

# Washington Law Review

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Volume 86

Number 4 *In Memoriam: Professor Paul Steven Miller*

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12-1-2011

## Blindsight: How We See Disabilities in Tort Litigation

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### Recommended Citation

Anne Bloom & Paul S. Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 Wash. L. Rev. 709 (2011).

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## BLINDSIGHT: HOW WE SEE DISABILITIES IN TORT LITIGATION

Anne Bloom\* with Paul Steven Miller\*\*

*Abstract:* Tort litigation operates with a distorted perspective of disability. It suffers from blindsight; it does not see people with disabilities the way they see themselves. Disability advocates emphasize that most people with disabilities lead happy lives. Deeply rooted biases, however, make it difficult for this perspective to be recognized. Tort litigation’s heavy emphasis on medical testimony and its repeated portrayal of plaintiffs as “less than whole” over-emphasize the physical aspects of disability and unfairly depict people with disabilities as tragic. When legal actors embrace these views, they reinforce harmful stereotypes outside the courthouse doors. Newly disabled plaintiffs are also likely to internalize this distorted perspective, as they are repeatedly exposed to it in the course of the litigation. This Article recommends several ways that tort litigation can present plaintiffs with disabilities in more empowering ways, while still recognizing the severity of the injuries involved, and without sacrificing the recovery of hedonic damages or otherwise reducing the plaintiffs’ awards.

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\* Professor of Law, University of the Pacific McGeorge School of Law. © 2011, Anne Bloom. Thanks to Elizabeth Emens, Sagit Mor, Brigham Fordham, Sara Leverette, Rebecca Levine, and attendees at the 2011 Association of American Law Schools (AALS) section on disability law for their helpful comments on earlier versions of the Article. Thanks also to Paul Miller, my collaborator and friend, whose vision inspired and guided me throughout.

\*\* Henry M. Jackson Professor of Law, University of Washington School of Law, 2004–2010, and lifetime advocate for individuals with disabilities. Professor Miller died during the planning stages of the Article. He is listed as a co-author to acknowledge his significant intellectual contribution to the Article.

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## INTRODUCTION

*Was not experience necessary to see?*

— Dr. Oliver Sacks<sup>1</sup>

In 1993, Dr. Oliver Sacks introduced *The New Yorker* readers to a condition called “blindsight.”<sup>2</sup> Blindsight is a kind of perceptual blindness.<sup>3</sup> People with blindsight have the ability to see but are not conscious of it.<sup>4</sup> Essentially, they are blinded by the limitations of their cognitive experience. As the great Irish playwright Brian Friel has taught us, however, blindsight can also be understood as a cultural condition.<sup>5</sup> In *Molly Sweeney*, a play Friel wrote after reading Sacks’ article,<sup>6</sup> Friel portrays society as suffering from blindsight in its interactions with people with disabilities.<sup>7</sup> While people without disabilities can physically see the lives of people with disabilities, Friel suggests, their biases make them blind to how individuals actually experience disability.<sup>8</sup>

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1. Oliver Sacks, A Neurologists’ Notebook, *To See and Not See*, THE NEW YORKER, May 10, 1993, at 59 (emphasis in original).

2. *Id.* at 72.

3. *Id.* (“Visual signals are perceived and are responded to appropriately, but nothing of this perception reaches consciousness at all.”).

4. *Id.*

5. BRIAN FRIEL, MOLLY SWEENEY (1994). *Molly Sweeney* retells a story that was originally told by Dr. Oliver Sacks about a blind person who undergoes surgery to restore vision lost in childhood. See Carole-Ann Upton, *Visions of the Sightless in Friel’s Molly Sweeney and Synge’s The Well of the Saints*, 40.3 MODERN DRAMA 347, 347–48 (1997) (explaining the relationship between Friel’s play and Sacks’ true story). In both versions of the story, the surgery is successful but the patient later suffers from “blindsight.” FRIEL, *supra*; Sacks, *supra* note 1, at 72. In Friel’s version of the story, however, blindsight is also a cultural condition, afflicting the people around the patient who are blind to their biases about the quality of the patient’s life before surgery. Upton, *supra*.

6. See Upton, *supra* note 5, at 347–48, 357 (citing Programme Note, Brian Friel, British Premiere of *Molly Sweeney*, at the Almeida Theatre, London, opening Oct. 27, 1994). The programme acknowledged Oliver Sacks’ influence on the play.

7. See *Id.* (describing Friel’s play and the social blindness of its seeing characters).

8. *Id.* Friel illustrates the differences in how disabilities are perceived and how they are experienced with competing monologues from Molly, who is blind, and from both her husband and surgeon, who are not. Before Molly undergoes surgery to restore her vision, for example, Molly’s husband and doctor both express the view that she has “nothing to lose.” FRIEL, *supra* note 5, at 20

In this Article, I argue that tort litigation suffers from a similar condition. I do so mindful of the limitations of using medical terminology to critique biases about disability.<sup>9</sup> Disability rights activists have long sought to have disability understood in social, rather than medical terms.<sup>10</sup> In light of this history, my use of medical terminology to diagnose and treat tort litigation's perspective on disability may seem ironic and potentially regressive. I also recognize that there are problems with using a disability metaphor, particularly one linked to blindness.<sup>11</sup> Disability metaphors can be offensive because they usually rely on negative stereotypes for their rhetorical power.<sup>12</sup> Despite these limitations, however, I think blindsight is a useful metaphor for understanding both what is wrong with tort litigation's current perspective on disability and how it needs to change. In part, this is because the term itself resists drawing lines between the "disabled" and "non-disabled" worlds. A person (or institution) with blindsight is neither "blind" nor "sighted," but both. For related reasons, what a diagnosis of blindsight suggests is not treatment for "blindness" (or "sightedness") but greater recognition of the limitations of our own perspectives. Finally, as I am using the term here, blindsight is a condition of the seemingly "non-disabled." In this respect, my use of blindsight as a metaphor for tort litigation's perspective on disabilities does not seek to reinforce negative stereotypes about people with disabilities but to turn them on their head.<sup>13</sup>

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(quoting the character Mr. Rice, a surgeon who eventually performs surgery on Molly to restore her vision). Friel presents Molly's perspective, however, quite differently. On the night before the surgery, her character says to the audience, "[H]ow can they know what they are taking away from me? How do they know what they are offering me? They don't. They can't. And have I anything to gain? Anything? Anything?" *Id.* at 23 (quoting the character Molly Sweeney). By repeatedly juxtaposing the characters' different perspectives against each other, Friel effectively uses the play to expose and confront the audience's blindsight about the lives of people with disabilities. *See* Upton, *supra* note 5, at 348 (suggesting that, in Friel's account, it is society that suffers from blindness).

9. For a thoughtful discussion of some of the limitations of using disability as metaphor, see Liat Ben-Moshe, *Infusing Disability in the Curriculum: The Case of Saramago's Blindness*, 26 *DISABILITY STUDIES QUARTERLY* No. 2 (2006).

10. *See, e.g.*, TOM SHAKESPEARE, *DISABILITY RIGHTS AND WRONGS* (2006).

11. *See* Ben-Moshe, *supra* note 9, at 2.

12. *See id.*

13. Another way to put it is to say that my use of medical terms and practices is intentional and strategic. By employing the "master's tools," I seek to expose both the culturally mediated character of the tools and the power dynamics that they conceal. *See generally* Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 *IOWA L. REV.* 1497, 1501 (2009) (citing Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110, 112 (1984)) (describing the technique of using the "master's tools" as a political

Tort litigation's blindsight stems from its assumption that the lives of people with disabilities are tragic.<sup>14</sup> This perspective is blindsighted because people with disabilities do not tend to share this assessment of their lives; in their view, a life with a disability is no more or less tragic than a life without one.<sup>15</sup> Despite the best efforts of disability activists, however, the widespread perception of disability as tragedy persists.<sup>16</sup> In tort litigation, the intransigence of this distorted perspective is especially remarkable. Because plaintiffs must have suffered a physical injury in order to recover on most tort claims, legal actors in tort litigation encounter people with physical disabilities on a regular basis.<sup>17</sup> Despite this regular interaction, however, tort litigation does not see people with physical disabilities the way they see themselves.<sup>18</sup> The cost of this blindsight is high. Tort cases are currently litigated on the basis of assumptions that do not comport with the actual experiences of people

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strategy).

14. For a similar argument in the context of hedonic damages, see Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 771–72 (2007). See also Sagit Mor, *A Disability Critique of Torts: Preliminary Directions*, presented at the Annual Meetings of the Law and Society Association, June, 2011, San Francisco, CA (on file with the author) (criticizing tort litigation's role in generating stigmatizing assumptions).

15. Perhaps because of this, it is a fairly common experience for people with physical impairments to find it difficult to identify as “disabled.” See EXPLORING DISABILITY: A SOCIOLOGICAL INTRODUCTION 50–62 (Colin Barnes et al. eds., 1999).

16. For an overview of the problem, see MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT* (1990). See also Simon Brisenden, *Independent Living and the Medical Model of Disability* (1986), reprinted in *THE DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES* 23 (Tom Shakespeare ed., 1998). For a discussion of the issue in the torts context, see Bagenstos & Schlanger, *supra* note 14, at 749, 752–60, 778 (arguing that hedonic damages cases present a view of disability as personal tragedy).

17. Legal actors in tort litigation encounter people with physical disabilities on a regular basis because of the role that physical harm plays in most tort claims. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1650 [hereinafter *Unrealized Torts*] (“Traumatic bodily harm and illness are the paradigmatic forms of ultimate harm [in tort law].”); see also MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 89 (2010) (noting that negligence, the dominant theory in tort law, extends only to physical harm and property damage).

18. Because injuries involving mental disabilities raise different issues, my arguments here are restricted to plaintiffs with physical disabilities. For a discussion of some of the challenges posed by mental disabilities, see Michael L. Perlin, “*Where the Winds Hit Heavy on the Borderline*”: *Mental Disability Law, Theory and Practice*, “Us” and “Them,” 31 LOY. L.A. L. REV. 775, 785–90 (1998) (describing some of the more prevalent stereotypes about people with mental disabilities). See also Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO L.J. 399, 422–30 (2006) (noting important differences between physical and mental disabilities in the context of hedonic loss); Harry J.F. Korrell, *The Liability of Mentally Disabled Tort Defendants*, 19 LAW & PSYCHOL. REV. 1 (1995) (noting that tort litigation treats defendants with mental disabilities differently from defendants with physical disabilities).

with disabilities.<sup>19</sup> This leads to distorted analyses and outcomes.<sup>20</sup> Perhaps more worrisome, tort litigation's distorted perspective fosters troubling stereotypes and encourages plaintiffs with disabling injuries to view themselves in harmful ways.<sup>21</sup>

Although tort litigation's blindsight is deeply ingrained, tort litigation could operate effectively with a different perspective. Instead of portraying plaintiffs as "tragedies," legal actors in tort litigation could present their clients' disabling injuries in more complex ways that better reflect people with disabilities' actual experiences. Moreover, it is possible for tort litigation to make these changes without sacrificing its historic role of providing compensation for people with severe injuries.<sup>22</sup> Recognizing the extent of our blindsight is the first step. As Dr. Sacks suggests in the quotation that appears at the beginning of this Article, "[E]xperience [is] necessary to see."<sup>23</sup> Most legal actors in tort litigation, however, have little to no personal experience with disabilities.<sup>24</sup> If we want to understand the extent of tort litigation's blindsight, we need to acknowledge this experiential deficit and how it is currently preventing tort litigation from delivering just results.

Because legal actors in tort litigation have failed to consider the real-life experiences of people with disabilities for so long, it is difficult to imagine how tort litigation might proceed differently if their experiences

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19. Cass R. Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157, S173–S175 (2008).

20. *Id.* at S175–S177 (summarizing the literature on affective forecasting (predicting a person's future sense of well-being) and noting that, when people without disabilities do not understand the experiences of people with disabilities, they are likely to exaggerate the effects of some losses and minimize the effects of others).

21. See discussion *infra* Part II; see also Bagenstos & Schlanger, *supra* note 14, at 784–87 (making a similar argument in the context of hedonic damages).

22. For a summary of the role of tort litigation in providing compensation of injuries, see DAN B. DOBBS, *THE LAW OF TORTS* 17 (2000).

23. See Sacks, *supra* note 1, at 59. Brian Friel makes a similar suggestion in his play, *Molly Sweeney*. See Upton, *supra* note 5, at 351–52 (describing how Friel's protagonist sees best when she becomes aware of her own limited experience). Research on affective forecasting provides empirical support for Sacks' and Upton's observation. See DANIEL GILBERT, *STUMBLING ON HAPPINESS* 185–88 (2006) (summarizing the relevant research and concluding that experience provides uniquely valuable insight into the experience of pain and suffering).

24. According to a recent American Bar Association (ABA) report, only about one in twenty lawyers report having a disability, as compared to about one in five people reporting a disability nationwide. See AM. BAR ASS'N, *ABA DISABILITY STATISTICS REPORT* (2010), available at <http://www.americanbar.org/content/dam/aba/migrated/disability/PublicDocuments/ABADisabilityStatisticsReport.authcheckdam.pdf>. What counts as "disability," however, is not always clear; the category is highly permeable in the sense that anyone can fall in or out of disability at any time. See generally Elizabeth Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act 17* (Oct. 14, 2011) (unpublished manuscript) (on file with the author).

were considered. We can begin, however, by learning more about how the experiences of people with disabling injuries differ from the assumptions about disabilities that govern our current practices. As it turns out, tort litigation provides us with a somewhat unique opportunity to do this. Many tort plaintiffs have suffered disabling injuries,<sup>25</sup> and in most instances, the litigation takes place while the plaintiffs are in a period of transition.<sup>26</sup> While their lawyers file claims, tort plaintiffs with disabling injuries are still recovering and adjusting to life with a disability. As tort litigation travels alongside these plaintiffs in their journey, we have a chance to learn something about the complex—and undoubtedly variable—experience of becoming designated as a person with a disability. If legal actors in tort litigation want to understand, and ultimately overcome, their blindness, tort litigation should provide more opportunity for plaintiffs and others with disabilities to share their experiences.<sup>27</sup>

While engaging more with people with disabilities is important, legal actors in tort litigation can and should do much more. Tort litigation is not simply a witness to the transition of newly injured plaintiffs; it also plays an active role in shaping their changing identities. As a result, how legal actors portray people with disabilities in tort litigation has broader social implications. Legal actors in tort litigation need to be much more attentive to the ways in which tort litigation's blindness harms people with disabilities and, ultimately, do something to stop it.

