Making It Right: Preserving Wrongful Birth After *Dobbs*

NATASHA STATZ-GEARY*

In overturning Roe v. Wade*, the U.S. Supreme Court opened the floodgates for anti-abortion laws to sweep the country, radically transforming the legal landscape surrounding prenatal care. On the criminal side, centuries-old abortion bans have been given new life following* Dobbs*. On the civil side, statutes have empowered private citizens to sue anyone who "aids and abets" an abortion. These concerns have dominated much of the legal discourse following* Dobbs*, but another civil cause of action implicated in the decision has received little attention: wrongful birth.*

Wrongful birth is a medical malpractice claim brought by parents who assert that but for a doctor's negligent failure to detect a fetal abnormality, they would have terminated the pregnancy. Despite criticisms from disability activists and anti-abortion groups alike, the tort has served its dual aims of compensating victims and deterring negligent care for over fifty years. Scholars have long believed that the cause of action was made possible by Roe*; following* Roe*'s reversal, the tort's future is unclear. Wrongful birth is in jeopardy at the precise moment when women need it most. Deterrence and financial compensation are more important than ever in a world with more pregnancies and ambiguous legal standards.*

*This Note examines wrongful birth's viability post-*Roe *and argues that the cause of action can remain available. After reviewing the tort's history and arguing that it is not dependent on* Roe*, this Note proposes three novel theories plaintiffs can utilize to recover for wrongful birth: (i) an expanded "loss of deliberation and preparation" theory that encapsulates the harm flowing from delayed diagnosis and the lost chance to travel for a legal abortion; (ii) a statutory interpretation analysis through which plaintiffs can argue that their child's condition would have fallen under an abortion-ban exception for fetal anomalies; and (iii) a choice of law analysis for plaintiffs whose prenatal care crossed state borders.*

---

* Executive Managing Editor, Colum. J.L. & Soc. Probs., 2023–24. J.D. 2024, Columbia Law School. The author thanks her Note Advisor, Professor Philip Genty, for his guidance and thoughtful comments; the author is also indebted to the editorial staff at the *Columbia Journal of Law and Social Problems* for their hard work and helpful feedback.

CONTENTS

INTRODUCTION 115
I. HISTORY OF WRONGFUL BIRTH 120
A. Intersection with Disability Rights 120
B. Relation to *Roe* 124
II. WHY WRONGFUL BIRTH MUST REMAIN VIABLE 128
A. Compensation and Deterrence Are Increasingly Important 128
1. *Financial Difficulties* 129
2. *Increased Prevalence of Birth Defects* 131
3. *Impacts on Maternal Mental Health* 132
4. *Preserving Prenatal Testing as the Standard of Care* 132
B. Other Solutions Are Insufficient 134
1. *Other Common Law Torts are Insufficiently Protective* 135
2. *Contract Law is Insufficient* 136
3. *Legislative Alternatives are not as Protective* 137
4. *Investing More Resources is Only a Partial Solution* 139
III. HOW PLAINTIFFS CAN STILL RECOVER FOR WRONGFUL BIRTH IN ABORTION-BAN STATES 140
A. Loss of Deliberation Theory 141
1. *For Parents Who Claim They Would Not Have Aborted* 142
2. *For Parents Who Claim They Would Have Aborted* 146
B. Statutory Interpretation 148
C. Choice of Law: Negligent Care Across State Lines 152
IV. POLICY IMPLICATIONS 157
CONCLUSION 159

INTRODUCTION

When Dortha Biggs was two and a half weeks pregnant with her second child, she broke out in a pinpoint rash all over her body.[1] It was 1968, just a few years after the rubella epidemic plagued the country. Often referred to as "German measles," rubella can infect the cells of a fetus if the mother contracts the disease during the first two months of pregnancy.[2] At the time, fetal exposure to rubella was known to cause an array of birth defects, including deafness, blindness, heart disease, neuromuscular tightness, seizures, and extreme intellectual disabilities.[3]

Concerned that the rash might be rubella, Dortha spoke to her physician, who concluded the rash was merely a reaction to an antibiotic and assured Dortha not to worry about the health of her fetus. Dortha trusted her doctor and, believing the fetus to be healthy, fought hard to save her pregnancy each of the three times her body went into labor. On March 8, 1969, Dortha's daughter Lesli Jacobs[4] was born deaf, blind, and with cerebral palsy, a seizure disorder, and severe brain damage. The rash was in fact rubella, just as Dortha had feared.

In her first year of life, Lesli would spend 100 days in the hospital and undergo an open-heart operation. She did not learn to sit up on her own until she was four years old. At one point, she took over forty medications daily.[5] By the time Lesli was six years old, her family owed $21,472 in medical bills.[6] Dortha sued her doctor, claiming that had she been properly diagnosed with rubella, she would have terminated her pregnancy. "Had I known [Lesli] would suffer as she has suffered, there's no way I would have made a decision other than to have had an abortion. . . . I

---

1. *See* Wayne Drash, *Mom at Center of 'Wrongful Birth' Debate: If Lawmakers Cared, They Would Have Called*, CNN (Apr. 4, 2017), https://www.cnn.com/2017/04/04/health/texas-wrongful-birth-dortha-lesli/index.html [https://perma.cc/34QT-7N3X].

2. *See* Alexis Pedrick & Elisabeth Berry Drago, *Roe v. Wade v. Rubella*, SCI. HIST. INST. (Dec. 17, 2019), https://www.sciencehistory.org/distillations/podcast/roe-v-wade-v-rubella [https://perma.cc/8FDB-JVK8]; Drash, *supra* note 1.

3. *See* Drash, *supra* note 1.

4. At the time of Lesli's birth, Dortha was married and used her husband's last name, Jacobs. The marriage fell apart shortly after Lesli's birth, in part due to the stress of her care and the subsequent lawsuit. *See id.*

5. *See id.*

6. Worth approximately $126,500 in August 2023. CPI Inflation Calculator, BUREAU OF LABOR STAT., https://data.bls.gov/cgi-bin/cpicalc.pl [https://perma.cc/YZR3-UGNQ].

love Lesli with all my heart, but I would never have let her suffer like this, ever."[7] Because abortion was illegal in Texas at the time Dortha was pregnant, she would have traveled to Colorado for the procedure.

In 1975, Dortha's suit came before the Supreme Court of Texas, which for the first time in the state's history recognized that parents can sue for wrongful birth.[8] Ultimately, Dortha settled with her doctor and received approximately $120,000,[9] which was placed in a special needs trust for Lesli. "Not one nickel" has ever been used for anything or anyone other than Lesli.[10]

To this day, the only way Dortha and Lesli can communicate is through touch. Dortha has long worried about her daughter's quality of life: "Not hearing or seeing, I've often thought . . . this is just a dark, silent world for her."[11] Lesli is immobile. Her hair must be kept shorter than an inch—if not, she will pull it out. One of her eyes has been removed because of cataracts, and the other eye is so damaged it is rarely open. She receives round-the-clock care in a group home in Texas. Lesli's continuing care is expensive, but Dortha pays out-of-pocket to ensure the trust has enough money for Lesli once Dortha is gone.[12]

Lesli and Dortha's case is not uncommon. One in every thirty-three babies born in the United States each year is affected by one or more fetal abnormalities, which translates to nearly 120,000 affected babies annually.[13] Birth defects, also called congenital anomalies or genetic disorders, vary in severity,[14] but they can be financially and emotionally taxing. The government has launched

---

7. Drash, *supra* note 1.

8. Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975).

9. *See* Drash, *supra* note 1. This sum is worth approximately $707,000 in August 2023. CPI Inflation Calculator, BUREAU OF LABOR STAT., https://data.bls.gov/cgi-bin/cpicalc.pl [https://perma.cc/YZR3-UGNQ].

10. Drash, *supra* note 1.

11. Pedrick & Drago, *supra* note 2.

12. *See* Drash, *supra* note 1.

13. *See What Are Birth Defects?* CTR. FOR DISEASE CTR. AND PREVENTION, https://www.cdc.gov/ncbddd/birthdefects/facts.html [https://perma.cc/PC8C-AZ3X] (last updated June 28, 2023).

14. Some anomalies are mild and non-life-threatening, such as a cleft lip; other conditions, such as Down Syndrome or spina bifida, may significantly impact the course of the baby's life and require lifelong accommodations. The most severe abnormalities are inevitably fatal—anencephaly, for example, is 100% lethal within the first year of life. *See* P.A. Baird & A.D. Sadovnick, *Survival in Infants with Anencephaly*, 23 CLINICAL PEDIATRICS 268, 268 (1984). A baby born with anencephaly has a 60% chance of dying within the first twenty-four hours after birth, and only 5% of those who survive the first twenty-four hours will still be alive by the seventh day. *See id.*

several successful public advocacy campaigns aimed at reducing the prevalence of certain defects, such as encouraging sufficient folic acid intake to prevent neural tube defects or advising against consuming alcohol, drugs, or tobacco during pregnancy. Nevertheless, preventative behavioral measures do not impact the large percentage of anomalies caused by genetics. As such, robust prenatal testing for fetal anomalies has emerged—albeit with controversy—as a way for parents to screen for abnormalities. Since the inception of amniocentesis and the ultrasound in the 1970s and 1980s, prenatal screening has become the standard of care in the United States.[15]

When this standard of care is not met, parents can turn to wrongful birth, the species of medical malpractice that was available to Dortha. A traditional negligence tort has four elements that must be proven: (i) the defendant owed a duty to the plaintiff; (ii) the defendant breached the duty; (iii) the plaintiff suffered an injury; and (iv) the injury was caused by the breach.[16] Duty and breach are straightforward in wrongful birth; injury and causation are the more controversial elements. While early courts first identified the injury as the birth of a disabled child, the harm was later reconceptualized as the loss of the parents' autonomy and decision-making.[17]

Just like any other tort, wrongful birth makes the plaintiff whole via monetary damages, deters negligence, and encourages due care. The latter two benefits are particularly relevant for medical malpractice claims, as the medical community itself defines the standard of care via profession-wide customs. Thus, as doctors practice medicine with increasing judiciousness to avoid liability, they raise the standard of care, which is then maintained through the potential for liability should the standard not be met.

---

15. *See* Elizabeth Weil, *A Wrongful Birth?*, N.Y. TIMES MAG. (Mar. 12, 2006), https://www.nytimes.com/2006/03/12/magazine/a-wrongful-birth.html [https://perma.cc/KZ57-2NDG].

16. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 657–58 (2001).

17. *See* Pilar N. Ossorio, *Prenatal Genetic Testing and the Courts, in* PRENATAL TESTING AND DISABILITY RIGHTS 308, 323 (Erik Parens & Adrienne Asch eds., 2000). "Courts following this new harm analysis have validated the idea that diminishing somebody's decision-making capacity can be a harm. The analysis and justification are similar to that used for informed consent." *Id.* For causation, because the doctor's failure to diagnose deprived parents of the option to terminate, the breach can be said to have caused the injury, even though the doctor did not literally cause the child's disability. *See id.* at 323.

A high standard of care in prenatal screening benefits all women,[18] regardless of their ultimate decision to terminate or not. Beyond allowing women to make an informed choice about whether or not to continue a pregnancy, screening can alert physicians to abnormalities that can be treated while the fetus is still in the womb—for example, congenital diaphragmatic hernia[19] can be significantly ameliorated through fetoscopic endotracheal occlusion while the fetus is in utero.[20] Even for conditions that cannot be treated and for mothers who choose not to terminate, prenatal screening empowers women to prepare for their child's care by, for example, seeking out specialized doctors in advance or relocating to be closer to support systems. Wrongful birth serves as a backstop for these interests and provides parents like Dortha Biggs with the money needed to pay for adequate care for their children.

