*, VICTORIAN ASSISTED REPRODUCTIVE TREATMENT AUTHORITY, <https://www.varta.org.au/information-support/assisted-reproductive-treatment/types-assisted-reproductive-treatment> [<https://perma.cc/TH8E-YKUA>].

11. *IVF by the Numbers*, PENN MEDICINE FERTILITY BLOG (Mar. 14, 2018), <https://www.pennmedicine.org/updates/blogs/fertility-blog/2018/march/ivf-by-the-numbers> [<https://perma.cc/U5EL-UGQC>].

12. *ART Success Rates*, CDC (Feb. 22, 2019), <https://www.cdc.gov/art/artdata/index.html> [<https://perma.cc/39E9-AREK>].

13. *Id.*

14. Some individuals and couples use surrogacy unrelated to infertility. Medical infertility is defined as the inability to conceive after one year of unprotected sex; men and woman can be medically infertile. *Infertility FAQs*, CDC (Jan. 16, 2019), <https://www.cdc.gov/reproductivehealth/infertility/index.htm> [<https://perma.cc/ZY9S-RUF4>]; Social infertility is a relatively new concept that defines infertility as the inability to conceive with one’s chosen partner—as is the case for same-sex couples. Connie Shapiro, *No Heterosexual Partner? It’s Called “Social Factor Infertility,”* PSYCHOL. TODAY (Mar. 4, 2010), <https://www.psychologytoday.com/blog/when-youre-not-expecting/201003/no-heterosexual-partner-its-called-social-factor-infertility> [<https://perma.cc/3FW7-FNLB>].

15. See generally Anjani Chandra, Casey E. Copen & Elizabeth Hervey Stephen, *Infertility and Impaired Fecundity in the United States, 1982-2010: Data from the National Survey of Family Growth*, 67 NAT’L HEALTH STATISTIC REP. 1 (Aug. 4, 2013), <https://www.cdc.gov/nchs/data/nhsr/nhsr067.pdf> [<https://perma.cc/UN29-K9EA>].

16. *Id.*

treatment differ—theories include a history of black mistrust of medical professionals and economic barriers to access.<sup>17</sup>

There is big business in assisted reproduction—which is unsurprising given the success and popularity of these technologies. Estimates value the American Fertility Clinic and Infertility Services Market at \$3.5 billion as of 2012.<sup>18</sup> The financial burden on individual patients varies widely because “the 422 infertility clinics in the United States operate without any regulation of cost, access, or scope and quality of treatments.”<sup>19</sup> On average, one IVF cycle costs \$12,400.<sup>20</sup> Overwhelmingly, patients pay out-of-pocket for assisted reproduction because most U.S. insurance plans do not cover infertility treatment.<sup>21</sup>

### B. Racial Mix-Ups: What’s the Harm?

Assisted reproductive technologies appeal to the desires of white, mostly affluent, prospective parents who desire having white babies. One side effect of appealing to such interests is that longstanding social beliefs about race, heritability, and family formation are reproduced. Specifically, ARTs in America reinforce the idea of the heritability of race, emphasize the importance of monoracial families, and promote the significance of genetic kinship.

No data exists on how often doctors and clinics accidentally use the wrong embryo, egg, or sperm in an assisted reproduction procedure.<sup>22</sup> Even without that data, we know that mistakes do happen and we can confidently surmise that some parents may be raising the “wrong” kids unknowingly.<sup>23</sup> *Racial* mistakes in assisted reproduction, however, are well documented. The clinic’s error is in plain sight when the implanted genetic material is a different race than intended. These cases of racial mix-ups during donor insemination procedures indicate that the popularity of the American ARTs market is explained, at least in part, by the desire of white parents to have white children.

17. See generally Taryn Hillin, *Why Black Women Struggle with Infertility in Silence*, SPLINTER (June 10, 2015), <https://splinternews.com/why-black-women-struggle-with-infertility-in-silence-1793848307> [<https://perma.cc/S2MJ-EAWZ>]; Cassandra Jackson, *I Thought that Infertility Was a White Woman’s Disease*, HUFFPOST, (Apr. 28, 2016), [https://www.huffingtonpost.com/cassandra-jackson/i-thought-that-infertility-was-a-white-womans-disease\\_b\\_9795284.html](https://www.huffingtonpost.com/cassandra-jackson/i-thought-that-infertility-was-a-white-womans-disease_b_9795284.html) [<https://perma.cc/99BS-KF53>]; Tanzina Vega, *Infertility, Endured Through a Prism of Race*, N.Y. TIMES (Apr. 25, 2014), [https://www.nytimes.com/2014/04/26/us/infertility-endured-through-a-prism-of-race.html?\\_r=0](https://www.nytimes.com/2014/04/26/us/infertility-endured-through-a-prism-of-race.html?_r=0) [<https://perma.cc/F57S-9ZBE>].

18. See Press Release, Market Data Enterprises, U.S. Fertility Clinics & Infertility Services Market Worth \$3.5 Billion. Recession Is Not a Factor (Nov. 5, 2013), <https://www.marketdataenterprises.com/wp-content/uploads/2014/01/Fertility%20Clinics%20PR%202013.pdf> [<https://perma.cc/H5ZW-V5V5>].

19. Adrienne Asch & Rebecca Marmor, *Assisted Reproduction*, HASTINGS CTR., <http://www.thehastingscenter.org/briefingbook/assisted-reproduction/> [<https://perma.cc/XJG4-NDEN>].

20. *Id.*

21. See *Health Insurance*, RESOLVE, <http://resolve.org/what-are-my-options/insurance-coverage/health-insurance-101/> [<https://perma.cc/CN3Z-SMDK>].