What follows is an attempt to come to terms with the extent of legal actors' blindness in tort litigation, including its effects on plaintiffs with disabilities and the broader public discourse. Because it is not enough simply to expose the problem, I also offer some solutions. I do so mindful of my own blindness—the ways in which I, too, am constrained

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25. There are apparently no studies of the number of plaintiffs with physical disabilities in tort litigation. The numbers are significant enough, however, to merit serious consideration of how tort litigation portrays disabilities. *See, e.g.*, Bagenstos & Schlanger, *supra* note 14, at 745 (analyzing hedonic damage awards to people with disabilities in tort cases); John Bronsteen et al., *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516 (2008) (discussing hedonic damage awards involving people with disabilities in tort cases); Sunstein, *supra* note 19, at S173–S175 (expressing concern about damage awards to people with disabilities in tort cases).

26. It is widely acknowledged that many plaintiffs with disabling injuries are in a period of transition during tort litigation, as they adjust to their new identities. *See, e.g.*, Bagenstos & Schlanger, *supra* note 14, at 785 (describing the changes that a plaintiff with disabling changes likely goes through during and after litigation); Bronsteen et al., *supra* note 25, at 1536–38 (describing the adaptation process that tort plaintiffs go through in the period before trial).

27. *See* Sagit Mor, *Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, 18 YALE J.L. & HUMAN. 63, 73 (2006) (arguing for more research on the role of law in the social construction of disability).

by the limitations of my own experience. Thus, both the critiques and the “fixes” are an invitation to further dialogue and should be read in that light.

Part I of this Article compares tort litigation’s portrayal of disability with the perspective of disability activists to expose the extent of tort litigation’s blindsight. While most disability advocates emphasize the social and political aspects of disability, tort litigation treats disability as if it were a solely medical phenomenon. Part I describes these different approaches in the context of the contrasting social and medical models of disability and argues that tort litigation currently proceeds in ways that more closely approximate the medical model.<sup>28</sup> Consistent with the medical model, legal actors in tort litigation place excessive emphasis on the physical aspects of plaintiffs’ injuries and tend to pathologize even average bodies. These practices, in turn, produce a distorted view of disability, which ignores the role of social prejudice in interpreting injuries as disabling conditions.

Part II explains why tort litigation’s distorted approach to disability poses problems beyond the courthouse doors. It discusses the socially harmful effects of current practices and expresses concern about how messages about disability that are generated in tort litigation may become part of our broader cultural discourse. Among other things, tort litigation’s distorted perspective of disability provides political and cultural legitimacy for harmful stereotypes about people with disabilities. These harmful stereotypes, in turn, help to construct the experience of being disabled in our culture.

Part III argues that things could be different. It proposes changes that would allow legal actors in tort litigation to confront their blindsight and play a more constructive role in public discourse about disabilities. One proposed change is to create more opportunities in tort litigation for people with disabilities to discuss their own experiences with impairment. A second proposed change is to take steps to ensure that judges and lawyers portray plaintiffs with disabilities in less tragic ways. To that end, Part III offers several alternative narratives that would present plaintiffs with disabilities in a more realistic light. Finally, Part III argues that these changes can be made without lowering the plaintiffs’ recoveries. Because juries tend to award more for outrage than they award for pity,<sup>29</sup> reframing tort litigation in ways that portray

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28. For an overview of the two models, see SHAKESPEARE, *supra* note 10, at 15–18

29. See Chris O’Brien & Christine Funk, *Put Jurors on Mission for Justice*, TRIAL, Apr. 2010, at 20.



plaintiffs in empowering ways will not necessarily result in lower verdicts, especially if plaintiffs' lawyers reframe the litigation in ways that emphasize the outrageousness of the defendants' conduct.

Ultimately, the Article concludes that, regardless of the potential impact on recovery, tort litigation must begin to move in a direction that acknowledges and respects the full humanity of people with disabling physical injuries. Legal actors in tort litigation should not portray plaintiffs with disabling injuries as tragic when most people with disabling injuries do not experience their own lives in that way. If legal actors in tort litigation can acknowledge their blindness and engage more directly with the real-life experiences of people with disabilities, tort litigation will begin to become a space where both newly injured plaintiffs and others learn to view disability in a less tragic light.

## I. TORT LITIGATION'S DISTORTED VIEW OF DISABILITY

*What kind of system bids us each to make of our bodies a problem to be solved, a claim we must defend, or a secret we must publicly confess, again and again?*

— Riki Anne Wilchins<sup>30</sup>

Legal actors in tort litigation treat people with disabling injuries as if their bodies, rather than defendants' conduct, were on trial. The excessive attention to plaintiffs' bodies stems, in part, from tort litigation's commitment to a particular understanding of injury. In tort litigation, physical harm is generally considered to be more important than social or emotional harm.<sup>31</sup> In most cases, plaintiffs must demonstrate that they have suffered physical harm before they can recover damages.<sup>32</sup> While there are many reasons why legal actors in tort litigation approach injury in this way,<sup>33</sup> one of the unfortunate side effects is a constant focus on plaintiffs' bodies at the expense of other

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30. Riki Anne Wilchins, *What Does it Cost to Tell the Truth?*, in THE TRANSGENDER STUDIES READER 547, 550 (Susan Stryker & Stephen Whittle eds., 2006) (paraphrasing Foucault).

31. On the significance of physical harm in tort litigation, see Anne Bloom, *Zen and the Art of Tort Litigation*, 44 LOY. L.A. L. REV. 11, 19 (2011). See also CHAMALLAS & WRIGGINS, *supra* note 17, at 90 describing tort law's emphasis on bodily harm); *Unrealized Torts*, *supra* note 17, at 1650 (noting the importance of bodily harm in tort law).

32. DOBBS, *supra* note 22, at 1115; see also *Unrealized Torts*, *supra* note 17, at 1626 (noting how courts hearing tort cases struggle with claims that do not involve bodily harm).

33. See CHAMALLAS & WRIGGINS, *supra* note 17, at 90 (explaining that tort law's emphasis on bodily harm stems from concerns about malingering or fraud and a belief that bodily harm is easier to verify than emotional harm).

issues in the case. For plaintiffs with physically disabling injuries, the attention to the body is particularly intense. Legal actors in tort litigation tend to view disabling injuries as strictly medical conditions.<sup>34</sup> This leads them to focus heavily on identifying and treating plaintiffs' bodily limitations in their preparation, presentation, and analysis of cases.<sup>35</sup>

From a disability rights perspective, this extreme focus on plaintiffs' bodies overlooks important aspects of a disabling injury.<sup>36</sup> While there may be many physical issues associated with disability, the main problem that most people with disabilities face is not their bodies but social oppression.<sup>37</sup> A person with a spinal injury, for example, faces less of a challenge from walking than from social discrimination and the inability to gain access to many buildings with a wheelchair.<sup>38</sup> Thus, from a disability rights perspective, when a person suffers a disabling injury, social and environmental factors play a significant role in creating the condition of being designated as disabled.<sup>39</sup>

In the scholarly literature, two theoretical frameworks represent these different ways of thinking about disability.<sup>40</sup> The "medical model" of disability views disability as an illness or a disease that requires a medical intervention and solution.<sup>41</sup> The "social model" of disability, in

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34. For a similar argument in the context of genetic interventions, see Brigham A. Fordham, *Disability and Designer Babies: Rethinking the Debate Over Genetic Interventions in Favor of Disability*, 45 VAL. U. L. REV. 1473, 1499–502 (2011).

35. See, e.g., Alicia R. Ouellette, *Insult to Injury: A Disability-Sensitive Response to Smolensky's Call for Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L. J. 397, 400 (2008) (describing how the medical view of disability emphasizes treating impairments rather than alleviating the social oppression of people with disabilities).

36. TOM SHAKESPEARE ET AL., *THE SEXUAL POLITICS OF DISABILITY* 2 (1996).

37. *Id.*

38. *Id.*

39. See, e.g., Mark C. Weber, *Disability Rights, Disability Discrimination, and Social Insurance*, 25 GA. ST. U. L. REV. 575, 575 (2009) ("[P]hysical or mental conditions do not disable; barriers created by the environment or by social attitudes keep persons with physical or mental differences from participating in society as equals."); see also Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251 (2007).

40. SHAKESPEARE, *supra* note 10, at 15–18. As Shakespeare notes, there are many other ways of conceptualizing disability but the medical and social models are the dominant models. *Id.* at 15–26 (describing different ways of understanding disability); see also Aart C. Hendriks, *Different Definition-Same Problems-One Way Out?*, in *DISABILITY RIGHTS LAW AND POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES* 195, 202 (Mary Lou Breslin & Silvia Yee eds., 2002) (describing the "minority-group model" and noting its close relationship to the social model); Weber, *supra* note 39, at 575, 593 (discussing the "civil rights model" and noting that it incorporates the "basic insight about how the social environment or attitude interacts with physical or mental traits of individuals to cause 'disability'").

41. SHAKESPEARE, *supra* note 10, at 15; see also Fordham, *supra* note 34, at 1473, 1497 (describing the medical model); Ouellette, *supra* note 35, at 397, 400 (same).

contrast, views disability as a social construct.<sup>42</sup> From this perspective, medical conditions do not create disability; rather, they are the product of a society that defines some people with bodily differences as “not normal.”<sup>43</sup> In practice, the medical model focuses on providing medical solutions to fit people with bodily differences to society.<sup>44</sup> In other words, the medical model focuses on “fixing” bodies, rather than addressing the environmental and social conditions that cause people to be considered disabled. The social model, on the other hand, asks society to make changes to fit different types of bodies.<sup>45</sup> Moreover, because the social model identifies the “problem” as societal discrimination and infrastructure limitations, it also maintains that the experience of disability depends greatly upon the particular social context in which people live and function—including any institutional, structural, and attitudinal barriers.<sup>46</sup>

Beginning in the late 1960s, disability activists began to criticize the medical model of disability.<sup>47</sup> These criticisms expressed particular concern about the relationship between the medical model and the presentation of disability as “tragedy.”<sup>48</sup> Disability advocates pointed out

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42. SHAKESPEARE, *supra* note 10, at 18; *see also* Brisenden, *supra* note 16, at 23 (“On the whole, it is the organization of society, its material construction and the attitudes of individuals within it, that results in certain people being *dis-abled*.”).

43. *See* Brisenden, *supra* note 16, at 22 (“The word ‘disabled’ is used as a blanket term to cover a large number of people who have nothing in common with each other, except that they do not function in exactly the way as those people who are called ‘normal.’”); *see also* Fordham, *supra* note 34, at 1502 (“This social model of disability recognizes that, for most people with disabilities, discrimination is a much greater obstacle than any physical impairment.”).

44. *See* Fordham, *supra* note 34, at 1502 n.185; Ouellette, *supra* note 35, at 400; Paul Steven Miller, Avoiding Genetic Genocide: Understanding Good Intentions and Eugenics in the Complex Dialogue Between the Medical and Disability Communities 20 (Dec. 10, 2008), *available at* [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1202682](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1202682).

45. Fordham, *supra* note 34, at 1498; Miller, *supra* note 44, at 20.

46. *See* Miller, *supra* note 44, at 20; *see also* Brisenden, *supra* note 16, at 23–25 (explaining how social and environmental conditions play a significant role in the experience of disability).

47. One of the first such critiques came from Paul Hunt. *See* Paul Hunt, *A Critical Condition* (1966), *reprinted in* THE DISABILITY READER: SOCIAL SCIENCE PERSPECTIVES 7, 9 (Tom Shakespeare ed., 1998). At the same time, disability rights organizations also began to adopt definitions of disability that emphasized the social components of disability. *See, e.g.*, Union of the Physically Impaired Against Segregation, Fundamental Principles of Disability (Oct. 1997), *available at* <http://www.leeds.ac.uk/disability-studies/archiveuk/UPIAS/fundamental%20principles.pdf> (“Physical disability is therefore a particular form of social oppression.”); *see also* The European Day of Disabled Persons, Report of the Human Rights Plenary Meeting, Dec. 3, 1994 (defining a disabled person as “an individual . . . in a disabling situation, brought about by environmental, economic and social barriers . . .”).

48. SHAKESPEARE, *supra* note 10, at 15; *see also* Hunt, *supra* note 47, at 9 (critiquing the portrayal of people with disabilities as tragic).

that life with a disability is no more tragic than a life without a disability.<sup>49</sup> Activists also urged policymakers to shift attention away from the medical model's focus on physical impairments and focus more closely on the cultural and political aspects of disability.<sup>50</sup> In many arenas, disability activists successfully influenced policymakers. For example, legislators drafted the Americans with Disabilities Act (ADA) with a social perspective of disability in mind.<sup>51</sup> At the urging of disability rights activists, the ADA focused less on identifying and treating people with disabilities and more on encouraging a more inclusive view of people with disabilities.<sup>52</sup>

In contrast to developments in other areas of public policy, however, tort litigation continues to utilize a medical model of disability.<sup>53</sup> Some of the problems with this reliance have already been documented. In an important early work, for example, Wendy Hensel showed how tort claims for wrongful birth and wrongful life presume that a life with certain types of physical impairments is not worth living, even though people with severe disabilities often report that they live rich and meaningful lives.<sup>54</sup> More recently, others noted similar biases in the

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49. Hunt, *supra* note 47, at 9.

50. SHAKESPEARE, *supra* note 10, at 18.

51. Fordham, *supra* note 34, at 1502 (“The social model of disability provided the basis for disability rights legislation, like the Americans with Disabilities Act of 1990, which introduced a definition of disability that, in part, recognized the social construction of disability.”); see also Kerry T. Cooperman, *The Handicapping Effect of Judicial Opinions in Reproductive Tort Cases: Correcting the Legal Perception of Persons with Disabilities*, 68 MD. L. REV. ENDNOTES 1, 1 (2008) (noting that disability activists were major players in the passage of the ADA). The 2008 Amendments to the ADA emphasize the social aspects of disability even more clearly than the original law. See, e.g., Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. LAW 203, 279 (2010) (stating that the Amendments' new “regarded as” prong “paves the way toward a broader conception of the social model of disability . . .”).