Yet the future of wrongful birth is unsteady following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe v. Wade* and eliminated the constitutional right to abortion. For years, legal scholars have theorized that wrongful birth was made possible by *Roe*, given that the missed opportunity to abort is the causal connection between the negligence and the birth of the disabled child.[21] *Dobbs* itself hinted that the repeal of *Roe* may prevent eugenic abortions, noting that abortion bans can be justified by a state's legitimate interest in preventing "discrimination on the basis of race, sex, or

18. The author is well aware that not everyone who becomes pregnant is a woman, yet because most literature on this topic refers to "women" and "mothers," this Note uses these gendered terms for clarity and consistency.

19. A congenital diaphragmatic hernia occurs when abdominal fluid enters the chest through a hole in the diaphragm, which in turn restricts lung development. *See* Ahmet Alexander Baschat, *Preventing and Treating Birth Defects: What You Need to Know*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/preventing-and-treating-birth-defects-what-you-need-to-know [https://perma.cc/7KUK-85RC].

20. *See id.*

21. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 371 (5th ed. 1984) (claiming that *Roe* made wrongful birth possible); Barbara Pfeffer Billauer, *Re-Birthing Wrongful Birth Claims in the Age of IVF and Abortion Reforms*, 50 STETSON L. REV. 85, 107 (2020) (same); James Bopp, Jr., Barry A. Bostrom & Donald A. McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 DUQ. L. REV. 461, 466–67 (1989) (collecting sources); Haley Hermanson, *The Right Recovery for Wrongful Birth*, 67 DRAKE L. REV. 513, 526 (2019); Sofia Yakren, *"Wrongful Birth" Claims and the Paradox of Parenting a Child with a Disability*, 87 FORDHAM L. REV. 583, 597 (2018).

disability."[22] Further, the one author who has discussed wrongful birth post-*Roe* made the grim prediction that, without *Roe*, wrongful birth claims will likely fail, and women will need to rely on traditional torts like negligent infliction of emotional distress or on breach of contract claims instead.[23]

With *Roe* overturned, it is time to question the long-standing assumption that wrongful birth was made possible by, and thus is still dependent upon, the constitutional right to abortion. This Note argues that the cause of action *can* survive in a post-*Roe* world. Part I details the history of the tort, including its relation to *Roe* and its fraught intersection with disability rights, and then surveys the current landscape of where it is recognized. Part II underscores why the tort is now more important than ever, with a particular focus on racial and economic disparities, and why potential alternatives to wrongful birth are insufficiently protective.

Part III proposes three novel legal approaches through which parents can still recover for wrongful birth in the post-*Roe* world: (i) under an expanded "loss of deliberation and preparation" theory that highlights the unique harms flowing from postnatal—rather than prenatal—diagnosis for parents who choose not to abort, and the right to interstate travel for mothers who want to terminate; (ii) under a statutory interpretation claim that the fetus's condition would have qualified for termination pursuant to narrow statutory exceptions for medically futile pregnancies; and (iii) under a choice of law claim for cases in which prenatal care crosses state lines. Part IV addresses potential drawbacks to expanding wrongful birth's protections, but ultimately concludes the tort's importance outweighs these concerns.

---

22. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (emphasis added) (suggesting a policy that serves the legitimate state interest of preventing "discrimination on the basis of race, sex, or disability" may withstand rational basis review).

23. *See* E. Travis Ramey, Wrongful Birth After Dobbs 40–41, 74–76 (Nov. 3, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4263215 [https://perma.cc/6HZ9-T5VN].

I. HISTORY OF WRONGFUL BIRTH

A. INTERSECTION WITH DISABILITY RIGHTS

Wrongful birth exists at the intersection of women's rights and disability rights; so, coincidentally, does rubella. Rubella—the "R" in the MMR vaccine—is mild for those infected but devastating for a fetus. "Congenital rubella syndrome" (CRS) refers to the host of birth defects it causes for babies like Lesli Jacobs: deafness, blindness, and severe brain damage. In its wake, women who were previously anti-abortion suddenly found themselves seeking abortions. "Because of who these women were, but more importantly how they were portrayed by the media—white, middle-class, responsible, married mothers—they changed the national conversation around abortion from something rooted in sexual depravity and danger to something rooted in the cares and concerns of motherhood."[24]

In addition to laying the groundwork for legalizing abortion, the rubella epidemic also contributed to the burgeoning disability rights movement. Despite this shared heritage, these two movements have long existed in tension. The first significant wrongful birth case, *Gleitman v. Cosgrove*, exemplified this friction in 1967.[25] Sandra Gleitman's physician failed to advise her that her rubella infection posed serious risks to her fetus.[26] Gleitman sued her doctor, claiming she would have terminated the pregnancy had she received a proper warning.[27] Although the Supreme Court of New Jersey accepted the truth of this claim, it nonetheless rejected the cause of action on public policy grounds and condemned the parents for treating their child like "prize cattle."[28]

These concerns have been well-documented in legal scholarship. Disability scholars have grappled with how to object to eugenic abortions while generally remaining pro-choice. Activist Adrienne Asch and others have done so using the "any-particular distinction": while the garden-variety abortion reflects a woman's desire not to bring *any* fetus to term, a eugenic abortion

24. Pedrick & Drago, *supra* note 2.
25. 227 A.2d 689 (N.J. 1967).
26. *See id.* at 690.
27. *See id.* at 691.
28. *Id.* at 693.

reflects a woman's desire not to bring this *particular* fetus to term.[29] The decision "to abort an otherwise desired fetus . . . sends the message that the lives of those with disability are not valuable and that 'the disability makes the child unacceptable.'"[30]

This harm is amplified in the wrongful birth context: parents must publicly claim that they would have aborted their child had they known of the prenatal diagnosis. The "whispered innuendo" of a selective abortion becomes a megaphone announcement, preserved forever in court records.[31] While some argue that the children may not understand the message being communicated due to their youth or disability, Professor Wendy Hensel argues that "it is precisely when the most vulnerable members of society are unaware of potential danger that society should protect them most vigorously."[32]

Critics rightfully note that selective abortions are often a bandage on the gaping wound of an ableist, discriminatory society:

> [I]f people with disabilities were fully integrated into society, then there would be no need for the testing. . . . [I]f a given health status turned out to be a handicap, that would be because of societal, not personal, deficits; the appropriate response would be to change society so that the person could live a full life with a range of talents, capacities, and difficulties that exist for everyone.[33]

Of course, this argument does not apply to all diagnoses that may lead to selective abortion. Society could (and should) adapt to conditions like Down Syndrome, spina bifida, deafness, and blindness; for example, during the mid-19th century, the island of Martha's Vineyard had such a high incidence of deafness that nearly all non-deaf residents learned sign language to accommodate their neighbors.[34] In contrast, inevitably fatal

---

29. *See* Erik Parens & Adrienne Asch, *The Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 15 (Erik Parens & Adrienne Asch eds., 2000).

30. Nancy Press, *Assessing the Expressive Character of Prenatal Testing: The Choices Made or the Choices Made Available*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 214 (Erik Parens & Adrienne Asch eds., 2000).

31. *See* Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 172 (2005).

32. *Id.* at 173–74.

33. Parens & Asch, *supra* note 29, at 23.

34. *See* Cari Romm, *The Life and Death of Martha's Vineyard Sign Language*, ATLANTIC (Sept. 25, 2015), https://www.theatlantic.com/health/archive/2015/09/marthas-vineyard-sign-language-asl/407191/ [https://perma.cc/6DT8-69SS].

conditions and severe brain damage present more challenging cases. Critics often ignore that abortion and wrongful birth are generally only pursued in these more extreme cases and that a policy like the one on Martha's Vineyard would do little to lessen the suffering of children like Lesli Jacobs.[35]

Despite any shortcomings, these disability arguments have successfully been used to curtail wrongful birth claims. For example, when the Court of Appeals of Michigan overturned its prior precedent recognizing wrongful birth, it claimed the tort was a gateway to eugenics:

If one accepts the premise that the birth of one 'defective' child should have been prevented, then it is but a short step to accepting the premise that the births of classes of 'defective' children should be similarly prevented . . . for the benefit of society as a whole through the protection of the 'public welfare.' This is the operating principle of eugenics.[36]

Legislative enactments draw on similar concerns. Even beyond the nine states that have statutes explicitly barring wrongful birth, seventeen states have passed Reason-Based Abortion (RBA) bans.[37] RBA bans prohibit abortions motivated by sex, race, or disability.[38] By explicitly making it illegal to seek an abortion due to a fetal anomaly, RBAs effectively preclude wrongful birth as a cause of action. At least three of these RBA bans mention "eugenics" in their statements of purpose.[39] For example, Tennessee's RBA ban states that "the use of abortion to achieve eugenic goals is not merely hypothetical."[40]

---

35. *See* Lori B. Andrews, *Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks*, 29 HOUS. L. REV. 149, 157 (1992) ("Courts consider the severity of the disorder as a factor in assessing the health care professional's liability for failing to provide information about genetic risks."). Of the reported decisions in this Note's states of interest, the conditions tend toward the extreme end of the birth defect spectrum: Congenital Rubella Syndrome (including Lesli Jacobs' case); Down Syndrome; Duchenne muscular dystrophy causing severe mobility impairments and premature heart failure; spina bifida, missing limbs and organs, and hydrocephaly resulting in death by age six; and Trisomy 9 Mosaic Syndrome. For examples, see *infra* note 62; Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); Davis v. Bd. of Supervisors of La. St. Univ., 709 So.2d 1030 (La. Ct. App. 1998); James G. v. Caserta, 175 W.Va. 406 (W. Va. 1985).

36. Taylor v. Kurapati, 600 N.W.2d 670, 688 (Mich. Ct. App. 1999).

37. Sonia M. Suter, *Why Reason-Based Abortion Bans Are Not a Remedy Against Eugenics: An Empirical Study*, 10 J. L. BIOSCI. 1, 22, 51 (2023) (internal quotations omitted).

38. *See id.* at 3. In the context of RBAs, "disability" encompasses congenital anomalies. *See id.* at 28.

39. *See id.* at 22.

40. 1 MISS. CODE ANN. § 41-41-403(1)(e) (citations omitted) (quoting Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1783, 1787 (2019) (Thomas J., concurring)).

This line of reasoning is nothing new: "the discursive use of eugenics to smear anything remotely associated with [abortion] . . . has been going on a long time."[41] Yet the invocation of eugenics is arguably misplaced. On a semantic level, eugenic concerns are limited to hereditary traits, but even more importantly, RBA ban states are generally not anti-eugenic. Professor Sonia Suter examined "laws related to sterilization, conjugal visits, incest, assisted reproductive technologies, and substance use during pregnancy" and found "that RBA-ban states often do not impose anti-eugenic remedies beyond RBA bans."[42] Other scholars note that none of these bans "have been proposed as part of a broader disability rights policy agenda . . . making it clear that proponents are not adopting the cause of disability rights wholesale and raising the question why [RBA bans] are the intervention of choice."[43]

Despite this lack of genuine commitment to disability rights, critics still paint parents—particularly mothers—who bring wrongful birth claims as bad parents at best and eugenicists at worst. The media, courts, and scholars all erroneously assume a mother's testimony in a wrongful birth case "reflects [the] plaintiff-mother's actual lack of acceptance and love for her child," thereby "reinforc[ing] a longstanding feminist critique that society fails to see mothers as human beings entitled to their own complex emotional experiences."[44] Mothers themselves have acknowledged the often-contradictory emotions they have regarding wrongful birth. One mother identified putting "this kind of pain into words" as the hardest part of wrongful birth: "To have to specify what would make me terminate a pregnancy, to imagine my life today without a toddler. There's no escape from knowing that the opportunity for mercy quietly slipped by. . . . But the most consuming, language-defying pain is just the other side of the most overwhelming joy."[45]

---

41. Eli Rosenberg, *Clarence Thomas Tried to Link Abortion to Eugenics. Seven Historians Told The Post He's Wrong*, WASH. POST (May 30, 2019), https://www.washingtonpost.com/history/2019/05/31/clarence-thomas-tried-link-abortion-eugenics-seven-historians-told-post-hes-wrong/ [https://perma.cc/3XZS-9K4Z].