22. See generally *Disclosure of Medical Errors Involving Gametes and Embryos: An Ethics Committee Opinion*, 106 FERTILITY & STERILITY 1 (2016), [http://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/disclosure\\_of\\_medical\\_errros\\_involving\\_gametes\\_and\\_embryos\\_an\\_ethics\\_committee\\_opinion.pdf](http://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/disclosure_of_medical_errros_involving_gametes_and_embryos_an_ethics_committee_opinion.pdf) [<https://perma.cc/UNF3-SC7Z>].

23. See *id.*

*C. Brief History of Black/White Racialization in America*

The social and legal supremacy of whiteness over blackness in America traces back to the seventeenth century. European settlers and colonists created racial hierarchies as a mechanism for legitimizing the institution of slavery,<sup>24</sup> thereby transforming the social hierarchy. At first, the relevant social and legal delineations between people in the colonies were “free” and “un-free” and “Christian” and “Non-Christian.” But over time, the relevant delineation became “white” and “non-white.”<sup>25</sup> Throughout the 1700s, colonies memorialized racial distinctions in “Slave Codes.”<sup>26</sup> These slave codes codified racial identities as well as the racial hierarchy.<sup>27</sup> In 1705, Virginia’s General Assembly passed *An Act Concerning Servants and Slaves*, which codified that “[s]laves are the Negroes” whose servitude is “for Life” while non-Negro servants only carried out servitude for a few years.<sup>28</sup> A 1727 amendment to the Virginia Slave Code defined the legal status of slaves as that of chattel, to be passed by “bargain and sale, gift and will.”<sup>29</sup> The Slave Code of Virginia and other colonies effectively wrote racial slavery into law. No longer did religion or class determine standing—the codes mandated that it was whiteness that “defined the legal status of person as slave or free.”<sup>30</sup>

Once defined, whiteness “was jealously guarded as a valued possession” because it conferred legal and economic benefits to those who possessed it.<sup>31</sup> New legal structures developed to maintain the racial divide and cement the racial hierarchy. These laws aimed to further define race and control intimacy because racial mixing threatened the power of whiteness.<sup>32</sup> Dorothy Roberts asserts that, “[f]or several centuries a paramount objective of American law and social convention was keeping the white bloodline free from Black contamination.”<sup>33</sup> During slavery, the law dictated that an enslaved mother’s legal status determined the legal status of her child.<sup>34</sup> The law, colloquially known as “the child follows the mother,” functioned to protect the white

24. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATIONS* 13-14 (2d ed. 1994).

25. “The colonists referred to *Negroes* and by the eighteenth century to blacks and Africans . . . After about 1680, taking the colonies as a whole, a new term appeared—*white*.” WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, 95 (2d ed. 2012); see also JANE PURCELL GUILD, *BLACK LAWS OF VIRGINIA* (4th ed. 1996).

26. JORDAN, *supra* note 25, at 84.

27. See generally WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS* (1853).

28. *An Act Concerning Servants and Slaves*, ENCYCLOPEDIA VA., (1705), [https://www.encyclopediavirginia.org/\\_An\\_act\\_concerning\\_Servants\\_and\\_Slaves\\_1705](https://www.encyclopediavirginia.org/_An_act_concerning_Servants_and_Slaves_1705) [<https://perma.cc/598G-VBSU>]; see also Robert Beverly, *On Servants and Slaves in Virginia*, NAT’L HUMAN. CTR., (1705), <http://nationalhumanitiescenter.org/pds/amerbegin/power/text8/BeverlyServSlaves.pdf> [<https://perma.cc/L5YM-9EYP>].

29. See generally GUILD, *supra* note 25.

30. CHERYL I. HARRIS, *Whiteness as Property*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 276, 280 (1995).

31. *Id.*

32. See generally *id.*

33. ROBERTS, *supra* note 1, at 268.

34. *Negro Women’s Children to Serve According to the Condition of the Mother*, ENCYCLOPEDIA VA. (1662), [https://www.encyclopediavirginia.org/\\_Negro\\_womens\\_children\\_to\\_serve\\_according\\_to\\_the\\_condition\\_of\\_the\\_mother\\_1662](https://www.encyclopediavirginia.org/_Negro_womens_children_to_serve_according_to_the_condition_of_the_mother_1662) [<https://perma.cc/G5JB-D6GG>].

bloodline from the children born from the rampant rape of enslaved women by white men.<sup>35</sup> A departure from “the common law presumption that the status of the child was determined by the father,”<sup>36</sup> these laws ensured that “[c]hildren born to slave women were slaves, regardless of their father’s race or status.”<sup>37</sup> As such, the law sanctioned white men’s raping of black women for personal pleasure and financial benefit without compromising the purity of the white race—mixed children were legally black.<sup>38</sup> However, the abolition of slavery abrogated the child follows the mother standard.<sup>39</sup> No longer was the white race protected from potential impurities. Almost a century later, during Reconstruction, the status of black Americans had changed. With black Americans now free, states passed anti-miscegenation laws that criminalized interracial marriage and intimacies that were once policed by the institution of slavery.<sup>40</sup> These anti-miscegenation laws intended to prevent the birth of mixed-race children and thus the deterioration of whiteness.<sup>41</sup> The ratification of the Thirteenth Amendment officially ended slavery in 1865,<sup>42</sup> and the Supreme Court in *Loving v. Virginia*<sup>43</sup> held all anti-miscegenation laws to be unconstitutional in 1967. But, racial division and hierarchy continues to persist in America.