52. See Mark C. Weber, *Home and Community-Based Services, Olmstead, and Positive Rights: A Preliminary Discussion*, 39 WAKE FOREST L. REV. 269, 278–79 (2004) (describing full integration as the goal of the ADA). While some judges still operate with the mindset of the medical model, the overall trend of thinking about disability in the civil rights context moves away from the medical model. Fordham, *supra* note 34, at 1498; see also Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91 (2000) (describing problems with how the ADA has been interpreted).

53. See, e.g., Bagenstos & Schlanger, *supra* note 14, at 752–60 (describing tort litigation's adherence to the medical model in the context of hedonic damages and the resulting problems of stereotyping and stigma).

54. Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 173 (2005).

debate over liability for genetic interventions.<sup>55</sup>

While genetic testing and selection have gone on for some time, concern arose in the academic community following reports that some parents sought to select traits associated with disability, like Deafness<sup>56</sup> or short stature.<sup>57</sup> Citing the reports, one scholar argued that liability should be imposed for the selection of traits associated with disability on the ground that certain types of physical disabilities are likely to be considered offensive to a person with “a reasonable sense of personal dignity.”<sup>58</sup> As critics pointed out, however, the argument assumes that “reasonable” people view physical disabilities as tragic—one of the central (and most heavily criticized) tenets of the medical model, and a view that many people with disabilities reject.<sup>59</sup>

A number of scholars have also drawn attention to how disabilities are portrayed in claims for hedonic damages.<sup>60</sup> Hedonic damage claims purport to compensate plaintiffs for the “lost enjoyment of life.”<sup>61</sup> Not

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55. See Fordham, *supra* note 34, at 1473 (providing an overview of the debates); see also Ouellette, *supra* note 35, at 398, 403–05 (noting that the focus of the debate is on conditions perceived to be disabling, rather than other types of traits, like sexual orientation or race).

56. The “D” in “Deafness” is capitalized to recognize that Deafness is understood by many Deaf people to be a cultural attribute, rather than a disability. See generally Edward Dolnick, *Deafness as Culture*, ATLANTIC MONTHLY, Sept. 1993, at 37–38.

57. See Fordham, *supra* note 34, at 1476 (providing an overview of the debates).

58. Kirsten Rabe Smolensky, *Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L.J. 299, 309–12, 320 (2008) (arguing that parents should be liable for the selection of genetic traits associated with conditions defined as disabilities under the ADA); see also *id.* at 319–20 (arguing that “genetic traits such as deafness [sic] or achondroplasia [dwarfness] are almost certain to be considered offensive to a reasonable sense of personal dignity”).

59. See Ouellette, *supra* note 35, at 400 (explaining that arguments in favor of liability for genetic intervention rely on a medical model of disability); see also Fordham, *supra* note 34, at 1494 n.129 (making the additional point that arguments in favor of liability for genetic interventions conflate the offense of changing someone’s physical attributes without their permission with the attributes themselves).

60. See, e.g., Bagenstos & Schlanger, *supra* note 14, at 745; Bronsteen et al., *supra* note 25, at 516; Rick Swedloff & Peter H. Huang, *Tort Damages and the New Science of Happiness*, 85 IND. L.J. 553 (2010).

61. Jurisdictions vary in their approach to hedonic damages. Some do not allow the claims at all, see, e.g., *Sullivan v. U.S. Gypsum Co.*, 862 F. Supp. 317 (D. Kan. 1994); some permit hedonic damages to be compensated as part of a pain and suffering award, see, e.g., *Banks v. Sunrise Hosp.*, 102 P.3d 52, 64 (Nev. 2004); others recognize hedonic damages as a separate category of recovery—sometimes called “disability” damages, see, e.g., *Knight v. Lord*, 648 N.E.2d 617, 623 (Ill. App. Ct. 1995). Still others make recovery contingent on the plaintiff having some cognitive awareness of the loss, whether it is considered as part of an award for loss of enjoyment of life, see, e.g., *McDougald v. Garber*, 73 N.Y.2d 246, 255 (1989), or compensable as a separate award. For an overview of this somewhat jumbled area of law, see David Polin, *Damages for Loss of Enjoyment of Life*, in 49 AM. JUR. 3D *Proof of Facts* 339 (1998).

all jurisdictions permit hedonic damage claims but, in the jurisdictions where they are allowed, courts permit a jury to presume that plaintiffs with disabilities will experience less pleasure in their life and to award hedonic damages on that basis.<sup>62</sup> Like the assumptions utilized by courts in wrongful life and wrongful birth cases, the practice ignores the real-life experiences of people with disabilities, who do not report a diminished capacity for pleasure.<sup>63</sup>

In each of these areas, greater attention to the gap between tort practices and the actual experience of disability has brought greater understanding of how blindsight clouds the perspective of legal actors in tort litigation. Yet, if these three examples—wrongful birth/life claims, liability for genetic intervention, and hedonic damages—represented the full extent of tort litigation’s blindsight, the problem might not seem terribly serious. Claims for wrongful birth and wrongful life are relatively infrequent;<sup>64</sup> the debate over liability for genetic intervention is largely theoretical;<sup>65</sup> and some jurisdictions do not recognize hedonic damage claims.<sup>66</sup> Tort litigation’s distorted perspective of disability, however, extends much further than these three types of claims.<sup>67</sup>

Two very common practices in tort litigation deserve particular attention. The first is the heavy reliance on medical experts in most personal injury cases.<sup>68</sup> The second is tort litigation’s emphasis on “making the plaintiff whole.”<sup>69</sup> Both practices rely upon the medical model’s distorted view of disability in the litigation of tort claims. When we examine them more closely, we see that the problem is not simply that legal actors in tort litigation do not see people with disabilities the way they see themselves; tort litigation’s distorted perspective of disability structures the way litigators currently practice personal injury

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62. Bagenstos & Schlanger, *supra* note 14, at 748–49.

63. *Id.* at 749.

64. See Hensel, *supra* note 54, at 160 (noting that the number of wrongful birth and wrongful life claims seems to be diminishing, perhaps because of the expansion of abortion rights and improved prenatal testing).

65. See Ouellette, *supra* note 35, at 398 n.4 (noting that the technology to permit genetic interventions does not yet exist); see also Fordham, *supra* n. 34, at 1480 (explaining that there are very few reported cases of parents selecting embryos with traits associated with disability).

66. See, e.g., *Sullivan*, 862 F. Supp. 317; *Carroll v. United States*, 295 Fed. Appx. 382 (2d Cir. 2008) (applying New York law).

67. See, e.g., Mor, *supra* note 14 (criticizing tort litigation’s approach to disabilities).

68. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 189 (5th ed. 1984).

69. Bronsteen et al., *supra* note 25, at 1538 (noting that references to making the plaintiff “whole” are part of the “typical parlance” of tort cases); see also John C.P. Goldberg, *Who Feels Their Pain? The Challenge of Noneconomic Damages in Civil Litigation*, 55 DEPAUL L. REV. 435, 435–36 (2006).

law. Consequently, tort litigation's blindsight has far-reaching implications.

A. *The Pathologizing Role of Medical Experts*

Medical experts play a privileged role in personal injury cases.<sup>70</sup> The reason for this has partly to do with tort litigation's emphasis on bodily harm.<sup>71</sup> Most personal injury claims require evidence of bodily injury to state a claim.<sup>72</sup> Medical experts can provide testimony on both the existence of bodily harm and the extent of plaintiffs' injuries.<sup>73</sup> Many lawyers also believe that medical experts increase the likelihood of a good outcome.<sup>74</sup> Indeed, their testimony is considered so important that it is rare for personal injury litigation to proceed without them.<sup>75</sup>

The case of *Bailey v. Ford and Firestone* illustrates the significance of bodily harm in tort litigation and the role that medical experts play in many tort cases.<sup>76</sup> In 2000, Donna Bailey sued Ford and Firestone after a car accident left her paralyzed.<sup>77</sup> There was no dispute that Bailey was seriously injured in the accident and neither defendant challenged her claim of significant bodily harm.<sup>78</sup> Instead, the legal focus of the case

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70. KEETON ET AL., *supra* note 68, at 89; *see also* Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357, 410–13 (2010) (describing the heavy reliance on medical experts in tort litigation).

71. *See* Bloom, *supra* note 31, at 19 (describing tort litigation's emphasis on the body and the role of medical experts in evaluating bodily harm).

72. *See Unrealized Torts*, *supra* note 17, at 1626 (noting that courts struggle with tort claims that do not involve bodily harm). This is true even with tort claims for emotional distress, which typically require that the plaintiff show some sort of bodily manifestation of harm. *See* Dobbs, *supra* note 22, at 1115. The one exception is defamation law. *See id.* at 1117.

73. KEETON ET AL., *supra* note 68, at 189; *see also* Richard Goodman, *Expert Medical Testimony: A Physician's Advice to Counsel*, N.J. LAW. MAG., Aug. 2004 (describing the role of doctors in providing expert testimony).

74. Goodman, *supra* note 73, at 25.

75. *See id.* ("Particularly in personal injury and in medical malpractice cases, the presence of a physician or doctor as an expert witness is common during the pre-trial investigative stage of a case, as well as during the presentation of the case itself in a courtroom."); David L. Merideth, *The Medical Expert Witness in Mississippi: Outgunning the Opposition*, 64 MISS. L.J. 85, 85 (noting that attorneys commonly hire medical experts in medical malpractice cases, personal injury suits, and workers' compensation claims and also noting that the use of and role of medical experts is expanding).

76. The case is featured in a best-selling book. ADAM PENENBERG, *TRAGIC INDIFFERENCE: ONE MAN'S BATTLE WITH THE AUTO INDUSTRY OVER THE DANGER OF SUVs* 14–20 (2003) (describing the facts of the case).

77. *Id.*

78. *Id.* at 110–13 (describing Bailey's injuries); *see also id.* at 235 (describing the filing of the complaint in the Bailey case and the defendants' response).

was on the cause of Bailey's injuries. Plaintiffs alleged that the defective design of the Ford Explorer, in which Bailey was a passenger, and the Firestone tires on the vehicle caused Bailey's injuries.<sup>79</sup> Defendants, on the other hand, explored alternative theories of causation, including driver negligence and negligent handling of Bailey's body by rescuers after the crash.<sup>80</sup>

Under any of these theories, the condition of Bailey's body after the accident had little to do with the main legal issues in the case.<sup>81</sup> Nevertheless, Bailey's attorneys focused on the condition of her body from the earliest stages of the litigation. At their very first meeting, Bailey's lead attorney "couldn't resist" looking at Bailey's body and immediately began thinking about "[h]ow much would it take for him to change places with her?"<sup>82</sup> During that meeting, the attorney explained to Bailey that she would become a "focal point" in the Ford–Firestone litigation and put a "human face on the tragedy" that results when companies put defectively designed products on the market.<sup>83</sup>

Consistent with this strategy, Bailey's attorneys proceeded to prepare for trial with the idea that Bailey's physical impairments would play a central role. As is frequently the case in personal injury practice, Bailey's attorneys hired medical experts to provide detailed testimony

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79. *Id.* at 233–34.

80. *Id.* at 263–72 (describing the theory of driver error). *See also id.* at 270 (summarizing defense counsels' questioning of a key rescuer during her deposition).

81. As in other "rollover" litigation involving the design of the Ford Explorer and Firestone's tires, the main issues in the Bailey case concerned the design of the defendants' products. *See id.* at 21–48, 70–83 (describing the strategy of plaintiffs' counsel in Ford "rollover" cases); *id.* at 123–36 (describing the defendants' response to the litigation). The only scenario under which the condition of Bailey's body was even marginally relevant to the main legal issues in the case was the defense's suggestion that Bailey's paralysis may have been caused by a rescuer's failure to secure Bailey's neck during the rescue. *Id.* at 270. For purposes of raising this defense, the condition of Bailey's body immediately after the accident (and before she was transported) might have been relevant for purposes of determining whether she was already paralyzed when she was moved. *Id.* Bailey's current medical condition, however, would not have been important even for this theory of the case, once the fact of her injuries was established. *See* Bronsteen et al., *supra* note 25, at 1545 (noting that once the nature of the plaintiff's injuries are known, the plaintiff's health is of little importance in tort litigation).

82. PENENBERG, *supra* note 76, at 249.

83. *Id.* This interaction between Bailey and her lawyer reveals how a lawyer's biases about the experience of disability can color the course of the litigation from the very start. From the moment he met her, Bailey's attorney perceived her disabilities as a "tragedy." Had he perceived her differently, he might have approached the litigation in a different way. For example, instead of making Bailey the "focal point" of the litigation, the lawyer might have focused on corporate executives at Ford and Firestone to provide a "human face" for the issues at stake. *See* discussion *infra* Part III.



about her impairments and Bailey's likely future needs.<sup>84</sup> It is also clear, however, that Bailey's attorneys intended to use medical experts to play a more atmospheric role. The trial strategy, for example, included a plan to present Bailey to the jury with a "team of doctors at her side."<sup>85</sup> While Bailey's attorneys did not ignore the legal issues in the case, they framed the case around the condition of Bailey's body, even though there was absolutely no dispute about the seriousness of her injuries. Meanwhile, other aspects of the case, such as the role of the defendants' products in causing the injuries, received relatively less attention in the framing of the litigation.<sup>86</sup>

This emphasis on the body, even in the absence of significant disputes over whether the plaintiff is injured, is common in tort litigation. Plaintiffs' lawyers believe that they must arouse the jury's pity in order to succeed in the case and they think that images of plaintiffs' impairments will help them to do that.<sup>87</sup> As a result, most trial lawyers develop trial themes that portray plaintiffs' bodies in negative ways.<sup>88</sup> A guide for plaintiffs' lawyers, for example, recommends themes such as: "[t]his is a case about broken bones but also broken dreams"; "[s]he is a prisoner in her own body"; "[s]he used to be so beautiful. All of her friends envied her. Now they pity her"; and even "[y]ou break it, you bought it" (referring to the plaintiff's body).<sup>89</sup>

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84. On the role of medical experts in personal injury litigation, see Robert Sullivan & Bob Langdon, *Developing Memorable Expert Testimony*, TRIAL, Oct. 2008, at 44–45 (describing the role of experts in personal injury cases). For a discussion of the role that they played in Bailey's case, see PENENBERG, *supra* note 76, at 262 (quoting medical expert testifying that Bailey would need constant assistance and supervision for the rest of her life and estimating the costs of that treatment).