42. Suter, *supra* note 37, at 6.

43. Nina Roesner et al., *Reason-Based Abortion Bans, Disability Rights, and the Future of Prenatal Genetic Testing*, 48 AM. J. L. & MED. 187, 192 (2023).

44. Yakren, *supra* note 21, at 602–03.

45. Jennifer Gann, *Raising a Child with Cystic Fibrosis*, N.Y. MAG. (Nov. 27, 2017), https://www.thecut.com/2017/11/raising-child-with-cystic-fibrosis.html [https://perma.cc/7ZZS-RZ7P].

Another mother noted, "Who wants to say 'I wish this child wasn't here'? What kind of mother is going to feel okay saying that?"[46] Yet most women have paradoxical feelings about motherhood in general, both adoring their children and recognizing that they have made sacrifices for them.[47] Women are not typically asked, however, to publicly explain the intricacies of this ambivalence. This can make it seem as though mothers bringing wrongful birth claims are strange, or even monstrous, for having these feelings. "[M]aternal well-being in the wrongful birth context and beyond" would improve if, instead of shaming mothers who bring wrongful birth claims, society accepted and "[acknowledged] the universal experience of maternal ambivalence."[48]

Any discussion of wrongful birth must navigate the tension between disability rights and maternal wellbeing. The disability community brings valid and important critiques to the conversation around the tort, but in practice parents—and especially mothers—in wrongful birth suits are often unfairly maligned for the painful choices they make in their hardest moments.

B. RELATION TO *ROE*

Despite these longstanding criticisms from the disability community, nearly half of the states have recognized wrongful birth as a valid cause of action.[49] Perhaps as an accident of history or due to the influence of *Roe*, this trend did not begin until after 1973. As such, most scholarship has assumed that the cause of action was only made possible by *Roe*.[50] Indeed, some state courts

46. Elizabeth Picciuto, *Parents Sue for 'Wrongful Birth'*, DAILY BEAST (Apr. 14, 2017), https://www.thedailybeast.com/parents-sue-for-wrongful-birth [https://perma.cc/8UD4-RGFQ]; *see also* Weil, *supra* note 15 ("The moral quandary we find ourselves in pits the ideal of unconditional love of a child against the reality that most of us would prefer not to have that unconditional-love relationship with a certain subset of kids.").

47. *See* Yakren, *supra* note 21, at 605.

48. *Id.*

49. *See* Billauer, *supra* note 21, at 90 n.34; *see also infra* p. 13.

50. *See, e.g.*, Rachel Tranquillo Grobe, *The Future of the "Wrongful Birth" Cause of Action*, 12 PACE L. REV. 717, 718 (1992) ("Prior to *Roe v. Wade*, parents could not sustain causes of action for wrongful birth injuries."); *see also* KEETON ET AL., *supra* note 21, at 371; Billauer, *supra* note 21, at 107; Hermanson, *supra* note 21, at 526; Yakren, *supra* note 21, at 597; Ramey, *supra* note 23, at 40; Bopp, Jr., *supra* note 21, at 466–67 (collecting sources).

have implied as much when recognizing wrongful birth.[51] Yet the case law suggests that not all states root their legal theory of wrongful birth in *Roe*. Dortha Biggs' case was decided in 1975, but at the time she was pregnant in 1967, abortion was illegal in Texas. The court nonetheless found that Dortha had suffered a cognizable harm because she could have traveled to another state to seek a legal abortion.[52] That same year, the Supreme Court of Wisconsin recognized the cause of action even though the underlying pregnancy and birth occurred prior to *Roe*, when abortion was still illegal in Wisconsin.[53] Thus, in at least Texas and Wisconsin, the cause of action was first understood to be separate from the legality of abortion in the state.

Federal courts espoused similar views. In 1973, just ten days before *Roe* was decided, Anna Robak gave birth to a daughter affected by congenital rubella syndrome.[54] Early in her pregnancy, she had visited a military hospital, seeking treatment for symptoms consistent with rubella.[55] Although she tested positive for the disease, doctors never informed her of her diagnosis and never warned her of the disease's impact on a fetus. She and her husband sued the United States under the Federal Tort Claims Act.[56] In making an ultimately successful *Erie* prediction recognizing wrongful birth,[57] the Seventh Circuit rejected the government's claim that because abortion was illegal in Alabama at the time, no proximate cause existed:

---

51. *See, e.g.*, Smith v. Cote, 513 A.2d 341, 346 (N.H. 1986) (acknowledging the influence of *Roe* in the New Hampshire Supreme Court's decision to recognize wrongful birth as a cause of action in the state); Plowman v. Fort Madison Cmty. Hosp., 896 N.W. 2d 393, 409 (Iowa 2017) ("We conclude Iowa public policy would not permit recovery for wrongful birth if the abortion in question would be illegal."). Yet even these cases indicate ambiguity—an abortion in a state other than Iowa is still not illegal, and since *Smith*, New Hampshire has repealed its pre-*Roe* ban and added an amendment to the state constitution protecting the right of privacy. CTR. FOR REPROD. RTS., *New Hampshire*, https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/YJ6Z-SAXH] (last updated Sept. 17, 2023). Regardless, these states are outside the scope of this Note's focus.

52. *See generally* Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975).

53. *See* Dumer v. St. Michael's. Hosp., 233 N.W.2d 372, 377 (Wis. 1975).

54. *See* Robak v. U.S., 658 F.2d 471, 473 (7th Cir. 1981). Anna's daughter Jennifer "is industrially blind and has a severe to profound hearing loss; she cannot speak intelligibly. . . . She will need deaf-blind care and supervision for the remainder of her life, as well as further operations." *Id.*

55. *See id.* Her husband was stationed at Fort Rucker, Alabama while serving in the U.S. Army. *See id.*

56. *See id.*

57. *See id.* at 475. Alabama subsequently recognized wrongful birth as a valid cause of action. *See* Keel v. Banach, 624 So.2d 1022, 1029 (Ala. 1993).

The fallacy of this argument is obvious. Mrs. Robak could have travelled to any of the states that then permitted abortions. . . . It is quite common for persons to travel to other jurisdictions in order to avoid restrictive laws in their home state or to take advantage of more lenient laws in another state, and it is perfectly lawful for one to advise another to do so. People travel to Nevada to gamble or to gain a quick marriage or divorce; they travel across state lines in order to purchase liquor cheaper.[58]

In addition to these cases, even courts that refused to recognize the cause of action acknowledged that wrongful birth and *Roe* exist separately. In *Gleitman*, decided before *Roe*, the court "assume[d] that somehow or somewhere Mrs. Gleitman could have obtained an abortion that would not have subjected participants to criminal sanctions."[59] Thus, recovery was not denied on the grounds related to the legality of abortion per se; it was rejected on public policy grounds and the court's discomfort with recognizing the birth of a child as a harm.[60]

Decades later, the Court of Appeals of Michigan noted, "In reality [ ] wrongful birth cases are not abortion cases. If the U.S. Supreme Court had never decided *Roe v. Wade*, the *Eisbrenner* decision [establishing wrongful birth in Michigan] would have been the same, because it takes its basic rationale from *Troppi*, a pre-*Roe v. Wade* decision."[61] This type of reasoning is almost certainly intended to eliminate wrongful birth without running afoul of *Roe*. By separating the cause of action from *Roe*, it allows courts to eliminate one without affecting the other. Using the inverse of this logic, even though *Roe* is overturned, wrongful birth should be unaffected.

The repeal of *Roe* impacts the entire country, but most relevant to this Note are the states that have banned abortion following the repeal of *Roe* yet still have precedents recognizing wrongful birth

---

58. *Robak*, 658 F.2d at 476–77; *see also* Phillips v. U.S., 508 F. Supp. 544, 550 (D.S.C. 1981) (making an *Erie* prediction that recognized wrongful birth in federal court while noting that even before *Roe*, the legitimacy of state courts invoking "polic[ies] disfavoring abortion" to deny recognition of wrongful birth was "suspect").

59. Gleitman v. Cosgrove, 227 A.2d 689, 691 (N.J. 1967); *see also* David D. Wilmoth, *Wrongful Life and Wrongful Birth Causes of Action: Suggestions for a Consistent Analysis*, 63 MARQ. L. REV. 611, 625–26 (1980) (noting that *Gleitman* predates *Roe*).

60. *See* Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979) (noting that the majority's decision in *Gleitman* was premised on "substantial (public) policy reasons" that prevented the court from awarding tort damages "for the denial of the opportunity to take an embryonic life") (quoting *Gleitman*, 227 A.2d at 693).

61. Taylor v. Kurapati, 600 N.W.2d 670, 687 (Mich. Ct. App. 1999).

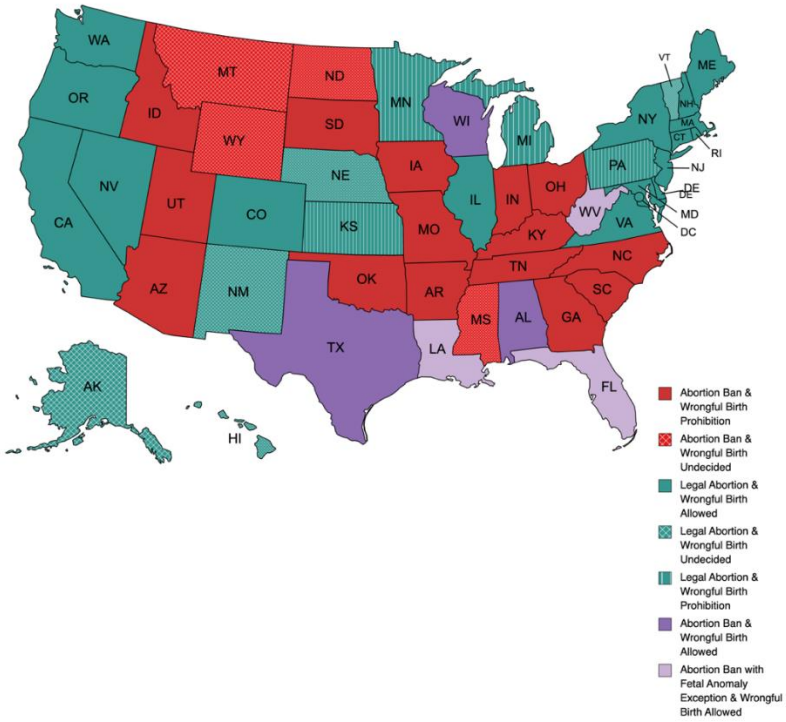
in the state.[62] Alabama, Texas, and Wisconsin have banned abortion entirely with no exceptions for fetal anomalies.[63] Louisiana and West Virginia have also banned abortion but recognize exceptions for fetal anomalies that are incompatible with life outside of the womb.[64] Florida has a 15-week gestational limit on abortion but has an exception for fatal fetal abnormalities.[65]

62. *See, e.g.*, Keel v. Banach, 624 So.2d 1022; (Ala. 1993); Pitre v. Opelousas Gen. Hosp., 530 So.2d 1151; (La. 1988); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); James G. v. Caserta, 332 S.E.2d 872 (W.Va. 1985); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975).

