

Righting Wrongful Birth

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Sofia Yakren, [“Wrongful Birth” Claims and the Paradox of Parenting a Child with a Disability](#), 87 *Fordham L. Rev.* 593 (2018).

Discussions of limits on women’s reproductive choice these days most often focus on legislative efforts to curtail that choice by narrowly limiting abortion access. [Sofia Yakren](#)’s new article reminds us that medical malfeasance in failing to provide accurate information about the fetus may also limit a woman’s choice regarding her pregnancy. Yakren’s article considers how tort law’s existing remedy for that malfeasance—the “wrongful birth” cause of action—is anti-therapeutic, harming the woman who seeks redress (and potentially her child) and stigmatizing people with disabilities. Drawing on legal scholarship, disability studies, feminist theory, psychological research, and journalistic accounts, the article is an important read for those interested in bioethics, torts, and feminist or disability studies.

Reproductive torts are sometimes characterized as embodying an inevitable tension between the interests of a disabled child (and disability advocates more broadly) and the interests of a woman (and feminists more broadly), but Yakren resists that smooth path. Her article criticizes how existing wrongful birth jurisprudence requires a mother to claim in court that, had she received accurate information from her doctor prenatally, she would have terminated her pregnancy. According to Yakren, this requirement leads to mothers being blamed and shamed—by courts and the media—for cold-heartedly rejecting their disabled children and being criticized—by disability advocates—for stigmatizing disabled lives as harmful. Yakren’s goal is to “shift[] blame from mothers to the legal system.” (P. 583.) In other words, the problem is not that mothers are cold-hearted, it is that the legal system forces them to act that way to recover resources needed for child rearing. To accomplish this goal, she offers a nuanced and contextual consideration of the emotional and financial experiences of plaintiff-mothers.

Central to Yakren’s understanding of plaintiff-mothers in wrongful birth lawsuits is an acceptance of their ambivalent feelings about mothering a child whose impairment was negligently undisclosed during pregnancy. According to Yakren, it is unsurprising that a woman bringing a wrongful birth suit may simultaneously love her child but resent or even hate the many difficulties associated with raising a child with extensive health and social needs in a society providing few supports. The article supplies rich support for “embracing the paradox” of a mother’s loving her disabled child, even if she might have terminated the pregnancy had she known of the disability.

Yakren deftly employs the work of feminist psychotherapist [Roszika Parker](#) regarding maternal ambivalence and journalistic accounts of plaintiffs in wrongful birth suits. She also makes good use of the extensive accounts of parenting a child with a disability that Andrew Solomon offers in his interview-based book *Far from the Tree*. In doing so, Yakren makes a powerful case that a mother’s ambivalence associated with raising a child with a disability that she would have chosen to avoid does not truly differ in kind from the emotional experience of mothering any child, though it may differ in degree. Unlike societal portrayals of the idealized, perfect mother, real mothers normally experience complex and paradoxical feelings towards their children. As Yakren puts it: “For parents bringing wrongful birth claims, as for all parents to one degree or another, love and labor go hand in hand.” (P. 615.)

After making the case that current wrongful birth jurisprudence is anti-therapeutic, Yakren explores how changing law and practice might mitigate existing harms. One change would entail courts’ accepting a more expansive understanding of the emotional distress for which successful plaintiffs can recover, thereby normalizing maternal ambivalence. The article suggests doctrinal strategies for accomplishing that expansion. Another key change is to shift how the law describes the wrong suffered by the mother, from the birth of a disabled child to the deprivation of her

reproductive control. That shift that could affect how damages are assessed. Yakren acknowledges that this shift may be largely semantic, but it is important to her overarching thesis: “[T]he rhetorical shift from a flawed child who should have been aborted to disappointed parental expectations could well improve plaintiff-mothers’ emotional experience and reduce the stigma of disability.” (P. 624.)

Yakren’s final suggestion is that lawyers representing plaintiff-mothers should be aware of the particular emotional toll that pursuing a wrongful birth claim can take on their clients. By being accepting of maternal ambivalence in counselling those clients, lawyers can decrease the negative impact of the judicial system. The article’s treatment of this point is brief, but it raises a concern deserving fuller consideration. How tort litigation, and particularly the assessment of damages, routinely serves to devalue disabled life by asserting its tragic nature is an important question largely unexplored by legal scholars.¹ This concern looms particularly large in reproductive tort litigation, where the very existence of a child with some kind of impairment is often a central aspect of the injury alleged. Effective client-centered representation in cases seeking compensation for disability requires sensitivity to the tension between maximizing the client’s (and thus attorney’s) financial recovery and minimizing the psychic harm potentially associated with proclaiming the client’s degraded quality of life.

Yakren’s article offers readers a vision of how to transform existing “wrongful birth” jurisprudence so as to respect women’s reproductive autonomy and deter medical malfeasance. Most valuably, the article honors the complex mixture of love, resentment, joy, and depletion that can accompany parenting a child with a disability in our society and demands that the law acknowledge that complexity.

1. One notable exception is Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 **Wash. L. Rev.** 709 (2011).

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