Today, social acceptance of the dual concepts of racial essentialism and biological determinism work in concert to legitimize the black/white color line and white supremacy. Racial essentialism perceives races as having fixed traits. In America, racial essentialism not only differentiates races, but ranks them. The American legal system, which privileges whiteness over blackness, depends on the belief in biologically fixed differences between the black and white race.<sup>44</sup> Whiteness is more than different from blackness—it is superior to it. The concept that “intrinsic to whiteness are so-called superior traits that are linked to success”<sup>45</sup> further justifies efforts to keep whiteness pure and encourages intra-racial reproduction.

Relatedly, biological essentialism is the notion that members of a race share common genes or share distinguishable sequences of DNA.<sup>46</sup> This theory persists in

35. See ROBERTS, *supra* note 1, at 29 (“Female slaves were commonly victims of sexual exploitation at the hands of their masters and overseers.”).

36. HARRIS, *supra* note 30, at 279.

37. ROBERTS, *supra* note 1, at 29.

38. “The rule facilitated the reproduction of one’s own labor force.” See HARRIS, *supra* note 30, at 279.

39. *Id.* (explaining that the common law presumption was that the father determined the child’s status).

40. ROBERTS, *supra* note 1, at 71.

41. See F. JAMES DAVIS, WHO IS BLACK: ONE NATION’S DEFINITION 54-58 (10th ed. 2001).

42. U.S. Const. amend. XIII, § 1.

43. 388 U.S. 1, 11-12 (1967).

44. “Racial beliefs operate as an ‘amateur biology,’ a way of explaining the variation in “human nature.” Differences in skin color and other obvious physical characteristics supposedly provide visible clues to differences lurking underneath. Temperament, sexuality, intelligence, athletic ability, aesthetic preferences and so on are presumed to be fixed and discernible from the palpable mark of race.” OMI & WINANT, *supra* note 24, at 13.

45. Szkupinski Quiroga, *supra* note 8, at 145.

46. See generally W. Carson Byrd & Matthew W. Hughey, *Biological Determinism and Racial Essentialism: The Ideological Double Helix of Racial Inequality*, 661 ANNALS AM. ACAD. POL. & SOC. SCI. 8 (2015).

America despite scientific consensus that race is not biological.<sup>47</sup> In fact, “there is on average more genetic variation within a socially constructed racial category (such as “white”) than between two people from socially constructed racial categories (such as “white” and “black”).”<sup>48</sup> Notwithstanding the science, biological essentialism and the heritability of race are strongly held social beliefs, arguably making race “the most significant genetic trait passed from parent to child” in this society.<sup>49</sup> The long-standing importance of race in America and widespread belief in racial heritability are necessary for understanding emotionally charged reactions when racial mix-ups occur in assisted reproduction.

## II. SPERM DONATION MIX-UPS

### A. *The Harnichers*

In *Harnicher v. University of Utah Medical Center*, parents David and Stephanie Harnicher realized the ARTs clinic’s error only after their infants needed blood tests because of unrelated medical problems. In *Harnicher*, the couple elected to use a mixture of David’s sperm and a donor’s sperm in a specialized form of IVF, micromanipulation.<sup>50</sup> The couple previously tried artificial insemination using only David’s sperm, without success.<sup>51</sup> The couple selected a donor—donor #183—who resembled David in physical characteristics and matched him in blood type.<sup>52</sup> Thus, by mixing the sperm, the couple would never be sure which sperm actually fertilized the egg.<sup>53</sup> They could choose to believe that David was the genetic father.<sup>54</sup> After the procedure, Stephanie gave birth to triplets.<sup>55</sup> Shortly thereafter, the blood tests revealed that the triplets were neither genetically related to David nor to donor #183.<sup>56</sup> The clinic mistakenly used sperm from donor #83.<sup>57</sup> The Harnichers sued, alleging negligent infliction of emotional distress.<sup>58</sup> The Supreme Court of Utah granted summary judgment in favor of the Medical Center.<sup>59</sup> Writing for the court, Chief Justice Howe explained why the Harnichers had no viable claim:

The Harnichers do not allege that the triplets are unhealthy, deformed, or deficient in any way. *Nor do they claim any racial or ethnic mismatch between the triplets and their parents.* In fact, the couple has presented no evidence at all that the physiological characteristics of three normal healthy children, which could not have

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47. *Id.* at 10.

48. *Id.* at 11.

49. ROBERTS, *supra* note 1, at 267.

50. *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 68 (Utah 1998).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* This tactic is quite common. For heterosexuals using assisted reproductive technologies, racially matching the donor to the parent that is not a genetic contributor allows them to pretend the child was naturally conceived.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 69.

59. *Id.* at 72.

been reliably predicted in any event, present circumstances with which a ‘reasonable [person], normally constituted, would be unable to adequately cope.’<sup>60</sup>

The court introduced the racial aspect of the mix-up *sua sponte*. By drawing attention to the lack of racial or ethnic mismatch between the triplets and the parents, the court implies that such a mismatch could give rise to a viable legal claim. Is a racial mix-up legally different than a non-racial mix-up? It stands to reason that the court would have found in favor of the parents if there were some racial or ethnic mismatch.