63. *See* ALA. CODE § 26-23H-4 (2019); Texas Heartbeat Act ("S.B. 8"), TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–212 (2021); WIS. STAT. § 940.04 (1849). In July 2023, a Wisconsin state judge ruled that the state's 1849 statute does not apply to medical abortions, thereby allowing a suit challenging the ban to continue in the state court system. *See* Todd Richmond, *Wisconsin Judge: Lawsuit to Repeal Abortion Ban Can Continue*, ASSOCIATED PRESS (July 7, 2023), https://apnews.com/article/abortion-wisconsin-ban-challenge-lawsuit-866eed85d2918113bfe644459e62171a [https://perma.cc/2P8F-BY8G]. Following that ruling, Planned Parenthood began offering abortion services in the state again, but the suit is still pending final decision in the lower court and is then expected to be heard by the state supreme court. Julie Bosman, *Planned Parenthood Will Once Again Provide Abortions in Wisconsin*, N.Y. TIMES (Sept. 14, 2023), https://www.nytimes.com/2023/09/14/us/wisconsin-abortion-planned-parenthood.html [https://perma.cc/6FBV-RRSK]. This Note will proceed under the assumption that the 1849 law remains in effect until the lawsuit's final disposition in the state supreme court, notwithstanding widespread belief that it is not currently enforceable.

64. *See* LA. STAT. ANN. §§ 40.87.7, 14.87.8, 40:1061 (2015); W.VA. CODE §°16-2R-3 (2023).

65. *See* FLA. STAT. § 390.01112 (2023). Governor Ron DeSantis signed a six-week gestational limit on abortions, yet its implementation is contingent upon the Florida Supreme Court's review and approval.



Map 1 is current as of October 6, 2023. This Note classifies disputed or blocked abortion bans as in effect until dispositively resolved. As of October 6, 2023, abortion bans in Iowa, Montana, Ohio, Wisconsin, and Wyoming are disputed or blocked.

II. WHY WRONGFUL BIRTH MUST REMAIN VIABLE

A. COMPENSATION AND DETERRENCE ARE INCREASINGLY IMPORTANT

Despite the disability critiques and concerns about its future after *Dobbs*, wrongful birth is still needed as an available cause of action. While many canonical torts have arguably become less important in the modern era,[66] wrongful birth is now more important than ever. The cause of action has historically been justified as a means of compensating women for the loss of their

66. For example, negligent train accidents have markedly decreased as technology has made transportation safer. *See* Joseph A. Ranney, *The Burdens of All: Progressive Origins of Accident Cost Socialization in Tort Law, 1870–1920*, 105 MARQ. L. REV. 399, 412 (2021).

decision to terminate the pregnancy, but like most torts it serves a deterrence function as well. These purposes take on additional significance due to current political, economic, and social trends—namely increased financial precarity, greater prevalence of birth defects, the vulnerable state of maternal mental health, and the potential for decreased access to prenatal screening.

1. *Financial Difficulties*

Caring for a disabled child has always been a significant financial undertaking. With abortion banned or severely restricted in twenty-two states and counting,[67] women are likely going to have more children than they did before *Dobbs*, which makes the prospect of raising a severely disabled child that much harder financially and that much more disruptive to family structure. Researchers estimate that the repeal of *Roe* could result in as many as 100,000 more unwanted pregnancies being carried to term.[68]

This issue is exacerbated when the unwanted pregnancy results in the birth of a disabled child, given the increased expenses, time, and care required. In 2012, scholars estimated that the average cost of raising a disabled child, including direct costs of care and lost income from a parent staying home to care for the child, was $3,000[69] higher annually than the cost of raising a non-disabled child. Families with disabled children are significantly more likely to live below the federal poverty line,[70] and forty percent of families

67. *See Tracking Abortion Bans Across the Country*, N.Y. TIMES (Aug. 23, 2023, 11:30 AM), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/UH93-8KM4]. As of August 2023, seven other states have abortion bans that were blocked by courts. *See id.* (noting that Montana, Wyoming, Utah, Arizona, North Dakota, Iowa, and Ohio each have had their abortion bans recently blocked by courts).

68. *See* Ariel Bleicher, *Preparing for a Post-*Roe *America*, U.C.S.F. MAG. (June 24, 2022), https://magazine.ucsf.edu/preparing-post-roe-america [https://perma.cc/RU72-MCNY]. Additionally, approximately six in ten women who seek an abortion already have a child, and research has shown that existing children are at greater risk of growing up in poverty if their mother is denied an abortion. *See* Diana Greene Foster et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. PEDIATRICS 183, 183 (2019).

69. Mark Stabile & Sara Allin, *The Economic Costs of Childhood Disability*, 22 FUTURE CHILD. 65, 85 (2012). This amount is worth approximately $4,000 in August 2023. CPI Inflation Calculator, BUREAU OF LABOR STAT., https://data.bls.gov/cgi-bin/cpicalc.pl [https://perma.cc/YZR3-UGNQ].

70. *See* QI WANG, U.S. CENSUS BUREAU, DISABILITY AND AMERICAN FAMILIES: 2000, at 10 (2005) ("Among families with one or more members with a disability, the poverty rate

that have children with special healthcare needs have reported experiencing financial hardship because of their child's condition.[71]

Because of this potential for economic stress, prenatal diagnosis of disabilities is a critical piece of information for women when deciding whether to proceed with a pregnancy. While parents may feel prepared for the financial burden of a child, the added cost of a disability could change that calculus. Moreover, research suggests low-income families have a disproportionate number of children with disabilities,[72] and three of this Note's relevant states—Alabama, Louisiana, and West Virginia—are among those with the highest female poverty rates.[73] Eliminating wrongful birth could severely compound these issues by simultaneously lowering the standard of care and denying women the compensation needed to care for their children.[74]

Post-*Roe*, the dual aims of wrongful birth are increasingly important. With potentially more children to care for, women have an even greater need for the compensation from wrongful birth,

---

was 12.8 percent—higher than the 9.2 percent for all families and the 7.7 percent for families without members with a disability.").

71. *See* Donna Anderson et al., *The Personal Costs of Caring for a Child with a Disability: A Review of the Literature*, 122 PUB. HEALTH REPS. 3, 4 (2007) ("Hence, not only is the child with the disability affected, but so is the family. For example, in order to meet their child's needs, families who care for a child with a disability are more likely to be single income families with lower quality jobs yielding lower incomes, to live in poor quality housing, and to live in poverty."). This is particularly concerning given that abortion-ban states already have the highest rates of childhood poverty, making the existence of wrongful birth in these specific states that much more important. *See* Rachel Treisman, *States with the Toughest Abortion Laws Have the Weakest Maternal Supports, Data Shows*, N.P.R. (Aug. 18, 2022), https://www.npr.org/2022/08/18/1111344810/abortion-ban-states-social-safety-net-health-outcomes [https://perma.cc/3QSU-42JY].

72. *See* Anderson, *supra* note 71, at 4 ("The literature reports troubling findings that uncover an association between low income and children with special needs, with associations between these factors that might go both ways."); *see also* Katherine Swarts, *Special Needs, Opportunities, and the Cost of Living: Extra Challenges for Low-Income Families*, BRIDGING APPS (June 16, 2022), https://bridgingapps.org/special-needs-opportunities-and-the-cost-of-living-extra-challenges-for-low-income-families [https://perma.cc/E7P4-QUGJ] (identifying decreased access to dependable medical care, healthy and affordable food, and stress-mitigating self-care as causes of this association).

73. *See Poverty and Opportunity Data*, INST. FOR WOMEN'S POL'Y RSCH., https://statusofwomendata.org/explore-the-data/poverty-opportunity/poverty-and-opportunity-full-section/ [https://perma.cc/BMW5-VQ42].

74. *See infra* pp. 19–21. This lowered standard of care increases the likelihood that "there will be nothing random about the impact of genetic bad luck, and the demographics of genetic disease will increasingly be defined by regional abortion restrictions and socioeconomic status." Sonia M. Suter & Laura Hercher, *Dobbs Decision is a Huge Setback for Genetic Counseling and the People Who Need It*, STAT NEWS (Aug. 25, 2022), https://www.statnews.com/2022/08/25/dobbs-decision-roadblocks-genetic-counseling/ [https://perma.cc/J59J-59MH].

not only for the sake of the disabled child but for the sake of their other children as well. There may also be more pregnancies going forward than there were before *Roe* was overturned, and the deterrent effect of wrongful birth will be critical to maintaining the standard of care in an increasingly overburdened healthcare system.

2. *Increased Prevalence of Birth Defects*

Social trends that increase the risk of birth defects also make wrongful birth claims increasingly important. Across racial, economic, and ethnic backgrounds, American women are having children at older ages.[75] For every demographic group except Native American and Alaskan Native women, the birth rate has increased for women aged thirty-five to thirty-nine.[76] An increase in maternal age brings an increase in the likelihood of chromosomal abnormalities,[77] so the importance of accurate prenatal screening is heightened as more women delay pregnancy.

Climate change and environmental pollution have also increased the prevalence of certain fetal anomalies. Studies have found an association between specific traffic-related air pollutants and neural tube defects such as spina bifida.[78] Environmental racism exacerbates this issue; racial and ethnic minorities and people of low socioeconomic status are more likely to live in neighborhoods with elevated levels of ambient air pollution,[79] a painful reminder of the continuing impact of racially restrictive covenants and redlining.[80] These groups are among the least likely

---

75. *See* Roni Caryn Rabin, *An Abortion Ban with Unexpected Consequences for Older Mothers*, N.Y. TIMES (Oct. 7, 2022), https://www.nytimes.com/2022/10/07/health/15-week-abortion-ban-older-mothers.html [https://perma.cc/497N-HN2N] ("The median childbearing age in the United States has increased in recent decades, reaching 30 in 2019, up from 27 in 1990.").

76. *See id.*

77. *See id.*

78. *See, e.g.*, Lili Xiong et al., *The Association Between Ambient Air Pollution and Birth Defects in Four Cities in Hunan Province, China, from 2014 to 2016*, 98 MED. BALT. 1, 5 (2019); Erin Digitale, *Air Pollutants Linked to Higher Risk of Birth Defects, Researchers Find*, STAN. MED. NEWS CTR. (Mar. 28, 2013), https://med.stanford.edu/news/all-news/2013/03/air-pollutants-linked-to-higher-risk-of-birth-defects-researchers-find.html [https://perma.cc/HZT5-CLQY].

79. *See, e.g.*, AM. LUNG. ASS'N, *Disparities in the Impact of Air Pollution*, https://www.lung.org/clean-air/outdoors/who-is-at-risk/disparities [https://perma.cc/52MV-7RDB] (last updated Apr. 17, 2023).

80. *Cf.* Shannon Roesler, *Racial Segregation and Environmental Injustice*, 51 ENV'T L. REP. 10773, 10774 (2021) ("Of course, economic zoning could not accomplish the exclusion

to have the financial resources to care for a disabled child and thus stand to lose the most without wrongful birth.

3. *Impacts on Maternal Mental Health*

On top of the financial burden of raising a disabled child, women may also suffer significant mental health impacts. Depending on the disability, an infant may die within minutes of birth. Infant death causes a four-fold increase in the odds of depression among mothers and a seven-fold increase in the odds of mothers having Post-Traumatic Stress Disorder.[81] This concern is particularly salient given that rates of suicidal ideation and intentional self-harm among mothers increased significantly between 2006 and 2017, with Black and low-income women suffering the largest increases in these rates.[82] The COVID-19 pandemic further increased the incidence of postpartum depression.[83] With maternal mental health in a particularly vulnerable state, wrongful birth's deterrence and compensation take on heightened importance.