85. PENENBERG, *supra* note 76, at 281.

86. See, e.g., Michael Winerip, *Ford and Firestone Settle Suit Over Explorer Crash*, N.Y. TIMES, Jan. 9, 2001, at C1 (discussing the Bailey settlement but only mentioning the legal issues in the case in the last sentence, and then only in a cursory way); see also PENENBERG, *supra* note 76, at 137–42 (describing a reporter's persistent attempts to interview Bailey's attorney about the safety issues in the case).

87. See Bagenstos & Schlanger, *supra* note 14, at 752–55 (providing examples of how plaintiffs' lawyers seek to arouse jurors' pity); Bronsteen et al., *supra* note 25, at 1535 n.106 ("[T]he trial process requires that the plaintiff perform her disability in front of the jury . . ."); see also Bagenstos & Schlanger, *supra* note 14, at 754 (noting that some practice manuals advise plaintiff's lawyers to have the plaintiff not attend trial if there is some risk that the plaintiff will appear to be coping better than the jury might imagine).

88. See, e.g., JOHN C. SHEA, TRIAL THEMES FOR THE INJURED PLAINTIFF 15–17, available at <http://www.marksandharrison.com/pdf/Trial%20Themes.pdf> (last visited Nov. 15, 2011). See generally Philip H. Corboy & Susan J. Schwartz, Pain and Suffering and Non-Economic Damages, in ATLA's Litigation of Tort Claims Section 24, at 13 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2003) (suggesting an approach that emphasizes testimony from medical experts on the plaintiff's limitations).

89. See SHEA, *supra* note 88, at 14–17. Other suggested themes also resonate with the medical

Medical experts play an important role in articulating and promoting these themes.<sup>90</sup> Tort litigation favors medical experts because they are believed to be more “objective” than other types of witnesses.<sup>91</sup> However, this faith in medical experts’ objectivity may be misplaced.<sup>92</sup> While medical experts have extensive training in the body’s medical aspects, their training comes with its own biases. These biases cause doctors to view disabilities in light of what they have been trained to see.<sup>93</sup> Psychologists refer to medical experts’ predispositions as a “normality bias.”<sup>94</sup> As Brian Friel suggests, however, the experts’ “normality bias” is also a form of blindsight.<sup>95</sup> Like the characters in Friel’s play, medical experts in tort litigation perceive disabilities from the limited perspective of their own cultural experiences and expectations.<sup>96</sup> In the case of disabilities, these experiences and expectations prejudice experts to view bodily differences as problems, even when the affected individuals may not view their own bodies that way.<sup>97</sup>

Over the last several decades, this blindsight has become even more

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model; for example, “This case is about a terrible tragedy.” *Id.* at 15; see also Gary Gober, *Closing Argument: The Lawyers’ Crowning Achievement*, TRIAL, Apr. 1998, at 70 (recommending arguments that emphasize the plaintiff’s physical limitations).

90. See Corboy & Schwartz, *supra* note 88, at 13 (noting that medical experts will testify to the plaintiff’s physical limitations).

91. See Bloom, *supra* note 31, at 22; see also Richard Goodman, *Expert Medical Testimony: A Physicians Advice to Counsel*, 229 N.J. LAW. 25 (2004) (describing the role of the medical expert in helping juries to reach fair and reasonable verdicts).

92. CHAMALLAS & WRIGGINS, *supra* note 17, at 127 (making a similar argument with respect to judges and jurors).

93. *Id.* (noting how expert opinions are shaped by a “normality” bias); see also Carol J. Gill, *Health Professionals, Disability, and Assisted Suicide: An Examination of Relevant Empirical Evidence and Reply to Batavia*, 6 PSYCH. PUB. POL. & L. 526, 530 (2000) (describing the disability biases of medical experts).

94. CHAMALLAS & WRIGGINS, *supra* note 17, at 127.

95. See Upton, *supra* note 5 (describing the broader significance of blindsight in Friel’s *Molly Sweeney*).

96. Hensel, *supra* note 54, at 185 (arguing that experts and jurors are “conditioned” to the medical model’s view of disability and are “unlikely to have insight into the potential richness” of the lives of people with disabilities).

97. Gill, *supra* note 93, at 530 (“[H]ealth professionals significantly underestimate the quality of life of persons with disabilities.”); see also T. Benjamin Singer, *From the Medical Gaze to Sublime Mutations: The Ethics of (Re)Viewing Non-normative Body Images*, in THE TRANSGENDER STUDIES READER 607 (Susan Stryker & Stephen Whittle eds., 2006) (“Ways of seeing are deeply embedded in culture, and images by themselves are hard-pressed to alter their conditions of visual reception. Visual perception of non-normative bodies, in particular, have been shaped through countless structured acts of viewing in contexts that range from talk show spectacles to case studies of medical pathology.”)

pronounced, as the medical baselines for “normality” have shifted from the characteristics of an average body to medicalized conceptions of what “ideal” bodies should look like.<sup>98</sup> “Normal” no longer means “natural” or even “what is commonly encountered”;<sup>99</sup> instead, it is defined by a set of expectations about what bodies *should* look like.<sup>100</sup> Because very few (and perhaps no) bodies can fully comply with these idealized conceptions, even average bodies are pathologized and treated as “problems” that need solving.<sup>101</sup>

The experts’ normality bias becomes part of the legal analyses in the litigation when legal actors in tort litigation rely on medical experts to provide testimony on plaintiffs’ injuries. Experts hired by both sides scrutinize plaintiffs’ bodies for signs of “abnormalities” and offer testimony about what treatment is required for the bodies to more closely approximate the idealized medical expectations.<sup>102</sup> Tort law then relies on this testimony to determine who qualifies for compensation and calculate damage awards. Generally speaking, plaintiffs diagnosed as “abnormal” qualify for compensation (assuming they can prove the other issues in the case) and receive compensation in amounts that correspond to the costs of the treatment the doctors recommend.<sup>103</sup> Thus, legal judgments in tort litigation rely heavily on idealized, medical understandings about what “normal” bodies should look like.<sup>104</sup> But, of course, these legal judgments ignore the important role of cultural experience in shaping how medical experts come to view bodily differences, such as disabilities, as “abnormalities.”<sup>105</sup> They also ignore the ways in which all of us—at different points in our lives, and perhaps always—fail to live up to these idealized norms.<sup>106</sup> In both respects, tort

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98. Robin Mackenzie, *Somatechnics of Medico-Legal Taxonomies: Elective Amputation and Transableism*, 16 MED. L. REV. 390, 390 (2008).

99. See, e.g., Bloom, *supra* note 70, at 361–62 (describing the shifting meanings of “normal” and “natural” in tort litigation); see also Fordham, *supra* note 34, at 1494 n.129, 1515 (noting that experts and others sometimes equate “unusual” with “abnormal”).

100. See, e.g., Bloom, *supra* note 70, at 361–62.

101. Mackenzie, *supra* note 98, at 391.

102. Bronsteen et al., *supra* note 25, at 1545; see also Hensel, *supra* note 54, at 175 (describing the role of courts in diagnosing physical abnormalities in wrongful birth and wrongful death cases and noting that something similar occurs in all tort cases); see also Mackenzie, *supra* note 98, at 390 (on the role of medical experts in normalizing bodily differences).

103. This is the essence of “make-whole” relief in the context of personal injury law. See John C.P. Goldberg, *supra* note 69, at 435–36 (2006).

104. Mackenzie, *supra* note 98, at 390.

105. Hensel, *supra* note 54, at 185.

106. See Brisenden, *supra* note 16, at 23 (discussing the “mythologized physical norm” and its “impossible demands”); Mackenzie, *supra* note 98, at 391.

litigation's heavy reliance on medical experts reveals both its commitment to the medical model of disability and its vulnerability to blindness with regard to the experiences of people with disabilities.

*B. How Tort Litigation Suggests that Plaintiffs with Disabilities Are "Less than Whole"*

One of the fundamental goals of tort litigation is to return plaintiffs as closely as possible to the positions they were in before they were injured.<sup>107</sup> In most instances, this is referred to as "making the plaintiff whole."<sup>108</sup> While "make-whole" relief is an element of remedies in other areas of the law,<sup>109</sup> in tort litigation the repeated references to "making the plaintiff whole" take on a disturbing connotation. Because plaintiffs in tort litigation frequently seek compensation for bodily injuries, the references to "making the plaintiff whole" suggest that plaintiffs' bodies are not "whole" without the relief. From a disability rights perspective, however, people with disabling injuries already are whole, even without medical intervention.<sup>110</sup> When legal actors in tort litigation suggest otherwise, they reveal another way in which tort litigation's commitment to a medical model of disability results in institutional blindness.

To understand why the references to "make-whole" relief in tort litigation are so problematic, it is helpful to consider how "make-whole" relief in tort litigation differs from "make-whole" relief in other areas of the law. One of the key differences is in the remedy's focus. In other areas of the law, "making the plaintiff whole" usually entails *forward-looking relief*.<sup>111</sup> Under this approach, the goal of the remedy is not to put the plaintiffs in the same position they were in before the defendant acted; rather, the goal is to put plaintiffs in the position that they would have been in, but for the defendants' conduct. In a contract case, for example, "making the plaintiff whole" means putting the plaintiffs in the

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107. MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 710 (9th ed. 2011).

108. Goldberg, *supra* note 103, at 435 ("The point of tort damages is to compensate, to restore the status quo ante, to make the plaintiff whole. . ."); *see also* FOWLER V. HARPER ET AL., THE LAW OF TORTS §25.1, at 490, 492 (2d ed. 1986) (noting that the role of tort compensation is to make the plaintiff as whole as possible with an award of money).

109. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 15–16 (3d ed. 2002) (describing the notion of returning plaintiff to the position she "would have been in but for the wrong" as the "essence of compensatory damages").

110. Hunt, *supra* note 47, at 9 ("[E]ven the most severely disabled people retain an ineradicable conviction that they are still fully human in all that is ultimately necessary.").

111. Goldberg, *supra* note 69, at 436.

same position that they would have been in if the defendant had fulfilled the contract.<sup>112</sup> While in some instances, a plaintiff may also receive backward-looking relief (such as reliance damages) in contract cases, in the usual case, the emphasis is on “making the plaintiff” whole in a way that looks *forward*.<sup>113</sup>

In tort litigation, however, “making the plaintiff whole” involves a different calculation. Instead of focusing on forward-looking relief, “make-whole” relief in tort litigation looks *backward* and seeks to restore the plaintiffs to the position they were in before the defendant engaged in wrongful conduct.<sup>114</sup> The difference in analysis is important because, while the forward-looking approach tends to focus on the wrongfulness of the defendant’s conduct, the backward-looking approach of tort litigation focuses on plaintiffs’ “losses.”<sup>115</sup>

In tort cases involving personal injuries, the emphasis on the plaintiffs’ losses that goes hand in hand with “make-whole” relief invariably leads to a focus on plaintiffs’ bodies. For example, in tort cases involving bodily injury, “make-whole” relief typically entails requiring defendants to pay the costs of the plaintiffs’ bodily “losses,” including the cost of any future medical treatments aimed at restoring the plaintiffs’ bodies to the condition they were in before the defendants’ actions. In some instances, this might mean allocating money for medical treatment or equipment.<sup>116</sup> In others, it may involve paying for plaintiffs to receive personal assistance.<sup>117</sup> The overall goal, however, is the same—to the extent possible, to restore plaintiffs’ bodies to the condition they were in *before* the injuries occurred.

The problem with this approach is that, as it is currently practiced, “make-whole” relief in tort litigation embraces the medical model’s notion of conforming plaintiffs’ bodies to society, rather than the other way around.<sup>118</sup> Rather than looking forward at what steps the defendant could take to ensure that plaintiffs will not suffer as a result of defendants’ conduct, tort litigation looks backward and treats plaintiffs’ injured bodies as the problem. The fact that damages seem to be calculated on the bases of what it would cost to “normalize” plaintiffs’ bodies makes this message even more powerful.

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112. RICHARD L. HASEN, *EXAMPLES AND EXPLANATIONS: REMEDIES* 60 (2d ed. 2010).

113. *Id.* at 100.

114. Goldberg, *supra* note 69, at 436.

115. *Id.*

116. FRANKLIN ET AL., *supra* note 107, at 14.

117. *Id.*

118. Fordham, *supra* note 34, at 1517.

Importantly, assessments of plaintiffs' likely medical costs are *not* the problem. Most plaintiffs with physical injuries will face these costs, and it is proper to include them in the overall damages calculation. It is problematic, however, to characterize these costs as necessary to "make the plaintiff whole." A better approach would refer to the damages as "plaintiff's anticipated medical costs as a result of the injury." By focusing on plaintiffs' future needs, this alternative approach to characterizing medical costs does not portray plaintiffs' bodies relative to an idealized norm or even compare plaintiffs' current bodies to the bodies they had before. Instead, the focus is *forward-looking* and, like "make-whole" relief in other areas of the law, speaks in terms of correcting the consequences of defendants' wrongful conduct rather than attempting to erase plaintiffs' "losses."<sup>119</sup>

It is also problematic to base the actual calculation of plaintiffs' damages on a backward looking approach to "making the plaintiff whole." For one thing, many people with disabilities do not want "normalized" bodies.<sup>120</sup> Instead, they feel "whole" without medical intervention and do not want treatment to change their condition. The most frequently cited example is that of Deaf people who refuse cochlear implants.<sup>121</sup> But Paul Miller, my co-author, also felt this way about his dwarfism. In an article on surgeries conducted with the purpose of "normalizing" children, he wrote about his childhood frustrations with adults who constantly asked him whether he wished he were taller.<sup>122</sup> Like many people designated as "disabled," he had no wish to change the part of himself that others equated with disability.<sup>123</sup> People who acquire a disability as a result of an accident or intentional wrongdoing may feel differently and welcome treatments aimed at changing a disabling condition but it is a mistake to assume they do. After suffering the initial injuries, some people may prefer not to undergo further bodily interference in the form of "normalizing" medical

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119. One of the problems with tort litigation's backward-looking approach is this equation of injury with "loss." From a disability rights perspective, disabling injuries involve physical changes but not necessarily bodily "losses."