### B. *The Skolnicks*

Less than a decade before *Harnicher*, a couple sued their doctors and clinic in a case of racial mix-up in New York. In 1990, the Skolnicks, a white heterosexual couple, sued their sperm bank after Julia Skolnick gave birth to a “dark-skinned” baby girl.<sup>61</sup> Julia and Fred Skolnick froze Fred’s sperm before he was treated for cancer.<sup>62</sup> The couple later returned to the clinic for Julia to be inseminated with Fred’s sperm.<sup>63</sup>

As soon as the child was born, the couple could see that she was not related to Fred. Julia Skolnick had “honey-colored eyes and long blonde hair,” Fred Skolnick was “dark-haired [and] movie-star handsome,” while baby Skolnick was “dark-skinned with biracial features.”<sup>64</sup> The descriptions conveniently fail to mention that the Skolnicks have white skin, but the racial euphemisms of “good” hair and looks are clear.<sup>65</sup> Julia Skolnick alleged negligence and medical malpractice, but the crux of her case for monetary damages was the evidence that her daughter was the victim of racial prejudice.<sup>66</sup>

The case is full of contradictions about the importance of the child’s race. Julia Skolnick described loving her black daughter, “but [was] determined that what happened to her and her daughter [did not] happen to any other couple.”<sup>67</sup> Julia Skolnick tried to make the child’s race both irrelevant to and the driving force behind the suit. Her lawyers stated that the child’s “color has nothing to do with [Mrs. Skolnick’s] anguish” and then that Julia Skolnick only turned to legal action when the “racial taunting of her child became unbearable for her,” as the child had been the repeated target of “racial teasing and embarrassment.”<sup>68</sup> The contradiction of

60. *Id.* at 72 (emphasis added).

61. Raizel Liebler, *Are You My Parent? Are You My Child? The Role of Genetics and Race in Defining Relationships After Reproductive Technological Mistakes*, 5 DEPAUL J. HEALTH CARE L. 15, 34 (2002) (internal citation omitted).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* (no mention of Skolnick’s skin color).

66. *Id.* at 35.

67. Ronald Sullivan, *Mother Accuses Sperm Bank of a Mixup*, N.Y. TIMES (Mar. 9, 1990), <http://www.nytimes.com/1990/03/09/nyregion/mother-accuses-sperm-bank-of-a-mixup.html> [<https://perma.cc/W7LU-NGCU>].

68. *Id.*

both ignoring and magnifying race demonstrates the layers of Julia Skolnick's alleged injury. Commenting on the *Skolnick* case, Dorothy Roberts opines that, "although receiving the wrong sperm was an injury in itself, the fact that it came from someone of the wrong race added a unique dimension of harm to the error. This second harm . . . was the fertility clinic's failure to deliver a crucial part of its service—a white child."<sup>69</sup>

If Julia Skolnick had given birth to a white baby that was neither genetically related to her husband nor her selected donor, she would have had no basis for seeking relief nor any desire to do so. By her own admission, the harm was inextricably tied to her daughter's race. Julia Skolnick did not allege harm because the clinic wrongfully inseminated her. She alleged harm because the clinic inseminated her with sperm from a black donor. Julia Skolnick did not sue simply for the clinic's negligence—she sought damages because her wrongful insemination resulted in her daughter facing racial animus. The *Skolnick* case ultimately settled for \$400,000: the sperm bank paid \$95,000 to Julia Skolnick, \$5,000 to her daughter, and the doctor paid \$300,000.<sup>70</sup>

Now, almost thirty years later, we can only speculate what a jury would have done. Was the *Harnicher* court correct in opining that a racial mix-up claim was legally viable in a way that a non-racial mix-up claim was not? Was Julia Skolnick harmed in a legally significant way that David and Stephanie Harnicher were not? If Julia Skolnick's harm was her daughter's race and not the clinic's mistake, then accepting her argument could open the door to other, potentially revolutionary, litigation. Could a person's skin color or race be the basis for seeking damages more broadly, even opening the door for reparations by legal settlement?

### C. *The Cramblett*s

In 2014, Jennifer Cramblett and Amanda Zinkon sued alleging breach of warranty and wrongful birth of their mixed-race daughter.<sup>71</sup> The couple sought \$150,000 in damages for the "personal injuries, medical expense, pain, suffering, emotional distress, and other economic and non-economic losses" associated with giving birth to and raising a non-white child.<sup>72</sup> To the relief of many commentators following the story,<sup>73</sup> Dupage County Circuit Court Judge Ronald Sutter dismissed the complaint in 2015, writing, "under Illinois law [Cramblett] is precluded from recovery costs associated with raising a normal, healthy child."<sup>74</sup> Unsurprisingly,

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69. ROBERTS, *supra* note 1, at 252.

70. Sullivan, *supra* note 67.

71. Matthew McKnight, *The Ohio Sperm-Bank Controversy*, NEW YORKER (Oct. 14, 2014), <https://www.newyorker.com/news/news-desk/ohio-sperm-bank-controversy-new-case-reparations> [<https://perma.cc/5CH5-FUT8>].

72. Complaint, *supra* note 2, at 31.

73. Hillary Crosley Coker, *White Mom Accidentally Gets Black Baby, Stresses Out, Sues Sperm Bank*, JEZEBEL (Oct. 1, 2014), <https://jezebel.com/white-mom-accidentally-gets-black-baby-stresses-out-s-1641191493> [<https://perma.cc/3KL8-WKH6>].

74. Christy Gutowski, *Downers Grove Sperm Bank Seeks Dismissal of Case Involving Biracial Child*, CHI. TRIB. (May 1, 2015), <http://www.chicagotribune.com/news/ct-dupage-lesbian-sperm-suit-folo-met-20150501-story.html> [<https://perma.cc/RU2N-DQY9>].

Cramblett quickly refiled the complaint in Dupage County and instituted a federal action.<sup>75</sup> Whether Cramblett succeeds in federal court is largely irrelevant because Cramblett's claim speaks to something much larger than her situation—her daughter. Cramblett's claim reflects widely held American beliefs about the heritability of race, the racial hierarchy, and how assisted reproduction is expected to reproduce this status quo.