4. *Preserving Prenatal Testing as the Standard of Care*

Lastly, wrongful birth serves the important purpose of maintaining a high standard of care. Wrongful birth actions, like other medical malpractice claims, are governed by industry-wide standards of care. Once a certain practice becomes routinized such that most doctors would suggest the practice as an option, that

---

of middle-class African Americans from single-family homes in the suburbs. This exclusion was a result of federal housing policy and, in particular, the federal practice of redlining.").

81. *See* Katherine J. Gold et al., *Depression and Posttraumatic Stress Symptoms After Perinatal Loss in a Population-Based Sample*, 25 J. WOMEN'S HEALTH 263, 266 (2016) ("Of 1400 women contacted by the State of Michigan, 609 completed surveys . . . bereaved women had nearly 4-fold higher odds of having a positive screen for depression and 7-fold higher odds of a positive screen for post-traumatic stress disorder.").

82. *See* Lindsay K. Admon, *Trends in Suicidality 1 Year Before and After Birth Among Commercially Insured Childbearing Individuals in the United States, 2006–2017*, JAMA NETWORK (Nov. 18, 2020), https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2772882?resultClick=1 [https://perma.cc/T9YS-R9Z7] ("[T]he prevalence of suicidal ideation and intentional self-harm occurring in the year preceding or following birth increased substantially over a 12-year period. . . . Non-Hispanic Black individuals, individuals with lower income, and younger individuals experienced larger increases in suicidality over the study period.").

83. *See Postpartum Depression Increased During Pandemic's First Year, Study Finds*, U. VA. HEALTH (May 9, 2022), https://newsroom.uvahealth.com/2022/05/09/postpartum-depression-symptoms-increased-during-pandemic/ [https://perma.cc/4EQ2-G2A7].

practice becomes a duty to which other doctors may be legally expected to adhere. For example, offering amniocentesis (the procedure by which a sample of amniotic fluid is taken from the womb to test for certain health conditions, including Down Syndrome) to women over age thirty-five has become so commonplace that failure to do so would constitute malpractice.[84] Yet some genetic counselors and experts worry that abortion bans will make prenatal testing less common, which could result in its exclusion from the standard of care and thereby relieve doctors of liability for failure to properly perform prenatal screening.[85]

Prenatal screening could be compromised for a number of reasons. Some doctors may feel there is no benefit to screening anymore because women cannot terminate their pregnancies in-state anyway.[86] Other doctors with good intentions may inadvertently lower the efficacy of prenatal screening. In states with gestational limits, doctors are administering screenings weeks before the norm, hoping to detect a diagnosis before the gestational limit bars abortion in the state, "despite evidence that earlier scans will miss some fetal anomalies and give less definitive information on others."[87]

In states such as Texas, which not only ban abortions but allow a private right of action for aiding and abetting an abortion, healthcare providers already feel restricted in their ability to do their jobs.[88] Prenatal testing can be viewed as a stepping stone to abortion, and because many states "already prohibit[ ] insurance companies from offering policies that cover termination of

84. *See* Ossorio, *supra* note 17, at 317.

85. *See* Laura Hercher, *Genetic Counselors Scramble Post-*Roe *to Provide Routine Pregnancy Services Without Being Accused of a Crime*, SCI. AM. (Aug. 3, 2022), https://www.scientificamerican.com/article/genetic-counselors-scramble-post-roe-to-provide-routine-pregnancy-services-without-being-accused-of-a-crime/ [https://perma.cc/CZ3L-KEHN].

86. *See* Sarah Zhang, *How the End of* Roe *Would Change Prenatal Care*, ATLANTIC (May 20, 2022), https://www.theatlantic.com/health/archive/2022/05/roe-abortion-overturn-impacts-prenatal-care/629929/ [https://perma.cc/NY34-EZB3]; *see also* Selena Simmons-Duffin, *3 Abortion Bans in Texas Leave Doctors 'Talking in Code' to Pregnant Patients*, N.P.R. (Mar. 1, 2023), https://www.npr.org/sections/health-shots/2023/03/01/1158364163/3-abortion-bans-in-texas-leave-doctors-talking-in-code-to-pregnant-patients [https://perma.cc/9ZME-KQ9K].

87. Hercher, *supra* note 85.

88. *See* Simmons-Duffin, *supra* note 86 ("[I]t's not uncommon for there to be pregnancy complications . . . where many doctors would consider it to be the standard of care to offer abortion as an option. Those are the kind of circumstances where physicians feel like they can't be fully truthful about a patient's options without risking a lawsuit.").

pregnancy,"[89] some scholars have expressed concern that doctors will curb the information they share with patients following prenatal screening, or that insurance will stop covering prenatal screening altogether.[90]

Ironically, "access to professional counseling, particularly by specialists, has been associated with lower rates of termination,"[91] leading some doctors to argue that "prenatal diagnosis is a life-giving[,] not a life-taking[,] technology."[92] While receiving appropriate prenatal care and diagnoses may empower a woman to choose to terminate, it also helps women who intend to carry the pregnancy to term. Prenatal care can allow a woman to prepare for a child's disability, reassure her that the child will live, and enable prenatal interventions to remedy certain conditions.

While providers' anxieties about criminal and civil liability are valid, women cannot be made to suffer the consequences. If enough genetic counselors and doctors stop offering certain prenatal screenings out of fear, the standard of care could drop to this lower level.[93] Wrongful birth fights fire with fire, reminding doctors that liability cuts both ways.

B. OTHER SOLUTIONS ARE INSUFFICIENT

Critics do not doubt the concerns discussed in Part II.A *supra*—instead they argue that there are alternatives to wrongful birth, both legal and policy-based, which can ease the financial burden of raising a child with disabilities. Yet none of these proposed solutions offer the same fine-tuned compensation and adequate deterrence made possible by wrongful birth.

---

89. Hercher, *supra* note 85.

90. *See* Simmons-Duffin, *supra* note 86 ("[Professor Elizabeth] Sepper argues many doctors and hospital systems are overreading the Texas abortion bans, and should consider the ethical and professional obligations to give patients complete information about their diagnoses and options. 'Providing information, even providing referrals, is not within the terms of SB8 or the criminal bans,' she says. When doctors and hospitals won't discuss abortion because they're afraid of lawsuits, she says, 'I think it's a real disservice to patients.'").

91. Nina Roesner et al., *Reason-Based Abortion Bans, Disability Rights, and the Future of Prenatal Genetic Testing*, 48 AM. J. L. & MED. 187, 195 (2022).

92. Andrews, *supra* note 35, at 160.

93. *Cf.* Carolyn Jacobs Chachkin, *What Potent Blood: Non-Invasive Prenatal Genetic Diagnosis and the Transformation of Modern Prenatal Care*, 33 AM. J. L. & MED. 9, 33 (2007) ("The development of a standard of care within a particular field of medicine is complex and is not greatly influenced by government standards. Instead, '[m]ost clinical policies develop from a flow of reports in the literature, at meetings, and in peer discussions.'") (citation omitted).

1. *Other Common Law Torts are Insufficiently Protective*

The most frequently invoked alternative to wrongful birth is the tort of informed consent. Informed consent claims are commonly brought either in addition to or in place of wrongful birth claims. Both torts require the patient to show that they would have elected a different course of treatment (namely, termination of the pregnancy) had they received the relevant diagnosis. In informed consent cases, however, "the plaintiff must additionally meet a two-pronged test of proximate causation: she must prove that the undisclosed risk actually materialized and that it was medically caused by the treatment."[94] Of course, in wrongful birth, the patient need not and cannot prove that the doctor caused the birth defect—rather, all she must show is that the risk was reasonably foreseeable and that had she been apprised of it, she would have terminated the pregnancy. Even beyond this difficult proximate causation test, informed consent fits somewhat awkwardly into the facts giving rise to wrongful birth. While a physician taking blood and conducting a prenatal test without consent presents a straightforward informed consent problem, "when the issue is failure to offer a prenatal test, it is difficult to understand where the failure of consent occurred. . . . Does it make sense to say that a woman continued her pregnancy without giving consent to her physician?"[95]

In addition to being harder to prove, informed consent does not offer damages sufficient to cover the extraordinary medical costs of raising a disabled child. In informed consent cases, damages are calculated to compensate the victim for the medical treatment given without consent.[96] Thus, in the context of a wrongful birth fact pattern, the compensation would be for the costs of prenatal care beyond the point at which the mother would have aborted, the cost of childbirth and any subsequent maternal care, and potentially emotional distress. Yet this excludes the costs of life-long care for the disabled child, which is arguably the most

94. Hermanson, *supra* note 21, at 532 (quoting Canesi *ex rel.* Canesi v. Wilson, 730 A.2d 805, 813 (N.J. 1990)).

95. Ossorio, *supra* note 17, at 325.

96. *See, e.g.*, Milton Oppenheim, *Informed Consent to Medical Treatment*, 11 CLEV.-MARSHALL L. REV. 249, 249 (1962) ("If the physician acts without consent, he is guilty of battery, and is liable for such compensatory damages as the patient can prove. If the doctor knows that he has no consent he may also be liable for punitive damages and court costs.").

important compensation for many parents who bring wrongful birth claims.

Negligent infliction of emotional distress has also been suggested as an alternative to wrongful birth, given that a handful of courts have allowed these claims to be brought independent of wrongful birth.[97] "Recovery is predicated on the fact that the physician had a preexisting relationship with the parents and because emotional injury was a foreseeable consequence of the physician's actions."[98] Yet these claims also fall short of wrongful birth: the compensation is not calculated to cover the cost of rearing the child, and it "may appear to promote an inappropriate focus on disabled children as sources of parental anguish, while ignoring the pleasures and benefits they bring."[99] Furthermore, these claims would likely be limited to the most severe cases in which the child dies or undergoes extensive treatment. While a court may permit recovery regardless of the condition's severity under an "eggshell plaintiff"[100] analysis, these damages would still be insufficient to compensate parents.

2. *Contract Law is Insufficient*

Some scholars[101] have suggested that breach of contract claims could serve the same function as wrongful birth claims. These theories are inspired by the Supreme Court of Kentucky's decision not to recognize these claims as a tort cause of action; instead, that court has held that a healthcare provider "who contracts and charges for a service, such as a prenatal ultrasound and consequent opinion as to the results of the ultrasound, is liable for any breach of contract in this regard."[102] The court feared that, absent such a claim, "medical providers could charge for services they had not really performed."[103]

---

97. *See* Ramey, *supra* note 23, at 61 (discussing how Missouri does not recognize wrongful birth but allowed a prenatal negligence claim sounding in negligent infliction of emotional distress, despite not using that label).

98. Ossorio, *supra* note 17, at 327.

99. *Id.* at 328–29.

100. *See* Ramey, *supra* note 23, at 61.

101. *See, e.g.*, *id.* at 62; *see also* Hermanson, *supra* note 21, at 533 (discussing how some courts, "[w]hile expressly rejecting claims for wrongful birth, [ ] hold that medical professionals cannot be relieved of their contractual responsibilities to report accurate results from diagnostic testing and other similar procedures").

102. Hermanson, *supra* note 21, at 533 (quoting Grubbs *ex rel.* Grubbs v. Barbourville Fam. Health Ctr., P.S.C., 120 S.W.3d 682, 691 (Ky. 2003)).

103. Ramey, *supra* note 23, at 64.

Yet this acknowledgement of a claim for breach of contract is hollow, given that in the world of contracting, liability can be waived. Further, most states refuse to recognize medical malpractice as a breach of contract claim rather than a tort unless the doctor made some promise beyond "us[ing] the medical skill necessary to deliver the treatment in the manner generally accepted by other physicians in the community."[104] Unless a patient contracts with a doctor to specifically detect any possible fetal anomaly, the breach of contract claim will fail. Doctors are unlikely to enter into such specialized contracts and expose themselves to contract liability over torts, given that contracts have a longer statute of limitations.