120. Mackenzie, *supra* note 98, at 391. In fact, some with bodies designated as "normal" seek bodily changes that would result in their bodies being re-designated as "abnormal." *Id.* (discussing elective amputees).

121. M. Grodin & H. Lane, *Ethical Issues in Cochlear Implant Surgery: An Exploration into Disease, Disability and the Best Interests of the Child*, 7 KENNEDY INST. OF ETHICS J. 231 (1997).

122. Paul Steven Miller, *Toward Truly Informed Decisions about Appearance-Normalizing Surgeries*, in SURGICALLY SHAPING CHILDREN: TECHNOLOGY, ETHICS, AND THE PURSUIT OF NORMALITY 211, 211 (Erik Parens ed., 2006).

123. *Id.*

treatments. Others may feel more “whole” after an injury than they did before.<sup>124</sup> For people in either of these two groups, calculating damages on the basis of a backward looking approach that seeks to “make the plaintiff whole” does not make sense because they may have no desire to return to the prior state.

Finally, it is important to recognize that tort litigation’s emphasis on “making the plaintiff whole” obscures an important fact: while many people without disabilities are very afraid of becoming disabled, people with disabilities typically do not actually enjoy life less than their non-disabled counterparts.<sup>125</sup> This is true even for those who acquire a disability later in life as a result of an accident or an intentional wrongdoing.<sup>126</sup> Contrary to popular belief, most accident victims adjust to their bodily differences fairly quickly and go on to live happy lives.<sup>127</sup> Donna Bailey is a good example. News reports on the litigation gave the impression that Bailey would be spending the rest of her life in a hospital bed, with little to no life beyond daily medical care.<sup>128</sup> In fact, she is very active and describes her life in positive ways.<sup>129</sup>

Tort litigation’s backward-looking approach to “making the plaintiff whole” ignores the experiences of Bailey and others with disabling injuries who often feel “whole” without medical treatment that restores them to their prior state. It also ignores the experience of people who may not wish to return to the state that they were in prior to their injuries. While most plaintiffs in tort litigation will seek compensation for future medical expenses, tort litigation should not require plaintiffs to characterize their lives, or their bodies, as “less than whole” in order to

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124. GILBERT, *supra* note 23, at 165–88 (providing examples of people who describe themselves as “better off” after a serious injury). To give an extreme example, what if a defendant accidentally maims a person who has long been seeking to become an elective amputee? In such a case, the plaintiff may feel more “whole” as a result of the defendant’s conduct than she did before the accident. Yet under tort law’s “make the plaintiff whole” approach, the plaintiff would need to present herself disingenuously as “less than whole” as a condition for relief. *See* Bloom, *supra* note 31, at 21 (discussing elective amputees).

125. *See* Bagenstos & Schlanger, *supra* note 14, at 775.

126. Indeed, it is notable that people with paralyzing injuries are particularly likely to return to high rates of happiness. Bronsteen et al., *supra* note 25, at 1541.

127. *See* Bagenstos & Schlanger, *supra* note 14, at 775; Bronsteen et al., *supra* note 25, at 1541.

128. *See, e.g., Eyewitness News* (KENS5 San Antonio broadcast Aug. 9, 2001) (showing images of Bailey in her hospital room) (on file with the author); Sara Nathan & Guillermo X. Garcia, *Woman Settles with Ford, Firestone*, USA TODAY, Jan. 9, 2001 (showing a photograph of Bailey in her hospital bed).

129. *See* Alejandro Bodipo-Memba, *Ford Replacement Plan to End; Texas Woman Copes With Paralysis* (Mar. 29, 2002), available at <http://sci.rutgers.edu/forum/showthread.php?t=29306> (describing Bailey as upbeat about her future and active with an outdoor counseling group for troubled youth).

obtain that relief.

In sum, much like the heavy reliance on medical experts, tort litigation's "make-whole" relief treats plaintiffs' bodies, rather than defendants' conduct, as the "problem to be solved."<sup>130</sup> In both instances, the "system" that makes this possible is the medical model of disability, which considers the body the best indicator of injury and views bodily impairments as tragedies. From the disability rights perspective, however, this use of the medical model in tort litigation results in institutional blindness; portraying people with disabilities as less than whole makes it difficult to recognize that they can lead happy and fulfilling lives.

## II. WHAT HAPPENS IN COURTS DOES NOT STAY IN COURTS: TORT LITIGATION'S INFLUENCE ON PERCEPTIONS OF DISABILITY

Legal narratives play an important role in shaping public perceptions and behavior.<sup>131</sup> The perceptions of lawyers, judges, and other legal actors are especially vulnerable to the persuasive power of legal discourse, but the narratives used in court cases also influence people with no apparent interest in the litigation.<sup>132</sup> Thus, when legal actors portray people with disabilities in distorted ways, the effects are not limited to the litigation.

This Part considers tort litigation's role in fostering a distorted view of disability in the broader culture. It examines the messages tort

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130. The reference is to the quote with which this Part began: "What kind of system bids us each make of our bodies a problem to be solved, a claim we must defend, or a secret we must publicly confess, again and again?" Wilchins, *supra* note 30, at 550 (paraphrasing Foucault).

131. See SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS* 9 (1990) (discussing how law shapes what we think about the world); see also MURRAY EDELMAN, *POLITICS AS SYMBOLIC ACTION: MASS AROUSAL AND QUIESCENCE* 101 (1971) (noting that governmental actors are "powerful shapers of perceptions"); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 135 (1974) (citing EDELMAN, *supra*, and making a similar point in the context of courts); see generally MARC GALANTER, *The Radiating Effects of Courts*, in *EMPIRICAL THEORIES ABOUT COURTS* 117, 118 (Keith Boyum & Lynn Mather eds., 1983) (describing the outward "flow of influence" from the courts);

132. See, e.g., WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 135 (1991) (arguing that legal rulings deeply affected the ideology and strategies of the American labor movement); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 58 (1994) (describing how legal rulings inform political activists); Sherilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 444-45 (2000) (noting that judges may be even more susceptible than jurors to narratives and stereotypes).



litigation conveys about disability and explains how these messages can shape cultural attitudes about people with disabilities. It also considers how contemporary tort practices—such as the reliance on expert medical testimony and the emphasis on “make-whole” relief—may affect plaintiffs’ views of themselves. In both instances, I express concern about how tort litigation provides legitimacy for harmful stereotypes about disabilities outside the courthouse doors.

#### A. *Tort Litigation’s Blindsight Shapes Public Perceptions*

When Donna Bailey sued Ford and Firestone, her attorney allowed the media to take videos and photographs of her in the hospital, which were then featured in news stories about the case.<sup>133</sup> These images—which may still be viewed on the internet—emphasize Bailey’s physical limitations.<sup>134</sup> She is shown lying in a bed in a position of complete dependency.<sup>135</sup> Like many people with severe injuries, however, Bailey adjusted to her impairments in a relatively short period of time.<sup>136</sup> While she went through a “long period of grieving and depression,” she also reported that she felt “joy” and “very fortunate” less than two years after the accident.<sup>137</sup> The extent to which Bailey adjusted to her injuries, however, received very little news coverage.<sup>138</sup>

This distorted coverage is not unique.<sup>139</sup> The media routinely report on tort litigation—and plaintiffs in particular—in ways that distort both plaintiffs’ injuries and legal outcomes.<sup>140</sup> In some instances, distortion

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133. See, e.g., Sara Nathan & Guillermo X. Garcia, *Woman Settles with Ford, Firestone*, USA TODAY, Jan. 9, 2001 (showing a photograph of Bailey in her hospital bed); see also *Eyewitness News*, *supra* note 128 (showing images of Bailey in her hospital room).

134. See e.g., *Eyewitness News*, *supra* note 128.

135. *Id.*

136. Bodipo-Memba, *supra* note 129; see also Bronsteen et al., *supra* note 25, at 1526–31 (summarizing the literature on adjustment and adaptation); Peter A. Ubel et al., *Mismanaging the Unimaginable: The Disability Paradox and Health Care Decision Making*, 24 HEALTH PSYCHOL. S57, S58 (2005) (describing how most people with disabilities and chronic illness adjust to their conditions and go on to lead happy lives).

137. Bodipo-Memba, *supra* note 129.

138. Only one article appears to have followed up on what happened to Donna Bailey after the litigation. See *id.* One reporter, however, wrote a best-selling book on the litigation, which was published well after the litigation ended. See PENENBERG, *supra* note 76. The book’s title—*Tragic Indifference*—suggests the overall theme.

139. For an overview of the problem, see WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004).

140. See *id.* at 20 (identifying the various institutional constraints, including the “sheer length, complexity, and uncertainty of legal proceedings,” that compromise the quality of the media coverage).

occurs despite the attorneys' best efforts to generate more accurate portrayals of the facts in the litigation.<sup>141</sup> In tort cases involving plaintiffs with disabilities, however, the biased ways in which courts, lawyers, and experts portray plaintiffs' injuries exacerbate the distortion.

Cases involving wrongful birth and wrongful life claims illustrate this point very clearly. In *Gleitman v. Cosgrove*,<sup>142</sup> the first case to address wrongful birth and wrongful life claims, the plaintiff alleged that the injury was "be[ing] born to suffer with an impaired body."<sup>143</sup> Although the court ultimately rejected the plaintiff's claims as "impossible" to decide,<sup>144</sup> the court's reasoning relied upon a view that children born with disabilities brought fewer benefits to their parents than children born without disabilities.<sup>145</sup> Subsequent cases have followed a similar path.<sup>146</sup> While courts hearing these cases are not always explicit in their reasoning, the inescapable message of *Cosgrove* and its progeny is that disability is undesirable.<sup>147</sup>

Legal rulings and arguments in cases involving hedonic damages send similar messages.<sup>148</sup> Courts in these cases frequently equate the experience of disability with the "lost enjoyment of life."<sup>149</sup> The message this sends is troubling enough but plaintiffs' lawyers and judges also send harmful messages in their presentations to the jury and legal rulings.<sup>150</sup> Some lawyers, for example, suggest that the lives of plaintiffs with disabilities lack dignity.<sup>151</sup> And courts commonly use language that suggests that plaintiffs with disabilities are unable to participate in their own lives.<sup>152</sup> Like the judicial discourse in wrongful life and birth cases,

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141. See, e.g., Michael McCann, William Haltom & Anne Bloom, *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113, 159–67, 172 (2001) (describing the persistence of a distorted media portrayal of the McDonald's coffee case, despite the efforts of the plaintiff's attorney to correct the distortion).

142. 227 A.2d 689 (N.J. 1967).

143. *Id.* at 692.

144. *Id.*

145. *Id.* at 692–93; see also Hensel, *supra* note 54, at 154–62 (discussing how courts tend to ignore the benefits of having children with disabilities in wrongful birth claims).

146. Hensel, *supra* note 54, at 154–62.

147. *Id.*; see also NICOLLETE PRIAULX, *THE HARM PARADOX: TORT LAW AND THE UNWANTED CHILD IN AN ERA OF CHOICE* 54 (Sheila McLean ed., 2007).

148. See Bagenstos & Schlanger, *supra* note 14, at 752–60 (providing examples of the stigmatizing portrayal of disabilities by judges and lawyers in cases involving hedonic damages).

149. *Id.* at 778.

150. See *id.* at 753 (providing examples of how plaintiffs' attorneys present hedonic damage claims); see also *id.* at 755–56 (providing examples of how courts present the claims).

151. *Id.* at 752–53.

152. See, e.g., *id.* at 755–56.

these messages amount to a “community pronouncement, via a government institution,” that the lives of people with disabilities are inherently tragic.<sup>153</sup>

Tort litigation’s heavy reliance on medical experts—and the emphasis on “make-whole” relief—also operate in ways that generate troubling messages about disability. Donna Bailey’s lawyers, for example, planned to use medical experts to create a picture of dependence and tragedy.<sup>154</sup> And lawyers commonly interpret “make-whole” relief in ways that suggest that the bodies of people with disabilities are “less than whole.” Trial manuals, for example, encourage plaintiffs’ lawyers to make references to the plaintiff’s “broken body” as a metaphor for the plaintiff’s entire life.<sup>155</sup> Thus, these practices, too, send a message that life with a disability is inherently undesirable.

These distorted portrayals reinforce legal actors’ own biases about people with disabilities but, much more broadly, they shape public perceptions by placing the court’s imprimatur on the messages involved.<sup>156</sup> When the media transmits these messages to the general public, the influence on perceptions is likely to be particularly powerful.<sup>157</sup> Not only do the messages get repeated over and over again, they also reach many more people. When this happens, the distorted messages about disability that are produced in tort litigation can encourage people who have no connection to the litigation to view disability in biased ways. Thus, when lawyers and courts present plaintiffs with disabilities as “tragedies,” they reproduce cultural stereotypes with far-reaching effects.

### *B. Tort Litigation Encourages Plaintiffs to View Themselves in Harmful Ways*

Presenting tort plaintiffs with disabilities as tragedies also poses risks to plaintiffs’ psychological well-being. Although many people with disabilities perceive that “[l]ife with a disability is no more often a

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153. Hensel, *supra* note 54, at 173.

154. See discussion *supra* notes 83–84 and accompanying text.

155. See, e.g., SHEA, *supra* note 88, at 15–17 (recommending comparing the plaintiff’s life to that of a “prisoner”).

156. Sagit Mor makes a similar argument in a forthcoming work on disability and torts. See Mor, *supra* note 14 (discussing tort litigation’s role in generating stigmatizing assumptions).