### 1. The Importance of Monoracial Families Within the ARTs Market

Cramblett explains that she first suspected that the sperm bank erred during a conversation with the bank's receptionist.<sup>76</sup> Cramblett, already a few months pregnant, wanted to order more sperm from the same donor because she and Zinkon planned to have another child.<sup>77</sup> The complaint recounts the exchange:

The receptionist asked Jennifer to hold while her file was retrieved. When she returned, the receptionist said, "Okay, you want eight vials of sperm from Donor No. 330." Jennifer replied, "No, I said we need eight vials of No. 380." Jennifer was put on hold again for what seemed to her like an eternity. When the receptionist returned for the second time, she asked Jennifer if she had requested an African American donor to which she replied, "*No, why would I request that? My partner and I are Caucasian.* You know that from our profiles."<sup>78</sup>

Cramblett's response signals more than just a concern for getting the correct vials: she is offended. Cramblett balks at the mere suggestion that she and her partner, both white women, would ever select sperm from a non-white donor. R.A. Lenhardt comments that Cramblett's reaction to the receptionist reflects "the often unspoken, but nevertheless still widely held belief that a white woman, whether gay or straight, is not *supposed* to produce a child of color."<sup>79</sup> In the assisted reproductive technologies market, choosing a donor of the same race is treated as the status quo for future parents.

As Dov Fox asserts, sperm banks tacitly suggest that people "who turn to artificial insemination should understand their parental role in racial terms and that they should distinguish among donors on the basis of race" by cataloging and organizing sperm donors by race.<sup>80</sup> These race-based registries imply that "monoracial families are preferable to multiracial ones."<sup>81</sup> But not all sperm banks use implication and insinuation to promote ideals of racial purity.

For example, the Sperm Bank of California's (TSBC) preference for monoracial families is more than just implied. A page on the TSBC<sup>82</sup> website, *Donor Ethnicity*,

75. See *Cramblett v. Midwest Sperm Bank, LLC*, 230 F.Supp.3d 865, 868 (N.D. Ill. 2017).

76. Complaint, *supra* note 2, at 14-15.

77. *Id.* at 13.

78. *Id.* at 14-15 (emphasis added).

79. R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071, 2082-83 (2016) (emphasis added).

80. Dov Fox, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1876 (2009).

81. *Id.*

82. Interestingly, TSBC started in 1982 as a project of the Oakland Feminist Women's Health Center. It was dedicated to providing assisted reproduction to women regardless of marital status or sexual orientation. *History*, SPERM BANK OF CAL., <https://www.thespermbankofca.org/content/history> [https://perma.cc/TVD7-69B2]

*Your Family, and Your Future*, advises recipients to consider race in choosing donor sperm:

Our goal is to help contribute to your future child's and family's long-term well-being. In this spirit, we present reasons to consider selecting a donor who looks like you, your partner, and the people who will surround your child as they grow up.<sup>83</sup>

TSBC is unabashed in encouraging racial matching between intended parents and the child conceived of donor sperm.

Moreover, by advocating for racial matching, the website assumes that prospective parents and couples are members of the same race. This shames interracial couples who choose to conceive interracial children. In a section titled *Children Want To Belong*, the website uses two testimonials to support that racial matching is better for children.<sup>84</sup> The first testimonial is from an adult born from donor sperm. The person explains how difficult it was to have white parents, but to have a donor who was "of color." In response to the question "[h]ow often were you ever treated differently when you were growing up," the person responds:

Very frequently. . . . Well, the reason I say very frequently is since I grew up in a [state], its very white and my parents are both white . . . so the rest of my family is white and my donor was [of color]. I look very different from my family and I look different than most people in my community growing up.<sup>85</sup>

This testimonial is like Julia Skolnick's complaint in which she sued for damages because her daughter was the victim of racial teasing. The testimonial is meant to be a cautionary tale of the harms of interracial sperm selection, but it reads more like commentary on racism in America generally. This mixed-race child's experience growing up in an all-white neighborhood was unlikely any different than that of a naturally conceived mixed-race child. Being a mixed-race child of donor sperm is difficult because it is difficult to be a mixed race *person* in America where race continues to be a major factor in organizing society—not because the mixed-race child was born to all-white parents through ARTs.

TSBC's second testimonial is from a white couple that chose a white donor because they worried about "the way [their] child would feel growing up so different from the two people [she is] supposed to trust the most."<sup>86</sup> Would a child, especially a child genetically related to one parent, really be so different from her parents simply because she is half the product of someone of a different race? Given what we know about the human genome, a parent and child of different races may have more genetic similarities than those of the same race.<sup>87</sup> Moreover, is race the main

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83. *Donor Ethnicity, Your Family and Your Future Child*, SPERM BANK OF CAL., <https://www.thespermbankofca.org/tsbcfile/choosing-ethnicity-my-donor> [<https://perma.cc/AP6D-WDWY>].

84. *Id.*

85. *Id.*

86. *Id.*

87. See Simon Worrall, *Why Race Is Not a Thing According to Genetics*, NAT'L GEOGRAPHIC (Oct. 14, 2017), <https://news.nationalgeographic.com/2017/10/genetics-history-race-neanderthal-rutherford/> [<https://perma.cc/>]

determinant in how a child grows up? Would a half-black child have a dissimilar upbringing to her white parents even if they raised her in a similar community with the same values and traditions? Perhaps unintentionally, this testimonial diminishes the value of parenting by suggesting that race supplants all other influences in a child's life.