Even assuming liability is not waived, the damages recoverable in such a claim pale in comparison to those possible under wrongful birth. While "common sense dictates that parents would be eligible to recover whatever they paid for the diagnostic testing,"[105] the cost of the testing is only the tip of the iceberg. While reasonably foreseeable damages are recoverable in contracts and parents can argue that lifelong child-rearing expenses are a foreseeable result, courts might find proximate cause to be too attenuated. This argument also runs into the same concerns surrounding eugenics that led the Kentucky court to reject wrongful birth in the first place: by claiming childcare expenses are a foreseeable result of failure to diagnose, parents are inherently arguing that they would have terminated the pregnancy. This same issue would arise in claims for emotional distress resulting from the breach of contract.[106]

3. *Legislative Alternatives are not as Protective*

If courts cease to recognize common law wrongful birth, state legislatures could theoretically intervene to codify the cause of action. But despite the fact that nearly half of the states recognize wrongful birth, Maine is the only state to have codified the cause

104. Heneberry v. Pharoan, 158 A.3d 1087, 1097 (Md. Ct. Spec. App. 2017) (collecting cases).

105. Ramey, *supra* note 23, at 65.

106. *See id.* at 66 ("Courts have recognized that agreements to provide prenatal medical care or care related to childbirth are contracts for which a breach is particularly likely to result in emotional distress.").

of action.[107] This underscores the sheer unlikelihood of states passing legislation to protect wrongful birth.[108] Maine's statute is, moreover, less protective than the wrongful birth common law in many states—Maine limits damages to only those flowing from the condition of the child, whereas some common law states such as New Jersey allow extraordinary damages for wrongful birth.[109]

Maine's watered-down wrongful birth statute is part of a larger trend in which codifications of common law are less effective as deterrents and compensatory mechanisms. Scholar Roscoe Pound notes that "judicial finding of law has a real advantage in competition with legislation in that it works with concrete cases and generalizes only after a long course of trial and error in the effort to work out a practicable principle."[110] One study, comparing fatalities from car crashes across European countries, found that countries with a common law system had better safety results and deterrence than civil systems that codified torts.[111] Thus, even if states were likely to codify wrongful birth, it remains unclear whether that outcome would be as protective of mothers as the common law.

The more common and realistic legislative alternatives to wrongful birth are "informed consent" statutes. These statutes are

---

107. *See* ME. STAT. INS. 24, § 2931 (1985); Ralph R. Frasca, *Negligent Beginnings: Damages in Wrongful Conception, Wrongful Birth and Wrongful Life*, 19 J. FORENSIC ECON. 185, 196 (2006) ("Thirty-one states have rejected wrongful life suits by court decision or statute. Wrongful life cases are permitted in only three states as determined by court opinion in California, New Jersey and Washington and one by statute, Maine.").

108. While the Kansas and Montana abortion referendums of 2022 indicate that direct democracy may be an avenue for bolstering reproductive rights, none of the states relevant to this Note have initiative processes in place. More generally, only eight abortion-restriction states have these processes in place. *See States with Initiative or Referendum*, BALLOTPEDIA, https://ballotpedia.org/States_with_initiative_or_referendum [https://perma.cc/E38M-LBRW].

109. *See* Canesi *ex rel.* Canesi v. Wilson, 730 A.2d 805, 819 (N.J. 1999) ("[A] woman asserting a wrongful birth claim who proves that she herself would have had an abortion if apprised of the risk of fetal defect is entitled to damages consisting of both the special medical expenses attributable to raising a child with a congenital impairment, and the emotional injury attributable to the deprivation of 'the option to accept or reject a parental relationship with the child'") (quoting Berman v. Allen, 404 A.2d 8, 14 (N.J. 1979) (citations omitted).

110. Ronald W. Eades, *Attempts to Federalize and Codify Tort Law*, 36 TORT & INS. L. J. 1, 20 (2000).

111. *See* Michael L. Smith, *Deterrence and Origin of Legal System: Evidence from 1950–1999*, 7 AM. L. ECON. REV. 350, 375 (2005) ("The disparity between civil code and common law systems that grows over time supports a conclusion that adaptability of common law systems creates ever-growing incentives against harmful acts. The data suggest that civil code systems have not created comparable incentives, especially where possible causes of harm are too diffuse to be specified ex ante in regulations.").

significantly less protective of women than common law wrongful birth claims and often carry ulterior motives. For example, in the 1980s and 1990s, over half of the states passed "informed consent" laws. These "Right to Know" laws purported to protect a woman's ability to make an informed choice, but in practice they were intended to dissuade women from following through with abortions.[112] This practice was "in direct contrast to the traditional use of informed consent," which has historically been to provide "enough information [for] the patient to consent to the procedure."[113] Given that anti-abortion advocates can hijack informed consent legislative alternatives to further their agendas (and have indeed done so before), common law wrongful birth remains a stronger option for protecting women than informed consent laws.

4. *Investing More Resources is Only a Partial Solution*

Lastly, some critics of wrongful birth argue that if the government dedicated more resources to making society accessible for individuals with disabilities or provided better financial support to disabled individuals and their families, then wrongful birth would no longer be needed to make the victim whole. While the government certainly should provide more resources to this population, this proposal overlooks the other goals of wrongful birth: deterring negligent prenatal care and giving women information critical to the decision to carry their pregnancies to term. Furthermore, this plan would not remedy the cases in which the child suffers from a fatal condition that results in emotional distress for the mother and family. No amount of government funding can soften the blow of losing a child mere minutes after birth.

---

112. *See* Kathy Seward Northern, *Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy*, 1998 U. ILL. L. REV. 489, 542 (1998) ("Some of these 'Right to Know' statutes, however, are double-edged swords. While the statutes purport to protect the woman's right to make an informed choice, the general thrust of the information they require would dissuade a woman from going through with an abortion."). Northern highlights the disingenuous legislative intents behind many of these statutes. *See id.* at n.221; *e.g.*, LA. REV. STAT. ANN. § 40:1299.35.6(A)(5)(b) (1997) (stating that the purpose of the Louisiana's Right to Know statute is to "[p]rotect unborn children from a woman's uninformed decision to have an abortion").

113. *Id.* at n.220.

III. How Plaintiffs Can Still Recover for Wrongful Birth in Abortion-Ban States

Having established that wrongful birth is the preferred remedy for negligent prenatal care, this Note now turns to the question of how parents can win on this claim after *Dobbs*. Although Part II.B *supra* argued that wrongful birth does not depend on *Roe*, the tort will still require adjustments in states where abortion is now banned or severely restricted, given that the convenience of *Roe* led the tort's jurisprudence to identify the compensable harm as the lost opportunity to terminate in the woman's home state. While this framing was sufficient during *Roe*, it was by no means necessary—the tort's historical grounding is not tethered to the constitutional right to abortion. The missed opportunity to abort in-state was certainly the simplest claim plaintiffs could make, but that does not mean this is the only possible conception of wrongful birth that could succeed.

This Note proposes three non-mutually exclusive ways in which wrongful birth can proceed in a post-*Roe* world. First, under a "loss of deliberation and preparation" theory, plaintiffs can argue that the doctor's negligence deprived them of meaningful decisions—namely, whether to seek in utero treatment, to prepare for the child's birth by processing emotions and seeking support, or to terminate out of state—and thus resulted in cognizable harms. The first two harms, while novel, are precisely within abortion-ban states' public policy interests, and the third harm is historically supported by case law—the existence of *Roe* simply made it unnecessary for women to bring the more complicated claim that the abortion would have been out of state.

Even if courts were to reject this reframing of wrongful birth, women still have viable claims. The second pathway to recovery involves statutory analysis in states with exceptions for fetal anomalies: parents can argue that their child's condition would have qualified for an abortion under these exceptions. Lastly, parents who cross state lines for prenatal or fertility treatment can utilize choice of law analyses to recover for wrongful birth using the law of the physician's state, even if their home state does not recognize the claim.[114]

---

114. This was a potential claim even before *Dobbs*, but it will be even more important now as more parents travel for prenatal and fertility treatment.

A. LOSS OF DELIBERATION THEORY

This Note proposes expanding the harm in wrongful birth to capture the lost opportunity to deliberate on *how to continue a pregnancy* rather than the lost opportunity to actually *terminate* the pregnancy. In theory, wrongful birth jurisprudence does in fact identify the compensable harm as the loss of reproductive autonomy.[115] Yet, as scholars have noted, this may be largely pretextual, given that only women who claim they would have terminated can recover.[116] In its current form, reproductive autonomy is defined narrowly—it is essentially a euphemism for the right to abort, presumably in the woman's home state, which is not an option for all women in a post-*Roe* world. "Autonomy," however, refers to decision-making, and decision-making is a process, not merely a fixed end result. Furthermore, autonomy is not confined to state lines—it encapsulates the constitutional right to travel and to take advantage of different states' laws. In sum, a missed prenatal diagnosis deprives a woman of the full panoply of options for how to proceed, and wrongful birth can easily capture the resultant harms.

Expanding the harm to truly capture the loss of decision-making, regardless of the ultimate decision on whether and where to abort, would allow recovery for women who decide to continue the pregnancy or decide to terminate in another state. Critically, this renders the legality of abortion in the plaintiff's home state irrelevant. While Professor Kathy Seward Northern proposed a similar reframing while *Roe* was in place, she suggested defining the negligent medical care as the injury in and of itself,[117] without requiring further proof of any materialized harm. This Note, in contrast, identifies concrete examples of the emotional and physical harms that flow from a missed prenatal diagnosis, regardless of the decision to abort.

---

115. *See, e.g.*, Hensel, *supra* note 31, at 165–66.

116. *See id.* ("A close look at this tort makes clear that the impaired child, not the reproductive choice of the mother, is the true injury at stake. . . . Those mothers who would choose to continue the pregnancy are deprived of the opportunity to prepare mentally and physically for the challenges attendant to raising a child with special needs. Instead, the parents first learn of the child's impairment at the time of birth, when their emotions and expectations are likely to be highest. If lost choice is truly the injury, then this loss occurs at the moment that the door to an abortion has closed, regardless of which choice ultimately would have been exercised.").

117. *See* Northern, *supra* note 112, at 535.

1. *For Parents Who Claim They Would Not Have Aborted*

Under this proposed framing of wrongful birth, women who would not have aborted can recover by claiming they lost the chance to prepare for the birth of their child. Preparation can refer to two different but overlapping ways in which a prenatal diagnosis changes the way parents approach the remainder of the pregnancy: (i) clinical treatment, and (ii) social and informational support and psychological adjustments.

i. *Clinical Treatment*

When wrongful birth claims were first brought, medicine was limited in its ability to treat fetuses, thereby leading to the assumption that prenatal tests invariably led to abortion. An early court decision noted that "the value of genetic testing programs . . . is based on the opportunity of parents to abort afflicted fetuses, within appropriate time limitations."[118] Yet science has come a long way since the 1970s—there are now in utero treatments available for a handful of anomalies and evidence to suggest that early intervention can improve survival and long-term outcomes. Whether or not to abort is no longer the sole decision for women to make.

Perhaps the most well-studied conditions amenable to prenatal treatment are congenital heart defects (CHDs). CHDs are the most common type of genetic anomaly, and despite often being treatable, they are the leading cause of infant death due to birth defects.[119] Medical advances have drastically increased the overall survival of infants born with CHDs, and recent studies have shown that infants diagnosed prenatally, rather than postnatally, have higher survival rates before planned neonatal cardiac surgery[120] and shorter intensive care stays following the operation.[121] Thus,

118. Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 695 (E.D. Pa. 1978).