157. See HALTOM & MCCANN, *supra* note 139, at 177 (explaining how media coverage “seeps into readers’ consciousness subtly and steadily”). There is perhaps no better example of this than the McDonald’s coffee case, which entered the cultural consciousness in an extraordinary way and convinced many Americans of the need for tort reform. See McCann et al., *supra* note 141.

tragedy than is life without a disability,<sup>158</sup> they sometimes internalize social prejudices about disabilities.<sup>159</sup> Unfortunately, repeatedly portraying plaintiffs with disabilities in negative ways may make it more likely that internalization of social prejudices will occur.<sup>160</sup> Current practices in wrongful birth and life actions, for example, send a message to people with disabilities that their impairments are so severe that a reasonable person would not want to live with them (or give birth to a child with similar impairments).<sup>161</sup> Arguments in the context of liability for genetic intervention send a similar message,<sup>162</sup> as do the presentations of claims for hedonic damages.<sup>163</sup> In each of these instances, tort litigation asks plaintiffs to “denigrate” themselves as a condition for recovery.<sup>164</sup>

The over-reliance on medical experts and the repeated references to “making the plaintiff whole” in tort litigation have similar effects. The heavy reliance on medical testimony, for example, sends a message to plaintiffs that the experience of disability is primarily a medical one. Likewise, the repeated references to “making the plaintiff whole” suggest that the plaintiff is currently less than “whole.” In both respects, tort litigation encourages plaintiffs to adopt an understanding of their injuries that is at odds with most people’s actual experiences with disabling injuries.

For people who acquire a disability later in life—perhaps through an accident that gives rise to tort litigation—the risk of internalizing these messages may be especially great. As we saw with the case of Donna Bailey, most people with serious injuries experience an adjustment period.<sup>165</sup> While the initial trauma is significant, most people with severe injuries return to their pre-injury states of happiness within a relatively short period of time.<sup>166</sup> During this time of adjustment, judges, lawyers,

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158. Miller, *supra* note 122, at 221.

159. Hensel, *supra* note 54, at 174.

160. As Bagenstos and Schlanger note, “if nothing else, the drive to avoid cognitive dissonance” may lead plaintiffs to come to believe their own testimony. Bagenstos & Schlanger, *supra* note 14, at 785; *see also* Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 253 (2001) (making a similar argument in the civil rights context).

161. Hensel, *supra* note 54, at 172 n.173.

162. Fordham, *supra* note 34, at 1525–26; *see also* Ouellette, *supra* note 35, at 400.

163. Bagenstos & Schlanger, *supra* note 14, at 785.

164. Hensel, *supra* note 54, at 172 n.171.

165. Bronsteen et al., *supra* note 25, at 1526–31 (summarizing the literature on adjustment for people who become disabled).

166. *Id.*

and other legal actors play a particularly important role in shaping how plaintiffs perceive their injuries.<sup>167</sup> When experts and lawyers repeatedly present a plaintiff as tragic, they may help the plaintiff to construct an understanding of her condition that may be more negative—and more permanent—than it would be otherwise.<sup>168</sup> Worse, plaintiffs repeatedly exposed to the view that the lives of people with disabilities are inherently “tragic” may internalize this view and never make the adjustment.<sup>169</sup>

For similar reasons, putting plaintiffs through a process in which they must repeatedly present themselves as “tragic” and “less than whole” is also a form of disempowerment. Messages like these encourage others to view plaintiffs with pity.<sup>170</sup> Pity, however, is not a sentiment generally associated with respect or power.<sup>171</sup> In some instances, an injured person’s desire to avoid this disempowerment may prevent them from bringing otherwise worthy claims. Currently, tort litigation demands a kind of public humiliation as the price of entry (or at least a willingness to identify publicly as someone who is less than whole). Because some people may not view themselves as less than whole in the ways that the tort system demands, they may be reluctant to bring claims that require them to describe themselves in this way.

In sum, when tort litigation repeatedly presents plaintiffs with disabilities as “tragedies” and “less than whole,” at least two things

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167. See Rovner, *supra* note 160, at 312–13 (making a similar argument in the context of civil rights claims); see also Ellen S. Pryor, *Noneconomic Damages, Suffering, and the Role of the Plaintiff’s Lawyer*, 55 DEPAUL L. REV. 563, 565 (2006) (arguing that plaintiff’s lawyers influence their client’s experience of suffering).

168. Bagenstos & Schlanger, *supra* note 14, at 785 (“[B]y focusing on the negative feelings that occur during [the period of injury], plaintiffs with disabilities may delay or derail their ultimate ability to adapt to their new condition . . . .”); Bronsteen et al., *supra* note 26, at 1537 (arguing that litigation may cause plaintiffs to overestimate the extent of their injuries); see also EDWARD B. BLANCHARD & EDWARD J. HICKLING, *AFTER THE CRASH: ASSESSMENT AND TREATMENT OF MOTOR VEHICLE ACCIDENT SURVIVORS* 171–86 (1997) (summarizing research on whether tort litigation prolongs or exacerbates suffering).

169. See Bronsteen et al., *supra* note 25, at 1545 (making similar arguments in the context of a trial). Professors Bronsteen, Buccafusco, and Masur argue for delaying tort claims to allow plaintiffs time to adjust. *Id.* at 1548–49. Because there are numerous drawbacks associated with delaying tort litigation (including the risk of losing key evidence) and because the plaintiffs will still be exposed to the harmful messages at a later date, I believe it makes more sense to incorporate procedures that will minimize exposure to harmful stereotypes and facilitate plaintiffs’ adjustment without delaying their day in court. See discussion *infra* notes 231–241 and accompanying text; see also Ronen Perry, *Empowerment and Tort Law*, 76 TENN. L. REV. 959, 986–87 (2009) (describing the psychological risks posed to the plaintiff by delaying trial).

170. Rovner, *supra* note 160, at 289.

171. *Id.* at 291.

happen. First, it presents a distorted view of disability to the public at large.<sup>172</sup> Second, the narrative becomes a part of the plaintiff's own self-understanding.<sup>173</sup> In both respects, the way in which tort litigation currently portrays injured plaintiffs is a form of interpretive violence that can cause real psychological and social harm.<sup>174</sup>

### III. HOW TO APPROACH DISABILITIES DIFFERENTLY (WITHOUT SACRIFICING PLAINTIFFS' RECOVERIES)

This Part suggests two ways that legal actors in tort litigation can begin to confront their blindsight and make tort litigation a more empowering space for people with injuries that are identified as disabling. The first proposed change is for legal actors to encourage plaintiffs and third parties with similar injuries to become more active participants in tort litigation and to speak freely about the complexity of their experiences. The second proposed change requires legal actors to talk differently about plaintiffs with disabilities. Instead of emphasizing that plaintiffs are "less than whole," legal actors in tort litigation should seek to present plaintiffs in ways that acknowledge the seriousness of plaintiffs' injuries without making plaintiffs objects of pity. Because some people may believe that it is impossible to make these changes without significantly reducing plaintiffs' recoveries, this Part also suggests alternative ways of presenting plaintiff's injuries that are consistent with recovering significant damages. Although it is impossible to predict the impact on recoveries, I argue that directing jurors' attention to other issues—such as defendants' wrongful conduct and interference with plaintiffs' liberty—could result in comparable and perhaps even higher verdicts.

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172. My arguments here were influenced by Anthony Alfieri's important critique of the practices of poverty lawyers. See generally Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

173. As Karl Llewellyn noted long ago, "[C]ategories and concepts, once formulated and once they have entered into thought processes, tend to take on an appearance of solidity, reality and inherent value which has no foundation in experience." Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 453 (1930); see also Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1288–89 (2000) (describing how identity performances can transform the performer's sense of self).

174. See Alfieri, *supra* note 172, at 2125–26 (describing the role of interpretive violence in poverty law practice); see also Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601–05 (1986) (arguing that legal interpretations are a form of social violence because as legal actors embrace one normative world, they destroy another).

A. *Making Room for People with Disabilities to Become More Active Participants in the Litigation*

Legal actors in tort litigation sit in a relatively unique position in relation to disability. Injured plaintiffs who bring tort claims are often in transition, as they adjust to a new understanding of themselves that may include identifying, for the first time, as persons with disabilities. As a result, tort litigation provides a unique opportunity to engage directly with people as they go through the experience of *becoming* disabled. Legal actors in tort litigation should take advantage of this opportunity. Not only will engaging more actively with plaintiffs help us to better understand the extent to which blindsight distorts current practices, greater engagement with plaintiffs is also likely to yield more just results.

Legal actors in tort litigation do not perceive disabilities accurately because most of them do not have personal experience with disabilities.<sup>175</sup> Just as experts' opinions are tainted by a "normality bias," lawyers, judges, witnesses, jurors, news reporters, and the general public also approach litigation from the viewpoint of their prior cognitive experiences.<sup>176</sup> These prior experiences shape how legal actors frame the issues and how the general public interprets the messages that the litigation transmits.<sup>177</sup> In most instances, however, the prior cognitive experiences on both sides of the communication do not include a personal experience with disability. As a result, the risk of blindsight is quite high.

The role that limited cognitive experience plays in creating blindsight, however, also suggests the appropriate response. Legal actors in tort litigation can minimize the effects of blindsight by learning more about how people with disabilities perceive their lives. While people without disabilities may never fully understand the experience of living with a disability, they can increase their cognitive understanding by interacting with people who do have that personal experience.<sup>178</sup> Thus, for legal

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175. See discussion *supra* Part I.

176. See Hensel, *supra* note 54, at 185–86 (describing the biases of legal actors about disability); discussion *supra* notes 93–106 and accompanying text (describing the cognitive biases of experts). See generally David Engel, *Lumping as Default in Tort Cases: The Cultural Interpretation of Injury*, 44 LOY. L.A. L. REV. 35, 52–54 (2011) (describing how cultural understandings of injury influence the perceptions of both legal and non-legal actors).

177. Engel, *supra* note 176, at 52–54, 64–65 (describing the role of perceptions in influencing, and being influenced by, legal discourse).

178. Some may also gain greater cognitive experience through their own personal experience with disability. For most of us, living without disability is a temporary state.

actors in tort litigation to overcome their blindsight, it is crucial to change the litigation in ways that will allow this engagement to occur.

Currently, tort practices provide few opportunities for people with disabilities to participate in the litigation in meaningful ways. Part of the problem is that plaintiffs with disabling injuries typically play a remarkably limited role in their own lawsuits.<sup>179</sup> One reason why they play such a limited role is that plaintiffs' lawyers seeking to portray their clients as "tragic" sometimes discourage their clients from appearing in the courtroom or taking the stand for very long—especially if the plaintiffs appear too happy or otherwise well-adjusted.<sup>180</sup> Even when this is not the case, however, the heavy emphasis on expert testimony in tort cases effectively marginalizes the plaintiff's voice.

These practices need to change. Plaintiffs should be encouraged to participate more in their own litigation.<sup>181</sup> The reasons for this are both individual and institutional. For many plaintiffs, greater participation will provide an important remedy for the wrong that has been done to them.<sup>182</sup> Equally important, greater participation from plaintiffs is likely to yield a more complex perspective on disability than we are currently hearing in most tort cases. In both respects, encouraging greater participation from plaintiffs in tort litigation is likely to improve the proceedings' overall fairness.

At the same time, legal actors in tort litigation also need to encourage more involvement from third parties with disabilities. While in most instances, plaintiffs will provide the best testimony about their own experience with the injuries, third parties with similar injuries and disabilities are likely to provide more accurate information about how the plaintiffs will experience their injuries in the future.<sup>183</sup> This is because, in most instances, third parties with similar injuries will have already gone through the period of adjustment that typically accompanies the experience of becoming disabled. Thus, if we want to gain a better understanding of how the plaintiff is likely to experience a

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179. See Rovner, *supra* note 160, at 312–13.

180. Bagenstos & Schlanger, *supra* note 14, at 754–55.

181. Rovner, *supra* note 160, at 312–13.

182. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 973–74, 1051 (1991) (emphasizing the importance of having our stories heard); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 105 (1988) (presenting evidence that involvement in the decision-making process enhances the participants' perception of fairness).

183. See GILBERT, *supra* note 23, at 114–16 (explaining how people with previous experience with an injury typically provide the best information about the likely future to others with similar injuries).



disabling injury in the future, it is essential for tort litigation to solicit testimony from third parties who have personal experience with a condition that is the same or similar to that of the plaintiffs.<sup>184</sup>

Testimony from third parties with disabilities would also yield a host of other benefits. First, testimony from third parties would likely provide a check against faking because the plaintiff's testimony would be heard in a broader context that includes testimony from others with similar injuries. Second, as compared to other sources of testimony, third parties with direct experience with disabilities are more likely to provide the fact-finder with important information about the social experience of living with a disability. This would help all legal actors to understand disability in more complex ways and would provide important balance for the view of disability that medical experts currently present.

Including third party testimony from witnesses with direct experience with disabilities would also be valuable to plaintiffs. Psychological studies confirm the value of hearing from others who have undergone similar experiences.<sup>185</sup> Among other benefits, experiential experts can help plaintiffs understand disabilities in more complex ways. For example, as compared to legal actors and others with whom the plaintiff is interacting, third party experiential experts are more likely to acknowledge that disability "need not be a disadvantaged or permanent state."<sup>186</sup> Ultimately, including these experiential experts could help plaintiffs with disabling injuries adjust to their changed circumstances with significantly less emotional trauma. In short, instead of encouraging plaintiffs to view themselves as tragedies, legal actors in tort litigation could employ practices that are likely to play a more therapeutic role in the plaintiffs' lives.<sup>187</sup>

My co-author, Paul Miller, described an example of how people with disabilities benefit from hearing from others with similar conditions in an article he wrote on the impact of assisted suicide on persons with disabilities.<sup>188</sup> It involved the case of Larry McAfee, who became disabled when he broke his neck in a motorcycle accident.<sup>189</sup> McAfee

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184. See, e.g., Bronsteen et al., *supra* note 25, at 1545 (describing the period of adjustment).

185. GILBERT, *supra* note 23, at 251.

186. Mackenzie, *supra* note 98, at 397.

187. On the potentially therapeutic role of law, see generally BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* (1977).

188. Paul Steven Miller, *The Impact of Assisted Suicide on Persons with Disabilities—Is It a Right Without Freedom?*, 9 ISSUES L. MED. 47, 58 (1993) (discussing *State v. McAfee*, 385 S.E.2d 651 (Ga. 1989)).

189. *Id.*

initially petitioned a court for the right to commit suicide by having his ventilator removed.<sup>190</sup> In response, several disability organizations contacted McAfee and offered to help him live independently and without stigma.<sup>191</sup> These contacts changed McAfee's perspective. He withdrew the petition and chose to live.<sup>192</sup>

McAfee's story suggests the importance of greater participation from people with disabilities in tort litigation, especially for plaintiffs with severe injuries. The current practice of privileging medical testimony over other forms of evidence makes the medical aspects of disability seem more important than they really are, and wrongly encourages all of tort litigation's participants—including the plaintiffs—to believe that disability is primarily a medical problem. Introducing third party experiential testimony about disabilities could change this dynamic in positive ways.