TSBC asserts that monoracial families are not just better for children—they are better for the parents too. Racial matching makes parenting easier because “having an ethnically different child means that the child will experience the world in ways in which the parent(s) cannot always prepare for or adequately understand.”<sup>88</sup> TSBC further warns that families with racially unmatched children may have trouble creating bonds because “[w]ithout resemblance, there can be an experience of unfamiliarity, unpredictability, or being the ‘other.’”<sup>89</sup> Monoracial families are positioned as the status quo, and anything that deviates is treated as a troubling alternative.

Monoracial families are so entrenched as the norm that choosing sperm from a donor that is the same race as the prospective parents is not even viewed as a choice. Lisa Ikemoto writes that, “to the extent we assume that those using artificial insemination choose donors of the same race as themselves, we do not think of racial selection. It is only when the choice crosses the color line that we call it a choice and identify that choice as troubling.”<sup>90</sup> She asserts that this discomfort arises from having to face the mutability of race: a white intended mother's choice of an Asian donor transforms a white egg and Asian sperm into another race entirely. A white mother choosing a white donor and birthing a white child confirms the immutability of race. A white mother choosing an Asian donor and birthing a mixed child provokes unease because it reveals the mutability of race.<sup>91</sup> The biological reality that race is mutable threatens the long-standing belief that race is certain, thereby fundamentally calling into question American society which has long relied on race to help organize society.

## 2. Race and Genetics

In the world of ARTs, “genetics” is often code for race. Heterosexual couples, like the Skolnicks, often desire to racially match the donor to the non-genetic parent to suspend belief that the resulting child was produced artificially. However, Cramblett and Zinkon, as a lesbian couple, could not have naturally conceived a child. Even if the child racially matches both parents, the outside world *knows* that the child is not genetically related to both Cramblett and Zinkon. If the women were never going to be able to feign natural conception, then why was having a white baby so important?

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RK6B-BKSX]. The average genetic dissimilarity between individuals of the same race and average genetic similarities of individuals of different races supports that our desire to have children of the same race is skin deep—we value visual sameness over genetic sameness.

88. *Id.*

89. *Id.*

90. Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1016 (1996).

91. *See id.*

Cramblett and Zinkon stated that they wanted to find a donor “with genetic traits similar to both of them.”<sup>92</sup>

Within the assisted reproduction market, race and racial matching are of paramount importance. Sperm banks use race to catalog and organize sperm donors.<sup>93</sup> For example, the California Cryobank, the largest sperm bank in America, provides an online search tool for those seeking donor sperm.<sup>94</sup> The donor search tool can filter the 510 available donors by height, eye color, hair color, hair texture, blood type, educational level, ethnic origin, ancestry, and religion.<sup>95</sup> Filtering for “Black or African American” ethnic origin, only twenty-three donors are available.<sup>96</sup> As recently as 2006, the California Cryobank color-coded vials of sperm by race to ease clients’ fears of racial mix-up: the caps of African American donors are black and brown, Asian donors are yellow, and Caucasian donors are white.<sup>97</sup> Egg banks similarly organize and categorize eggs by race.<sup>98</sup> Although they are medical providers, ARTs clinics do not provide patients with accurate information about the genetics and heritability of race. Rather, ARTs widely rely on race in gamete selection.<sup>99</sup> This “reinforce[s] the erroneous belief that race is a biological classification that can be determined genetically or that genetic traits occur in human beings according to their race.”<sup>100</sup>

In the assisted reproduction discourse, Cramblett and Zinkon’s desire to use a donor that “looked like them” is common. On a webpage titled *How to Choose the Right Sperm Donor*, the Seattle Sperm Bank counsels intended parents that “[i]t’s natural and understandable that you might choose a donor that resembles you or your partner.”<sup>101</sup> But the desire for a child that bears physical resemblance does not explain why race is a relevant factor for donor selection. Egg and sperm banks provide information of a donor’s hair color, eye color, height, weight, and many banks even provide donor photos. This information better equips intended parents to choose a donor that will create a child with “similar characteristics” than a donor’s race or ethnicity. For example, if the intended parents want a blonde baby because

92. Complaint, *supra* note 2, at 9.

93. Fox, *supra* note 80, at 1846.

94. See generally CALIFORNIA CRYOBANK (2019), <https://www.cryobank.com/> [<https://perma.cc/RHE3-5QHU>].

95. See *Donor Search*, CALIFORNIA CRYOBANK (2019), [https://cryobank.com/search/?donor\\_sort=default\\_Sort&page=1](https://cryobank.com/search/?donor_sort=default_Sort&page=1) [<https://perma.cc/7GH2-7GYN>].

96. See *id.*

97. Szkupinski Quiroga, *supra* note 8, at 150.

98. See *Egg Donor Search*, EGG DONOR AMERICA, [https://www.eggdonoramerica.com/db/par\\_don\\_search\\_results.php](https://www.eggdonoramerica.com/db/par_don_search_results.php) [<https://perma.cc/KL7B-X3KC>]; *Browse Our Egg Donor Registry Online*, DONOR EGG BANK USA, [https://donoreggbankusa.com/our-egg-donors/egg-donor-search?race=All&hair\\_color=All&eye\\_color=All&height=less5-5&cycle=before](https://donoreggbankusa.com/our-egg-donors/egg-donor-search?race=All&hair_color=All&eye_color=All&height=less5-5&cycle=before) [<https://perma.cc/Q8NE-G2EJ>]; *Find Egg Donors by Ethnicity*, DONOR CONCIERGE, <https://www.donorconcierge.com/egg-donor-search/ethnicities> [<https://perma.cc/6U5V-8J7X>].