119. *See Infant Death Due to Heart Defects*, CTR. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/ncbddd/heartdefects/features/heartdefects-keyfindings.html [https://perma. cc/2KB3-325J] (last updated Jan. 24, 2022).

120. *See* B.J. Holland et al., *Prenatal Diagnosis of Critical Congenital Heart Disease Reduces Risk of Death from Cardiovascular Compromise Prior to Planned Neonatal Cardiac Surgery: A Meta-Analysis*, 45 ULTRASOUND IN OBSTETRICS & GYNECOLOGY 631, 636–37 (2015).

121. *See* Robert S. Yates, *The Influence of Prenatal Diagnosis on Postnatal Outcome in Patients with Structural Congenital Heart Disease*, 24 PRENATAL DIAGNOSIS 1143, 1148 (2004).

when a physician fails to detect and diagnose CHD prior to birth, the baby's health outcomes could be compromised. As such, parents should be able to sue the healthcare provider under this expanded scope of wrongful birth for depriving them of the chance to treat the CHD. The analysis in such a suit would likely be similar to the "loss of chance" theory used in failure to diagnose cases.[122] Here, the patient deprived of the better chance of survival is a fetus, not an adult.[123]

As medicine changes, so too should wrongful birth. While abortion may have been the only "treatment" option following diagnosis in the 1970s and 1980s, modern medicine has found prenatal interventions that improve the mortality of affected infants. Parents and their children deprived of this opportunity should be compensated under the same rubric that adults are under failure to diagnose claims. This theory is particularly appropriate for abortion-ban states, as ensuring accurate prenatal diagnoses capable of improving fetal outcomes is exactly within their public policy ambit and would improve the efficacy of their healthcare systems.

ii. *Psychological and Social Preparation*

Even for conditions that cannot be treated in utero, such as Down Syndrome, prenatal diagnosis gives parents time to process their emotions prior to the birth of the child and to make other necessary preparations. Under the traditional model of wrongful

---

122. *Cf.* Northern, *supra* note 112, at 535 ("Loss of chance theory compensates an injured plaintiff for her diminished chance of recovery from a major illness, typically cancer. The theory provides an exception to the traditional requirement of proving that a negligent act caused a physical injury."). Yet the analysis could arguably also fit easily into the traditional wrongful birth theory as well—the doctor's negligence caused the birth of a child with a health condition. While traditionally the causal connection is the missed abortion, here it would be the missed treatment.

123. Another comparable analysis involves Twin-to-Twin Transfusion Syndrome (TTTS) medical malpractice cases. TTTS occurs when identical twins or multiples share a placenta. *See* Simona Zaami et al., *Twin-to-Twin Transfusion Syndrome: Diagnostic Imaging and Its Role in Staving Off Malpractice Charges and Litigation*, 11 DIAGNOSTICS 445, 445 (2021). If left untreated, TTTS is likely to be fatal or result in long-term health problems for the twins. As such, medical malpractice claims for failure to timely diagnose TTTS are common, with plaintiffs frequently winning damages or settlements upwards of $2,000,000. *See id.* This was the result even when doctors had experts "testify not only that there were other possible causes of injury to the minor-plaintiff, but also that treatment options for TTTS, if present, were experimental in nature and would not likely have avoided injury to the plaintiff." *Id.* As more prenatal diagnoses become treatable, these claims will likely become even more common. *See id.*

birth, mothers who would choose to continue the pregnancy are deprived of the opportunity to prepare mentally and physically for the challenges attendant to raising a child with special needs. Instead, the parents first learn of the child's condition at the time of birth, "when their emotions and expectations are likely to be highest."[124] Accordingly, parents could sue for the emotional distress and other harms[125] that could have been avoided had the prenatal diagnosis been properly made.

The major benefit of this approach is that it provides a pathway to recovery regardless of the legal status of abortion in the state. As explained above, the plaintiff can simply claim that the negligent medical care interfered with her ability to properly prepare for the birth of her child. Beyond maintaining wrongful birth suits post-*Roe*, expanding the scope of the tort has other benefits. When scholars previously recommended reframing the tort, the focus was largely on eliminating the perceived eugenic implications and the resultant harm to individuals with disabilities. As explained in Part II.A *supra*, disability scholars and activists have long condemned wrongful birth as either fundamentally offensive to those with disabilities or unduly burdensome in asking parents to publicly renounce their child.[126] Allowing compensation without requiring mothers to publicly and repeatedly claim that they would have aborted their child—who may very well be alive and capable of understanding the court proceedings—is more respectful of both parents and their children. Furthermore, from a deterrence standpoint, it adds another layer of liability (allowing recovery for all mothers, regardless of their decision to abort), and thus should result in less negligence.

The drawback of the loss of preparation theory is that while it has intuitive appeal and is frequently identified by the literature as a reason for or benefit of prenatal testing,[127] "prenatal

---

124. Hensel, *supra* note 31, at 166; *see also* Chachkin, *supra* note 93, at 51 ("[A] Harvard Medical School study found that mothers who received a diagnosis of Down Syndrome prenatally were 'generally happier over the birth of their infant with DS than their counterparts who had received the diagnosis postnatally.'") (quoting Brian G. Skotko, *Prenatally Diagnosed Down Syndrome: Mothers Who Continued Their Pregnancies Evaluate Their Health Care Providers*, 192 AM. J. OBSTETRICS & GYNECOLOGY 670, 676 (2005)).

125. Texas and Wisconsin do not allow emotional distress damages in wrongful birth cases, but plaintiffs can recover other damages flowing from loss of preparation. These harms are addressed in note 122 *supra*.

126. *See* Hensel, *supra* note 31, at 171.

127. *See, e.g.*, Marsha Michie, *Is Preparation a Good Reason for Prenatal Genetic Testing? Ethical and Critical Questions*, 112 BIRTH DEFECTS RES. 332, 333 (2020) ("Many

preparation is a slippery concept: in different contexts it may mean medical intervention, delivery room arrangements, contacting a support group, learning more about the condition, simply avoiding a surprise at birth, or something else."[128] Without a firm grasp on what exactly it means, researchers have had difficulty identifying what specifically is helpful about prenatal preparation, which may undermine the likelihood of courts accepting this expanded scope.[129] Tightening the definition of preparation will be essential for reframing the tort.[130]

An additional downside is that these claims are unlikely to result in compensation for the cost of the child's care, given that the parents would have been exposed to those expenses anyway because of their decision not to abort.[131] Damages would likely be similar to those under negligent infliction of emotional distress,[132]

---

scholars cite preparation as a reason prenatal genetic testing is offered or accepted, perhaps even as a benefit of prenatal diagnoses.").

128. *Id.* at 335.

129. *Id.*

130. Along with further research comparing parents' emotions when they receive a postnatal versus prenatal diagnosis, other ways to measure preparation include studies regarding the impact of applying for Supplemental Security Income before versus after birth, how often parents decide to move or make career changes in anticipation of a special needs child, and how birth plans and postnatal care may change following prenatal diagnosis.

131. Yet, as discussed in note 122 *supra*, if parents can prove price differences between preparations made prenatally and postnatally, they should be able to recover those expenses as well.

132. While Ramey suggests these claims can be channeled into negligent infliction of emotional distress (NIED) rather than wrongful birth, four out of the six abortion-ban states that recognize wrongful birth—Alabama, Florida, Louisiana, and Texas—either do not allow NIED as a standalone claim or have a heightened standard to prove emotional distress absent physical injury. *See* Allen v. Walker, 569 So.2d 350 (Ala. 1990) (holding that Alabama does not recognize NIED as a cause of action); LeGrande v. Emmanuel, 889 So.2d 991, 995 (Fla. Dist. Ct. App. 2004) ("The elements required for this cause of action are: (1) the plaintiff must suffer a discernable physical injury; (2) the physical injury must be caused by the psychological trauma; (3) the plaintiff must be involved in the event causing the negligent injury to another; and (4) the plaintiff must have a close personal relationship to the directly injured person."); Johnson v. Orleans Par. Sch. Bd., 975 So.2d 698, 711 (La. Ct. App. 2008) ("The correct standard for the recovery of negligent infliction of emotional distress absent physical injury is that the plaintiff must show an 'especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious.'") (internal citation omitted); Chapa v. Traciers & Assoc., 267 S.W.3d 386, 397 (Tex. App. 2008) ("With limited exceptions, claims of negligent infliction of emotional distress are not recognized under Texas law."). Yet more importantly, the case Ramey cites as a model for this type of claim, *Shelton v. St. Anthony's Medical Center*, 781 S.W.2d 48, 50 (Mo. 1989), contains language arguably more offensive than the typical wrongful birth claim—the court refers to the child's abnormalities as a "catastrophe," and as discussed in Part II.B *supra*, the NIED approach inappropriately focuses on the child as the cause of distress for the parents, rather than on the parents' need for compensation to care for their child. By coupling emotional distress damages with

but in contrast to an emotional distress case, the loss of preparation claim would not identify the child's disability as causing the emotional distress. The emotional distress would instead be caused by the stress of finding accommodations for the child's disability without notice and the surprise diagnosis during a particularly vulnerable time. While the compensation would not be calculated to specifically encapsulate all childrearing and medical expenses, the damages may nonetheless ease financial difficulties and deter negligent prenatal care.

2. *For Parents Who Claim They Would Have Aborted*

Other scholars[133] have noted that women can argue that their reproductive autonomy was impaired by their loss of the chance to travel to another state for a legal abortion.[134] In overturning *Roe*, the Supreme Court emphasized the importance of allowing states to decide their own laws on abortion. Justice Kavanaugh even opined in his concurrence that a state cannot prevent its residents from traveling to other states to obtain abortions.[135] Yet when a state has no liability scheme to compensate women for the deprivation of information pertinent to abortion, or has no liability scheme in place to deter doctors from withholding said information,[136] the state seemingly runs afoul of Justice Kavanaugh's opinion.

For abortion-ban states that recognize wrongful birth,[137] the woman's loss of opportunity to deliberate results in the same harm

---

wrongful birth, the focus remains where it should be—on the doctor's negligent care and the parents' desire to provide the best possible care for their child.

133. *See* Ramey, *supra* note 23 at 51–53 (arguing that parents can still recover under the traditional conception of wrongful birth because of the ability to travel across state lines for abortions).

134. In fact, the District Court of Appeals of Florida for the Fourth District seemingly contemplated as much, holding that whether a woman could have traveled to another state to seek a legal abortion is a question for the jury. OB/GYN Specialists of the Palm Beaches, P.A. v. Mejia, 134 So.3d 1084, 1091 n.5 (Fla. Dist. Ct. App. 2014).

135. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) ("For example, may a state bar a resident of that state from traveling to another state to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.").

136. *Cf.* Hensel, *supra* note 31, at 191 ("A real threat exists that, in the absence of external incentives, physicians who strongly oppose abortion will be more likely to forego genetic testing in order to preempt a potential abortion.").