Importantly, nothing stands in the way of permitting testimony from third parties with similar injuries, except lawyers' and judges' blindness. Judges typically grant lawyers wide latitude in presenting their cases.<sup>193</sup> The main restriction on the presentation of evidence is relevance.<sup>194</sup> This should not be an issue with third party experiential testimony, however, because the testimony is plainly relevant to the question of future injury. Thus, it would be difficult to exclude third party testimony on this ground. Moreover, to the extent that third parties with disabilities speak to issues beyond the scope of their personal experience, the witnesses could be qualified as experts and subjected to the usual rules governing the admission of expert testimony.<sup>195</sup>

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190. *Id.*

191. *Id.*

192. *Id.*

193. *See, e.g.*, THOMAS A. MOORE, EVIDENCE IN NEGLIGENCE CASES, at 3-27 to 3-29 (10th ed. 2010) (noting that trial courts should give attorneys wide latitude in the selection and presentation of testimony from witnesses).

194. *See, e.g.*, *United States v. Schneider*, 111 F.3d 197, 202 (1st Cir. 1997); *United States v. Robinson*, 560 F.2d 507, 519 (2d Cir. 1988); *see also* FED. R. EVID. 401 (defining relevance as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

195. *See generally* *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-95 (1993). The use of third party experiential experts is also not unprecedented. In civil rights cases, third party experiential testimony has been used to help the court understand how individuals experience differential treatment. For example, in the recent California case on the constitutionality of a local proposition prohibiting gay marriage, the court heard third party experiential testimony on the experience of being gay. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 938-40 (N.D. Cal. 2010) (describing the testimony of lay witnesses in the case, including testimony from non-parties on their experiences with discrimination). This testimony was offered in addition to testimony from expert witnesses, so as to provide the court with more information about the effects of the

Nevertheless, some lawyers and judges may object to the testimony of third parties with direct experience with disabilities on the ground of prejudice.<sup>196</sup> Objections on the basis of prejudice, however, should not succeed. Testimony from people with direct experience with disabilities is no more prejudicial, and perhaps less prejudicial, than that of experts without disabilities. While lawyers on both sides may be concerned about how the testimony of third parties may influence a fact-finder's view of the case,<sup>197</sup> this is exactly the point of offering the testimony—to influence how all actors in the litigation perceive the experience and to encourage them to understand disability in more complex ways. From this perspective, the testimony of third parties should be seen as helpful to the fact-finder for purposes of countering prejudices against people with disabilities that already taint the case. For all of these reasons, a court should conclude that the value of third-party testimony outweighs any potential prejudicial effect.<sup>198</sup>

Thus, we can encourage greater participation in tort litigation from people with disabilities immediately. Nothing stands in our way besides our own unwillingness to change. The benefits of greater engagement, on the other hand, are potentially tremendous. As plaintiffs and others with disabling injuries begin to play a more active role in tort litigation, it is likely that legal actors in tort litigation will develop a more complex understanding of disability and portray people with disabilities in less distorted ways.

### B. *Changing the Way We Talk*

Engaging more with people who have direct experience with disabilities is an important step in the direction of confronting tort litigation's blindsight about disabilities. The next steps are necessarily more tentative. As we learn more about the experience of people with disabilities in tort litigation, we will want to make changes that incorporate those insights. It is impossible to know exactly what those

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proposition on their lives. *Id.* at 932–38.

196. See FED. R. EVID. 403 (providing for the exclusion of evidence that poses a danger of unfair prejudice).

197. See Peter Nicolas, “*They Say He’s Gay*”: *The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793, 798 (2003) (noting that all evidence is usually, at some level, “prejudicial” to the party against whom it is admitted).

198. Under the rules of evidence, courts typically weigh the benefits of the evidence against any potential prejudice in deciding whether the evidence should be admitted. See JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 403.02[1][a] (Joseph M. McLaughlin ed., 2d ed. 2011).

changes will be until we actually begin the process of listening and learning. That process will take time but, in the meantime, we can show greater respect for people with disabilities by changing the way we talk.

Current practices portray people with disabilities in offensive ways. In many instances, the practices portray plaintiffs with disabling injuries as “tragic” and “less than whole.”<sup>199</sup> At other times, tort litigation suggests that the lives of people with disabilities are not worth living.<sup>200</sup> A better approach would permit plaintiffs to recover without sacrificing their ability to identify as “whole” persons, and without denying the joy and happiness that people with disabilities experience in their lives. As a practical matter, this means moving away from our current narratives in tort litigation and adopting new ones.

What other ways might lawyers structure the narratives of tort claims involving seriously injured plaintiffs? One possible alternative is a more rights-based narrative.<sup>201</sup> In cases involving personal injuries, American culture tends to emphasize self-sufficiency over the assertion of legal rights.<sup>202</sup> Because of this emphasis on self-sufficiency, many people do not pursue tort claims unless their injuries are so serious that they are unable to take care of themselves on their own.<sup>203</sup> Moreover, once people decide to pursue claims, the tort system encourages plaintiffs to emphasize this lack of self-sufficiency by presenting themselves as “less than whole.”<sup>204</sup> A rights-based narrative, in contrast, would not make the same cultural demands on plaintiffs and would allow for recovery without placing undue attention on the plaintiffs’ ability to care for themselves.

A rights-based narrative, for example, might emphasize the right to be free from unwanted bodily interference. Such an approach recognizes that, while people may adapt to changes in their physical condition, they resent changes imposed on them without their consent.<sup>205</sup> Moreover, a

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199. See discussion *supra* notes 53–58, 107–110 and accompanying text.

200. See discussion *supra* notes 53–58 and accompanying text.

201. See Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 *LOY. L.A. L. REV.* 1435, 1436 (2005) (making an argument for better linkages between tort law and rights claims, in the context of race and gender).

202. See David M. Engel, *The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community*, in *LAW AND COMMUNITY IN THREE AMERICAN TOWNS* 27, 33, 50 (Carol J. Greenhouse et al. eds., 1994) (describing findings that Americans tend to emphasize self-sufficiency over rights in personal injury litigation).

203. See *generally id.* at 33.

204. See discussion *supra* notes 158–164 and accompanying text (describing the narrative demands that tort litigation makes on injured plaintiffs).

205. Fordham, *supra* note 34, at 1494 n.129.

narrative that focuses on plaintiffs' right to be free from unwanted bodily interference also takes the emphasis off the perceived limitations of plaintiffs' bodies and focuses instead on defendants' wrongful conduct, including the defendants' interference with the plaintiffs' liberty.

To understand how changing the legal narrative would play out in practice, consider this excerpt from an opinion in a tort case involving a seriously injured plaintiff:

In this situation, Eric will never be able to do *most* of the normal things of life: the first date, parenting children, reading, debating the politics of the day, etc. Eric can see but not substantially comprehend, and he can hear but not substantially understand. There may be love and affection in his life, but almost all of the developments to which a normal person is exposed during his or her childhood and adulthood will pass him by.<sup>206</sup>

While well-intended, the court's opinion embraces many of the medical model's themes of disability. It presents the plaintiff's future life as a tragedy, while overlooking other important stories about the plaintiff's experience. Of particular interest is the court's focus on the plaintiff's impairments. Repeatedly, the court mentions the activities that the plaintiff can no longer perform. But the opinion is also troubling because it attempts to predict a particular future for the plaintiff that may or may not correspond with what the plaintiff will actually experience. While it may be true that discriminatory attitudes and practices *currently* make engaging in these activities unlikely (or at least more difficult) for the plaintiff, for the court to rigidly incorporate these attitudes into its assessment of the plaintiff's future seems terribly unfair and unnecessarily limiting.

An alternative framing of the case might recognize the seriousness of the plaintiff's injuries while still presenting the plaintiff in an empowering way. For example, the excerpt might be re-written as follows:

In this situation, *the defendant's unwanted and wrongful interference with Eric's autonomy has forced Eric to make substantial changes in his life without his consent. It is likely that defendant's conduct will also cause Eric to experience significant constraints on his liberty in the future. For example, because of defendant's conduct, it is likely that Eric will not be able to engage in common activities like the first date, parenting*

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206. Nemmers v. United States, 681 F. Supp. 567, 575 (C.D. Ill. 1988) (emphasis in original).

children, reading, and debating the politics of the day, *without encountering social prejudice and structural barriers. We cannot fully understand what this might be like for Eric, either now or in the future. Nonetheless, we can recognize that the defendant's conduct has wrongfully interfered with his rights and we can compensate him for that interference* (changes in italics).

In this new framing of the case, the emphasis is not on the plaintiff's loss of physical capacity but on the defendant's wrongful conduct in violating the plaintiff's right to live without unwanted bodily interference. As re-written, the opinion also emphasizes the plaintiff's right to liberty and connects the plaintiff's disabilities to social prejudice and structural barriers. Finally, the re-written opinion does not deny the plaintiff's capacity to engage in pleasurable activities.

Reframing disability tort actions in this way is not as radical as it might seem. Rights-based narratives—which focus on ensuring accountability for the defendant's wrongful interference with the plaintiff's rights—are more consistent with the historic goals of tort law than the current emphasis on “making the plaintiff whole.”<sup>207</sup> Properly understood, arguments for “make-whole” relief belong outside the purview of substantive tort law.<sup>208</sup> Tort law's principal aim is to provide a mechanism for “accountability.”<sup>209</sup> The “less-than-whole” theme that dominates contemporary tort narratives distracts from this fundamental role by focusing more on the remedy than the wrong that gave rise to the case.

Perhaps the most important implication of the proposed alternative framing, however, is the emphasis on plaintiff empowerment and equality.<sup>210</sup> Instead of asking “to be made whole,” plaintiffs employing rights-based narratives demand respect and accountability as equals.<sup>211</sup>

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207. See Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1775–79 (2009) (summarizing scholarship supporting the view that a notion of accountability is more consistent with the structure of tort law than “make-whole” relief); Benjamin C. Zipursky, *Rights, Civil Recourse, Not Corrective Justice*, 91 GEO. L. J. 695, 697–98 (2003) [hereinafter Zipursky, *Civil Recourse*] (suggesting that rights-based models are more consistent with the structure of tort law than corrective justice or “make-whole” models).

208. Zipursky, *Civil Recourse*, *supra* note 207, at 697–98. Thus, a court might consider “make-whole” relief in the form of a remedy but it would follow the court's recognizing the legal wrong and not be incorporated into the narratives accompanying the substantive tort claim. *Id.* at 697–98.

209. See John Solomon, *supra* note 207, at 1775; Benjamin C. Zipursky, *Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 6 (1998) [hereinafter Zipursky, *Wrongs and Recourse*].

210. Solomon, *supra* note 207, at 1796.

211. *Id.* at 1778, 1796, 1807.

The point of the lawsuits is not to seek pity but for plaintiffs to have an opportunity to say directly to the defendants: “I know what you did, and you can’t do this to me.”<sup>212</sup> If tort litigation is to overcome its blindness toward people with disabilities, we need to move in this direction.<sup>213</sup>

### C. *What About the Money?*

Plaintiffs’ lawyers may be understandably concerned that departing from the current narratives in tort litigation will lead to seriously reduced recoveries. Under the conventional wisdom, “the more that a plaintiff looks like [a] victim, the more likely it is that she will be awarded damages.”<sup>214</sup> If this belief is correct, plaintiffs’ lawyers are unlikely to refrain from presenting plaintiffs as tragedies because they may believe that doing so will prevent them from obtaining big recoveries.<sup>215</sup> Changing tort litigation’s narrative from pity to rights and accountability, however, will not necessarily have a negative impact on the overall award. *Trial* magazine—the leading practice magazine for the plaintiff’s bar—reports that juries award greater damages in response to outrage than they award for pity.<sup>216</sup> If the magazine is correct, shifting away from pity will not result in a lower verdict, provided the lawyer reframes the litigation with a theme that is likely to trigger outrage, such as the wrongfulness of the defendant’s conduct or the unwanted interference with the plaintiff’s liberty.<sup>217</sup>

It is also not necessary to present plaintiffs as tragedies to recover the medical costs associated with the injury, including any future medical expenses. In most personal injury cases, these costs properly constitute a large part of the recovery.<sup>218</sup> Under an alternative narrative—including narratives that present plaintiffs in more empowering ways—plaintiffs would continue to obtain compensation for these medical costs and

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212. *Id.* at 1797; see also Perry, *supra* note 169, at 966 (noting the role of tort litigation in conveying a “clear message of social dissatisfaction”).

213. See, e.g., Fordham, *supra* note 34, at 1503 (noting that the disability rights community values self determination and community over self sufficiency and independence).

214. Rovner, *supra* note 160, at 292; see also Perry, *supra* note 169, at 984 (describing how attorneys strategically victimize their clients).

215. Rovner, *supra* note 160, at 287.

216. O’Brien & Funk, *supra* note 29, at 20.

217. This would also seemingly be an easy transition to make because many trial lawyers already rely on themes of accountability in their cases. SHEA, *supra* note 88, at 17 (suggesting numerous “accountability themes,” including “[t]his is a case about fairness” and “[h]e who does not open his eyes must open his purse.”).

218. Swedloff & Huang, *supra* note 60, at 577–78 (describing the difference between economic losses, including medical costs, and non-economic losses).

medical and economic experts would continue to provide evidence to help the fact-finder award compensation for these costs in appropriate amounts. The difference would not be in the ability to recover but in how the testimony is presented and characterized.<sup>219</sup> Instead of emphasizing plaintiffs' impairments, expert testimony would emphasize the extraordinary economic costs that the plaintiffs will incur in the future. Third party experiential testimony could also provide important information about whether the estimates of the plaintiffs' expenses are realistic. Third party experiential experts might testify, for example, about whether their own damage awards were adequate to cover their medical costs.