99. Dorothy E. Roberts, *Race, Gender, and Genetic Technologies: A New Reproductive Dystopia?*, 34 J. WOMEN CULTURE & SOC. 783, 789 (2009).

100. *Id.*

101. *How to Choose the Right Sperm Donor*, SEATTLE SPERM BANK, <https://www.seattlespermbank.com/how-to-choose-the-right-sperm-donor/> [<https://perma.cc/Q43B-R8YY>].

they have blonde hair, the parents should select a donor that has blonde hair (and thus the gene for blonde hair) rather than a donor that is a particular race. A child born from a white sperm donor may have red, black, brown, or blonde hair, as could a child born from a Hispanic sperm donor. Notably, race is not even an accurate proxy for skin tone. The Fairfax Cryobank—acknowledging the variance of skin tones within a racial category, provides a skin tone color grid<sup>102</sup> for further donor categorization. Along the y-axis, the skin tone grid ranges from Caucasian to Black, with Asian and Latino in between. Along the x-axis, the grid ranges from light to dark. Each square on the grid is a different skin color.

Within each racial category, there are five possible skin tones. The lightest skin tone option in the “Black” category appears to be the same color as the second lightest skin tone in the “Caucasian” category. Often, race is not even a good indicator for physical characteristics beyond skin tone. A broad racial category like Asian does not account for the differences in face shape, hair texture, and stature between people from China or Japan or India. If the ARTs market were simply trying to provide clients with donor information to enable them to choose specific physical characteristics, race would be an irrelevant categorization.

### III. RACE AND GENETIC INHERITANCE

Cramblett explained that when she ultimately learned of the clinic’s mistake she felt as though “all of the thought, care, and planning that she and Amanda had undertaken to control their baby’s parentage had been rendered meaningless.” Certainly, the clinic’s mistake reduced the couple’s control over Payton’s parentage, but Cramblett is still Payton’s biological mother. In fact, Payton is just as genetically related to the couple as she would have been had the clinic correctly used sperm from the white donor. Whether the sperm came from a white or black donor, fifty percent of Payton’s genes come from Cramblett.

Cramblett’s contention that the mistake rendered their control *meaningless* illustrates the power of “black blood.”<sup>103</sup> Since slavery, the law of hypo-descent has functioned to prevent whiteness from the reality of racial mixing. The law of hypo-descent, also known as the “one-drop rule,” dictates “a single drop of “black blood” makes a person black.”<sup>104</sup> In his book, *Who is Black?: One Nation’s Definition*, F. James Davis traces the power of the one drop rule since its inception. He writes, “the one-drop rule emerged to protect slavery and later became crucial in building and maintaining the Jim Crow system of segregation.”<sup>105</sup> Largely due to the failure of anti-miscegenation laws, there were “large numbers of mixed persons who appeared white and who could pass when they wanted to, either permanently or for temporary convenience.”<sup>106</sup> The law of hypo-descent “made possible the incredible myth

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102. *Donor Skin Tone*, FAIRFAX CRYOBANK, <https://fairfaxcryobank.com/donor-skin-tone> [https://perma.cc/HN5Z-HSQ2].

103. See DAVIS, *supra* note 41, at 5.

104. *Id.*

105. *Id.* at 174.

106. *Id.* at 56.

among whites that miscegenation had not occurred, that the races had been kept pure.”<sup>107</sup>

The discourse around President Barack Obama’s race exemplifies how the one-drop rule continues to dominate racial definitions today.<sup>108</sup> Born of a white mother and a black father, Barack Obama is hailed not as America’s first *mixed-race* president, but as its first *black* president.<sup>109</sup> It is not just a social convention. The U.S. Census Bureau still relies on the principles of the law of hypo-descent today: in guidance published in January 2017, the Bureau defines “Black or African American” as a person having origins in any of the Black racial groups of Africa.<sup>110</sup>

Whiteness is a legal and social benefit that can only be inherited and is destroyed by the presence of any amount of black blood.<sup>111</sup> As a result, genetic linkage is important for white people generally. Purity is essential to whiteness: “In the United States . . . [w]hite is seen as a pure category. Any racial intermixture makes one ‘nonwhite.’”<sup>112</sup> Beyond conferring social and legal benefits, this expectation of white purity prescribes and limits white familial relations. A person is only white if she proves genetic relatedness to white parents who can prove genetic relatedness to only white ancestors. Seline Szkupinski Quiroga explains that, “[p]arents and children in a [white] family must have a phenotypic resemblance (similar physical features) so all family members must be of the same race” because “[p]hysical markers evidence the purity of whiteness.”<sup>113</sup> Even though Cramblett is genetically Payton’s mother, she looks like a mixed-race child. Because Payton does not look white like Cramblett, it is as if “the clinic’s racial mix-up negated the value of the [Cramblett’s] genetic tie.”<sup>114</sup>

Fundamentally, the *Cramblett* case is about the loss of white privilege. Although the couple sues under the theories of wrongful birth and breach of warranty, the text of the complaint focuses on the social and emotional harms *to Jennifer* caused by having to raise her mixed-race daughter. The *Cramblett* complaint tells the story of two white women having to reckon with the realities of racial inequality in America. Just as in *Skolnick*, these social and emotional harms seem to justify the legal action more than actual mistake by the sperm bank. The complaint explains:

Jennifer bonded with Payton easily, and she and Amanda love her very much. Even so, Jennifer lives each day with fears, anxieties and uncertainty about her future and Payton’s future. Jennifer admits that she was raised around stereotypical attitudes about people other than those in her all-white environment. Family members, one uncle in particular, speaks openly and derisively about persons of

107. *Id.* at 174.