Changing tort litigation's narrative from pity to rights and accountability may pose greater risks to the plaintiff's recovery of non-economic or "general" damages.<sup>220</sup> Many plaintiffs' lawyers currently believe that presenting plaintiffs as tragedies is essential to maximize jury awards for pain and suffering and hedonic damages.<sup>221</sup> The problem is particularly serious in the presentation of hedonic damage claims.<sup>222</sup> In presenting these claims, plaintiffs' lawyers and courts typically suggest that a life with a disabling injury is a life without pleasure.<sup>223</sup> Because the presentation of claims in this way reinforces negative stereotypes about disabilities, some disability-rights oriented scholars have argued that courts should not compensate for hedonic losses in cases involving disabilities.<sup>224</sup>

While well-intended, refusing to allow plaintiffs to recover for lost pleasures in life is a mistake both analytically and practically. To understand why, it is important to separate out the particular types of injuries for which plaintiffs are seeking recovery with hedonic damage claims. Some claims for hedonic damages seek awards for the hedonic losses that plaintiffs incur *immediately after the injury*.<sup>225</sup> Under these circumstances, the analysis looks *backward* and focuses solely on

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219. See discussion *supra* notes 119–129 and accompanying text (arguing that medical damages can be presented in alternative ways without posing a risk to recovery).

220. For an overview of the differences between "economic" and "non-economic" or "general" damages, see HASEN, *supra* note 112, at 37.

221. Perry, *supra* note 169, at 984.

222. Bagenstos & Schlanger, *supra* note 14, at 751.

223. *Id.* But see Swedloff & Huang, *supra* note 60, at 580–83 (arguing that, while courts use the language of "loss of enjoyment of life," hedonic damage awards typically compensate for loss of capacity).

224. Bagenstos & Schlanger, *supra* note 14, at 797.

225. See Swedloff & Huang, *supra* note 60, at 585 (discussing the valuation of hedonic damages immediately after a plaintiff's injury).



awarding compensation for past losses. As a practical matter, plaintiffs deserve compensation for these *actual losses* that they incurred as a result of the defendant's wrongful conduct. Moreover, *from a disability rights perspective, there is no reason not to allow these awards.* Awards for plaintiffs' loss of activities in which they once engaged, like horseback-riding or canoeing, for example, focus on compensating for the loss of particular activities that plaintiffs enjoyed in the past.<sup>226</sup> Such an award says nothing about plaintiffs' present or future capacity for pleasure and happiness (as a person with disabilities or otherwise), nor does it attempt to restore plaintiffs to some prior state that blindsighted legal actors presume is superior to plaintiffs' current state.<sup>227</sup>

A similar situation is presented by the question of whether hedonic damages should be awarded for lost pleasures experienced by plaintiffs *during the period after injury and before adaptation.*<sup>228</sup> During this period of adjustment, plaintiffs with disabling injuries typically experience a significant overall loss of pleasure in their lives, due to defendants' wrongful conduct.<sup>229</sup> Moreover, plaintiffs' freedom to pursue pleasurable activities may also be significantly more limited during this period of time because they are busy with medical treatments or in too much pain.<sup>230</sup> As a practical matter, plaintiffs deserve and should receive compensation for lost pleasures that they incur during this period of time, just as it is appropriate to compensate them for the loss of pleasures that they engaged in before the injury occurred. Moreover, because these awards reflect *actual* hedonic losses, from a disability rights perspective, there is no reason not to make the awards.

Hedonic damage awards become much more problematic, however, when courts and plaintiffs' lawyers characterize the damages as an award for *future* losses and, in particular, for losses associated with legal actors' perceptions of the plaintiffs' capacity to lead a "normal" life.<sup>231</sup> When courts make hedonic awards on this basis, they are, by definition,

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226. See, e.g., *Hendrix v. Stepanek*, 771 N.E.2d 559, 569 (Ill. App. Ct. 2002) (upholding an award for hedonic damages compensating the plaintiff for the loss of certain activities in her life).

227. See discussion *supra* notes 112–120 and accompanying text (describing the problems with a backward looking analysis that focuses on restoring the plaintiff to a prior state).

228. See Swedloff & Huang, *supra* note 60, at 585 (distinguishing between pre-adaptation and post-adaptation losses).

229. *Id.*

230. See, e.g., *Poche v. Allstate Ins. Co.*, 04-CA-1058 (La. App. 5 Cir. 3/1/05); 900 So. 2d 55 (upholding a jury's award of hedonic damages for the period of thirteen months that the plaintiff spent in medical treatment because during this time she could not participate fully in activities that she previously enjoyed).

231. Bagenstos & Schlanger, *supra* note 14, at 797.

speculating about plaintiffs' likely future happiness.<sup>232</sup> On the one hand, it is appropriate to focus on the plaintiffs' future and speculate about the potential restrictions that plaintiffs may experience on their freedom to pursue pleasure. Plaintiffs with disabling injuries *should* be able to recover for *all* future economic and non-economic injuries that they will endure as a consequence of the defendant's wrongful conduct. Where current formulations of future hedonic damage claims go wrong is not on the emphasis on plaintiffs' future but in how legal actors analyze and perceive plaintiffs' future.

Under the current approach, legal actors mistakenly attempt to assess the extent of the injury to plaintiffs' future "enjoyment of life" by comparing what plaintiffs are likely to do in the future with what plaintiffs did in the past.<sup>233</sup> The best example of this is the widespread practice of treating the fact of a disabling injury as a proxy for future "loss."<sup>234</sup> The only circumstances under which a disabling injury makes sense as a proxy for future "loss," however, is if you view a life with a disability as inherently less valuable than a life without one. But, as we have seen, this approach to hedonic damages—and hedonic loss—is at odds with how people with disabilities actually experience their lives. In short, the analysis is problematic on two levels. First, it looks *backward* to speculate on *future* injury. Second, it relies on a distorted perspective of disability to assess the plaintiffs' future happiness on the basis of this backward analysis.

For similar reasons, awards for future hedonic injuries should also not be based on "lost capacity."<sup>235</sup> For one thing, the emphasis on "lost capacity" is no less offensive than the practice of using the existence of a disability as a proxy for "hedonic loss."<sup>236</sup> More fundamentally—as is the case with existence of "disability"—there is no evidence indicating that the fact of "lost capacity" will itself lead to "hedonic loss."<sup>237</sup> If anything, the evidence may be to the contrary.<sup>238</sup> To assume otherwise is to assume that *future* loss can be understood by looking *backward*. There is no evidence, however, that future loss can be meaningfully understood

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232. See, e.g., *Varnell v. La. Tech Univ.*, 709 So. 2d 890 (La. Ct. App. 1998) (awarding hedonic damages on the ground that the plaintiff did not have "much of a future").

233. *Id.*

234. See Bagenstos & Schlanger, *supra* note 14, at 755–56.

235. See Swedloff & Huang, *supra* note 60, at 581–83, 587.

236. See generally Fordham, *supra* note 34, at 1512–21.

237. See generally *id.* at 1519–20.

238. See generally *id.* at 1518 (noting research indicating that some people with severe physical disabilities report greater life satisfaction than people without disabling conditions).

in this way.

Thus, a less blindsighted version of hedonic damage claims would permit awards for future hedonic injury that, *looking forward*, reflect the cost of placing plaintiffs in the hedonic positions that they would have been in but for defendants' wrongful conduct.<sup>239</sup> Juries, for example, might award plaintiffs amounts that reflect the costs to plaintiffs of overcoming any social or environmental barriers to pleasure that resulted from the defendants' wrongful conduct (including, perhaps, the costs associated with the time and effort associated with learning and experiencing new pleasures).<sup>240</sup> Similarly, plaintiffs should also be able to recover for both the economic and *noneconomic* costs of social discrimination and exclusion that they are likely to experience in the future.<sup>241</sup>

These very serious future injuries are worthy of significant compensation. Moreover, the forward-looking focus of the analysis changes the narrative in ways that will permit plaintiffs to pursue hedonic damage claims for future hedonic injury, without the stigmatizing effects of current practices. Specifically, the forward-looking approach shifts the focus away from biased assessments of plaintiffs' bodies and places more emphasis on plaintiffs' freedom to engage in pleasurable activities, without unwanted interference. Rather than requiring plaintiffs to argue that they have lost the capacity to have a "normal" life, hedonic damage claims would compensate plaintiffs for the defendants' interference with their right to self-determination and liberty in the hedonic realm.

Framing plaintiffs' claims in this way also opens up the potential for other types of remedies. To give one example, if we focused more on the future social harms that are likely to flow from disabling injuries,

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239. See discussion *supra* notes 112–115 and accompanying text (explaining the difference between forward looking relief and backward looking relief, in the context of damages).

240. Some defendants may attempt to argue that they should not be liable for damages stemming from social prejudice on the ground their conduct was not the proximate cause of any social exclusion. Because social exclusion is an entirely foreseeable result of conduct that leads to a disabling injury, however, these arguments should fail. See generally Dobbs, *supra* note 22, at 443–45 (providing an overview on the principles of proximate cause).

241. Bagenstos and Schlanger make a similar argument in the context of *economic* damages. See Bagenstos & Schlanger, *supra* note 14, at 791. My argument here is for the recovery of the *non-economic* aspects of these future injuries. With the inclusion of testimony from third-party experiential experts, both types of compensation—for economic and non-economic costs of social harm—will flow more naturally in tort litigation. The downside of this approach is that the consideration of future social harm might prompt the jury to blame someone other than the defendant for plaintiffs' injuries. With proper jury instructions, however, the risks can be minimized and plaintiffs should be able to recover compensation for the future injuries of social discrimination.

plaintiffs rendered disabled by defendants might be able to recover for unjust enrichment.<sup>242</sup> Unjust enrichment awards compensate plaintiffs when defendants unfairly enrich themselves at plaintiffs' expense.<sup>243</sup> Importantly, damage calculations for unjust enrichment tend to focus on defendants' gain rather than plaintiffs' losses.<sup>244</sup> For example, in other contexts, courts have relied on a theory of unjust enrichment to strip defendants of benefits obtained unfairly at plaintiffs' expense.<sup>245</sup> In a similar way, in the context of torts involving disabling injuries, courts might rely on a theory of unjust enrichment to strip the defendants of any benefits that they obtained as a result of their wrongful conduct. For example, a court might strip a defendant product manufacturer of any profits that it obtained as a result of exposing plaintiffs to a product that was not sufficiently tested.

Taking these principles more seriously in tort litigation involving disabling injuries might also trigger some interesting conversations about other ways in which defendants may benefit from disabling others. Some disability rights activists argue, for example, that people without disabilities benefit from disabling others because it places people without disabilities in a more privileged social and economic position.<sup>246</sup> Legal actors and defendants need to hear these views. These conversations, in turn, might eventually prompt damage awards that take into account any unfair social and economic advantage that defendants gain from plaintiffs' disablement.

Reframing narratives in terms of rights and accountability might also illuminate the way in which tort litigation's legal process is itself a form of remedy for plaintiffs, with its own rewards and potential impact on plaintiffs' recovery.<sup>247</sup> Many scholars have noted the value of

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242. See generally RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (2000); see also James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55, 57 (2007).

243. See Rogers, *supra* note 242, at 57.

244. Andrew Kull, *Rationalizing Restitution*, 83 CALIF. L. REV. 1191, 1224 (1995).

245. See, e.g., *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 508 F. Supp. 798, 800–01 (S.D.N.Y. 1981) (ordering George Harrison to disgorge twenty-five percent of the profits from the hit *My Sweet Lord* to the plaintiff); *Olwell v. Nye & Nissen Co.*, 26 Wash. 2d 282, 287, 173 P.2d 652, 654 (1947) (ordering defendant to compensate the plaintiff for the amount of labor costs saved by the defendant after using plaintiff's egg washing machine without the plaintiff's permission).

246. See Hunt, *supra* note 47, at 9 (describing the disabling of others as possibly motivated by a "need to safeguard" the "security" of those without disabling conditions); see also Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1638–40 (1999) (making a similar argument in the race context).

247. For similar arguments in the civil rights context, see Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413–14 (1989); Richard

storytelling for injured plaintiffs.<sup>248</sup> At the same time, some of the most financially successful plaintiffs' lawyers also argue that plaintiffs' lawyers should focus more on understanding plaintiffs' views of their own cases.<sup>249</sup> These lawyers claim that listening more carefully to plaintiffs' stories is not only the right thing to do in terms of providing meaningful representation to their clients but also more likely to lead to successful outcomes for the attorneys.<sup>250</sup>

## CONCLUSION

This Article encourages a fundamental revision of the way that tort litigation portrays disabilities. It begins with the observation that legal actors in tort litigation do not view people with physical disabilities the way those individuals view themselves. Although many legal actors view disability as a tragedy, most injured plaintiffs adjust to their disabilities and go on to lead happy lives. The predisposition to view disabilities as tragedies is a form of institutional blindness. Legal actors in tort litigation can physically see disability, but they do not perceive disability as individuals actually experience it.

To address tort litigation's blindness, this Article offers several proposed changes. First, it argues that we need to be more cautious about tort litigation's current over-reliance on medical experts. Second, the Article suggests that tort litigation should focus instead on making more space for testimony from plaintiffs and others with similarly disabling injuries. Third, the Article calls for changing the way we talk about disabilities in tort litigation. Instead of presenting plaintiffs with disabling injuries as tragedies, legal actors should reframe the litigation in ways that will portray plaintiffs in more empowering ways. One way to do this, the Article suggests, is to focus more heavily on defendants'

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Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 95–96 (1990) [hereinafter Delgado, *When a Story is Just a Story*].

248. Delgado, *When a Story is Just a Story*, *supra* note 247, at 95–96; *see also* Elizabeth Emens, *Shape Stops Story*, NARRATIVE, 2007, at 130–31 (asserting that storytelling can contribute to client empowerment but also arguing that sometimes lawyers should protect their clients' right not to tell a story).

249. *See, e.g.*, GERRY SPENCE, GIVE ME LIBERTY!: FREEING OURSELVES IN THE TWENTY-FIRST CENTURY 304–05 (1998) (describing the methods taught at Spence's trial lawyer college, including how to "crawl into the hides" of clients, "experience their pain," and understand their witness); *see also* Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1, 22 (2001) (describing Spence's techniques, which encourage intense client identification).

250. Cole, *supra* note 249, at 22; *see also* Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 564–65 (1994).

interference with plaintiffs' liberty, while placing less emphasis on plaintiffs' bodies. If we can make these changes, tort litigation will be able to play a more empowering role in the lives of plaintiffs and contribute more constructively to our understanding of how disability is produced.