108. “To this day, one’s social status in America is determined by the presence or absence of a genetic tie to a black parent.” ROBERTS, *supra* note 1, at 268-69; see also *About*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/race/about.html> [https://perma.cc/3ZT7-F2JB]

109. See Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES (Nov. 4, 2008), <http://www.nytimes.com/2008/11/05/us/politics/05elect.html> [https://perma.cc/EX35-V9P6].

110. U.S. CENSUS BUREAU, *supra* note 108.

111. HARRIS, *supra* note 30 at 280.

112. OMI & WINANT, *supra* note 24, at 11.

113. Szkupinski Quiroga, *supra* note 8, at 146.

114. ROBERTS, *supra* note 1, at 271.

color. She did not know African Americans until her college days at the University of Akron.<sup>115</sup>

Insemination by black donor sperm compromised the white privilege Cramblett has enjoyed throughout her life and the privilege she would have continued to enjoy had her daughter been born white. If Payton was white, Cramblett would not have to worry about the stereotypical attitudes of her family members.<sup>116</sup> The complaint explains that Cramblett and Zinkon moved to all-white Uniontown from racially diverse Akron because the schools were better.<sup>117</sup> Now she worries how Payton will fare at an all-white school.<sup>118</sup> If Payton had been white, Cramblett would not face the dilemma of having to choose between sending her daughter to a good school or to a school where other people look like her. Furthermore, Cramblett would not care about the racial makeup of her daughter's school.

Cramblett also claimed a harm in having to travel to a black neighborhood to get Payton's hair cut.<sup>119</sup> Not only must Cramblett travel far from where she lives, but she must also go to a place where "she is obviously different in appearance, and not overtly welcome."<sup>120</sup> If Payton was white, Cramblett would never have to go to a non-white space where she was the minority. In *The Color of Kinship*, R.A. Lenhardt explains that, "Payton's blackness imposes a kind of associational harm on her birth mother. It cancels out any modicum of privilege that Jennifer might have held prior to Payton's birth."<sup>121</sup> White mothers Cramblett and Zinkon, like Skolnick, are seeking damages for the costs associated with racism, costs which families and people of color pay every single day without any avenue for legal redress.

But the most insidious aspect of the complaint is Cramblett's reliance on the tort of wrongful birth. Cramblett's wrongful birth claim asserts that she, her wife, and her child would have been better off if that child had never been born. The tort of wrongful birth is generally used by parents of children born with "a medical condition, birth defect, or genetic problem that could have been detected" but for the defendant's negligent pre-natal testing.<sup>122</sup>

Although a novel application of the wrongful birth tort, Cramblett's action has distressing implications. The claim analogizes Payton's race to a medical illness; it "necessarily implies that [Payton's] race is, itself, a disability."<sup>123</sup> A wrongful birth action implies that the parents could have decided to have an abortion if they were aware of the child's condition in utero.<sup>124</sup> This tort allows parents to recover damages

115. Complaint, *supra* note 2, at 22.

116. *Id.*

117. *Id.* at 26.

118. *Id.*

119. Complaint, *supra* note 2, at 24.

120. *Id.*

121. Lenhardt, *supra* note 7, at 2086 (internal citation omitted).

122. Alberto Bernabe, *Do Black Lives Matter? Race as a Measure of Injury in Tort Law*, 18 ST. MARY'S L. REV. & SOC. JUST. 41, 49 (2016).

123. Bernabe, *supra* note 122, at 54.

124. Cailin Harris, *Statutory Prohibitions on Wrongful Birth Claims and Their Dangerous Effects on Parents*, 34 B.C. J.L. & SOC. JUST. 365, 369 (2014).

for medical costs and emotional hardship of raising a child with a serious disability or disease, although Payton is a perfectly healthy baby and does not require any special medical tests or treatments. Despite public statements about how much the women love Payton,<sup>125</sup> the complaint suggests the opposite inference.

#### CONCLUSION

The Dupage County Circuit Court rejected Cramblett's wrongful birth claim. But Payton Cramblett is unlikely to be the last child born of a racial ARTs mix-up and Jennifer Cramblett is unlikely to be the last white parent to seek legal relief as a result of the mix-up. The tort of wrongful birth as a legal remedy would only further cement white supremacy in America today. This interpretation of the wrongful birth tort implies that the birth of a healthy child constitutes a legal injury warranting legal relief simply because of the child's race.

Providing legal remedy for mixed racial children born of a clinical error begs the following question: what about all the other non-white children who are victims of racial prejudice and parents of non-white children who must raise their kids in a society in which whiteness reigns supreme? If a white woman like Mrs. Skolnick can recover damages for herself and her child because of its race, then must we not also accept that any parent of a non-white child has a viable legal claim? In response to the Skolnick case, Patricia J. Williams ponders "whether [this legal argument] might not be a nifty way of collecting reparations" and whether a non-white person could successfully bring "suit for racial deviance as a breach of birthright, a broken warranty of merchantability in the forum of marketed actors."<sup>126</sup> I would not want to encourage courts to accept a non-white race as a legal harm that warrants damages. However, if courts did accept such a claim, there would be potential to reconceive and rearticulate it as a claim for reparations.

Assisted reproductive technologies have enabled hundreds of thousands of people to have children. Despite providing life-changing value to people with medical and social infertility, the American assisted reproduction market is imbued with racism. Rooted in the longstanding legal and social forces that created and preserved race and racial hierarchy, the assisted reproductive technologies market continues to reproduce the erroneous and deeply harmful myths that race is heritable, monoracial families are preferable, and white is right.

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125. Complaint at 2.

126. Complaint at 22.