137. Alabama, Texas, and Wisconsin are the only states that recognize wrongful birth and have an abortion-ban without an exception for medically futile pregnancies. *See supra* notes 63–65. In Florida, Louisiana, and West Virginia, where there are exceptions for fetal

as traditional wrongful birth: the lost opportunity to abort. Where that abortion is performed is not at the heart of the claim—the focus is on where *the prenatal care* was negligently performed, *not* on where the imagined abortion would have been performed.[138] As discussed in Part II.B *supra*, Texas and Wisconsin recognized as much in each state's first case recognizing wrongful birth as a cause of action, and a federal court in Alabama made a similar argument when making a successful *Erie* prediction.[139] These early courts similarly recognized that doctors' concerns about criminal liability do not excuse them from giving accurate prenatal diagnoses. In *Jacobs*, the court rejected the idea "that by affording the patient proper diagnosis," the doctor would "become guilty as an accomplice" to an abortion later obtained: "There would have been no criminal liability unless the doctor advised the plaintiffs to commit an illegal act and unless the illegal act were committed."[140]

As far back as 1975, the Texas Supreme Court recognized that diagnosing fetal anomalies and recommending abortion are not the same.[141] As such, even doctors fearing liability under the "aiding and abetting" abortion bounty would not be subject to liability for merely giving appropriate, accurate prenatal care.[142] Healthcare workers will certainly have to use their discretion in advising treatment options, but fear that a woman will seek further (potentially pregnancy-ending) care based on a prenatal diagnosis is not a sufficient defense for providing negligent medical care. Women have the constitutional right to interstate travel, which they can use to take advantage of different states' laws, and doctors will not incur criminal or civil liability for simply diagnosing a prenatal condition. As such, parents should still be able to recover

---

anomalies, women could bring claims under this expanded loss of deliberation theory or under a statutory interpretation claim discussed in Part III.B *infra*.

138. If this were not the case, then wrongful birth would have no deterrent effect whatsoever.

139. *See* Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975) (recognizing wrongful birth claim was available despite abortion being banned at the time of the pregnancy); *see also* Dumer v. St. Michael's. Hosp., 233 N.W.2d 372, 377 (Wis. 1975) (establishing that plaintiff need only "convince the trier of fact that they would have sought and submitted to an abortion . . . and that the abortion was legally available to them"); Robak v. U.S., 658 F.2d 471, 473 (7th Cir. 1981) ("[Plaintiff] could have traveled to any of the states that then permitted abortions. . . . It is quite common for persons to travel to other jurisdictions in order to avoid restrictive laws in their home state.").

140. 519 S.W.2d at 848.

141. *See id.* at 846.

142. *See* Simmons-Duffin, *supra* note 86.

for wrongful birth in abortion-ban states that have recognized the tort in the past.

B. STATUTORY INTERPRETATION

Even if courts reject the expanded scope of wrongful birth proposed above, parents should still be able to recover in the handful of abortion-ban and abortion-restriction states that have statutory exceptions for certain fetal abnormalities.[143] A particularly well-publicized anecdote out of Louisiana illustrates how women can use ambiguous or vague statutory language to their advantage in bringing wrongful birth claims.

Following the repeal of *Roe*, Louisiana's trigger ban on abortions went into effect. Drafted in 2019, the law provided an exception for "medically futile" pregnancies, "mean[ing] that, in reasonable medical judgment, the unborn child has a profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth."[144] Yet within weeks of taking effect, this exception proved confusing for healthcare providers and patients alike. Nancy Davis was ten weeks pregnant when her doctors told her that the fetus was developing without a skull.[145] While initially a doctor told Davis that he could perform an abortion under Louisiana's narrow exception for "medically futile pregnancies," hospital officials deemed the move too risky and denied Davis the abortion. She traveled to New York for the procedure and later held a press conference to denounce Louisiana's policy: "Basically, they said I had to carry my baby to bury my baby."[146]

In the wake of Davis' case, State Senator Kathrina Jackson, who authored the state's abortion ban, claimed that the hospital misunderstood the law and could have legally performed the abortion under the medically futile pregnancy exception. In an

---

143. Florida, Louisiana, West Virginia. *See supra* notes 64–65.

144. LA. STAT. ANN. §°40:1061.1.3 (2019), *amended by* 2022 La. Sess. Law Serv. Act 545 (S.B. 342) (West). West Virginia's fetal anomaly exception is similarly vague. *See* 2022 W. Va. Acts 1 (HB 302) (allowing abortions where the fetus is "nonviable," defined as when "an embryo or a fetus has a lethal anomaly which renders it incompatible with life outside of the uterus").

145. A condition known as acrania. Sara Cline, *Louisiana Woman Denied Abortion Wants 'Vague' State Ban Clarified*, L.A. TIMES (Aug. 26, 2022), https://www.latimes.com/world-nation/story/2022-08-26/louisiana-woman-denied-abortion-wants-vague-ban-clarified [https://perma.cc/PMC8-Z7SV].

146. *Id.*

attempt to clarify the meaning of "medically futile," the Louisiana Department of Health issued a list of conditions that would qualify. Twenty-four specific conditions are listed,[147] and a catch-all category is included at the end: "a profound and irremediable congenital or chromosomal anomaly existing in the unborn child that is incompatible with sustaining life after birth in reasonable medical judgment as certified by two physicians that are licensed to practice in the State of Louisiana."[148] This catch-all definition is almost identical to the original "medically futile" exception that initially confused doctors, so arguably the only utility of the Louisiana Department of Health's clarification comes from the listed conditions.

For women who give birth to a child with one of the listed conditions, bringing a wrongful birth claim should be nearly identical to bringing a claim before the trigger ban took effect. Ultimately this claim is a more complicated version of wrongful birth—the plaintiff has to prove that she would have opted to terminate the pregnancy, that the condition qualified for the exception, and that a court would agree, as plaintiffs cannot benefit from a windfall. Proving the latter two requirements is simple if the condition is explicitly listed—the trickier cases involve conditions *not* listed. To bring those claims, plaintiffs will have to rely on statutory interpretation to prove that the child's condition would have fallen under the catch-all exception.

The key phrase in the catch-all category is "incompatible with sustaining life after birth." Statutory interpretation begins with considering the plain meaning of the statute "by giving words their ordinary sense," such as dictionary definitions.[149] The plain meaning of this language suggests that only fatal conditions qualify. Merriam-Webster defines "incompatible" as "incapable of association or harmonious coexistence" and "life" as "the quality that distinguishes a vital and functional being from a dead body" or "an organismic state characterized by capacity for metabolism,

147. Achondrogenesis; anencephaly; acardia; body stalk anomaly; campomelic dysplasia; craniorachischisis; dysencephalia splanchnocystica (Meckel-Gruber syndrome); ectopia cordis; exencephaly; gestational trophoblastic neoplasia; holoprosencephaly; hydrops fetalis; iniencephaly; perinatal hypophosphatasia; osteogenesis imperfecta (type 2); renal agenesis (bilateral); short rib polydactyly syndrome; sirenomelia; thanatophoric dysplasia; triploidy; trisomy 13; trisomy 16 (full); trisomy 18; trisomy 22. LA. ADMIN. CODE PUB. HEALTH 48, § 4.101 (2022).

148. *Id.*

149. *See, e.g.*, Nat. Res. Def. Council v. Muszynski, 268 F.3d 91, 98 (2d Cir. 2001).

growth, reaction to stimuli, and reproduction."[150] Thus, Down Syndrome, for example, likely will not fall under this exception, given that it rarely causes death. While plaintiffs could point to lower life expectancy and the need for medical and social assistance, and thereby argue that the condition is incapable of harmonious existence with life, courts would likely reject these interpretations of "incompatible with life" as against legislative intent and against public policy. Further, turning to the canons of statutory interpretation, *noscitur a sociis*[151] and *ejusdem generis*[152] suggest that the catch-all category is intended to encompass only fatal conditions.

Yet within the category of fatal diseases, further ambiguities remain. For example, the list of excepted conditions notably does not include the often lethal group of lysosomal storage diseases (LSDs), which comprises over seventy distinct diseases that include Gaucher syndrome, Tay-Sachs disease, and Hurler syndrome.[153] Gaucher syndrome (type 2) is fatal, usually resulting in death by age two;[154] Tay-Sachs is also fatal and results in death by age four to five;[155] Hurler syndrome can vary, but the average life expectancy is between nine and eleven years.[156] Thus, Louisiana's "clarification" may leave more questions than answers. How soon after birth must the infant die to qualify? Does

---

150. *Incompatible*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/incompatible [https://perma.cc/5BS3-8RF6]; *Life*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/life [https://perma.cc/ZU4E-WT2Z].

151. "The meaning of an unclear or ambiguous word (as in a statute or contract) should be determined by considering the words with which it is associated in the context." *Noscitur a sociis*, MERRIAM-WEBSTER.COM LEGAL DICTIONARY, https://www.merriam-webster.com/legal/noscitur%20a%20sociis [https://perma.cc/T7E2-7RQT].

152. "[G]eneral words (as in a statute) that follow specific words in a list must be construed as referring only to the types of things identified by the specific words." *Ejusdem generis rule*, MERRIAM-WEBSTER.COM LEGAL DICTIONARY, https://www.merriam-webster.com/legal/ejusdem%20generis%20rule [https://perma.cc/BRA9-YD3A].

153. *See* Venkatraman Rajkumar & Vikramaditya Dumpa, *Lysosomal Storage Disease*, NAT'L LIB. MED. (2022), https://www.ncbi.nlm.nih.gov/books/NBK563270/ [https://perma.cc/KKX7-Y8F9].

154. *See Gaucher Disease*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/diseases/16234-gaucher-disease [https://perma.cc/NZU6-5A3H] (last updated Aug. 21, 2023).

155. *See Tay-Sachs Disease*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/diseases/14348-tay-sachs-disease [https://perma.cc/D5NR-MWAZ] (last updated Dec. 7, 2020).

156. *See Hurler Syndrome*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/diseases/24000-hurler-syndrome [https://perma.cc/BWK7-VQHH] (last updated Aug. 17, 2022).

"sustaining life" include medical interventions that keep the infant alive? These ambiguities present opportunities for women to later sue for wrongful birth by arguing that their child's condition should have qualified for termination under the exception. Although these conditions may arguably be included under the catch-all category, finding two doctors willing to go on the record supporting an abortion (no matter how "incompatible with life") may be difficult given the political climate of Louisiana and the potential for criminal liability.[157]

A generous judicial interpretation of the qualifying conditions is particularly fair given that not all of the conditions listed are inevitably fatal. For example, for fetuses with hydrops fetalis,[158] approximately 20% will survive birth. Within that group, about 20–30% will survive the first year of life, but those who do survive have shown normal development and a positive outlook for long-term health. Tay-Sachs, in comparison, is inevitably fatal. Thus, under *ejusdem generis*, Tay-Sachs should be considered a qualifying condition. Furthermore, under a simple plain meaning interpretation, Tay-Sachs is incompatible with life outside of the womb: no existing medical intervention can prevent the child from dying within the first decade of life.

While this type of claim would be limited to fatal birth defects, those plaintiff-mothers are likely to experience severe emotional trauma. Unsurprisingly, losing a child is associated with significant negative mental health effects for parents, including thoughts of self-harm.[159] The need for deterrence is therefore heightened in these most severe cases. Under this theory, the deterrence would be strong and multifaceted, protecting against both negligent medical care and doctors denying women abortions due to fear of criminal liability.

---

157. *See* LA. ADMIN. CODE PUB. HEALTH 48, § 4.101 (2022).

158. A condition in which "large amounts of fluid build up in a baby's tissues and organs, causing extensive swelling (edema)." *What is Hydrops Fetalis?*, BOSTON'S CHILD.'S HOSP., https://www.childrenshospital.org/conditions/hydrops-fetalis [https://perma.cc/6L2Q-3NWU].

159. *See, e.g.*, Kathleen Chin et al., *Suicide and Maternal Mortality*, 24 CURRENT PSYCHIATRY REP. 239, 269 (2022) (finding mothers who experienced a stillbirth were 5.2 times more likely to commit suicide than mothers who had a livebirth).

C. CHOICE OF LAW: NEGLIGENT CARE ACROSS STATE LINES

Lastly, when prenatal care crosses state lines, there is potential for parents to recover even if their own state does not recognize wrongful birth. While there are no available statistics on exactly how many women cross state lines for prenatal care, there is reason to believe the number is not negligible.

For years now, women have sought fertility treatment—specifically in-vitro fertilization (IVF)—outside of their home state. While some may travel for better expertise, many are motivated by cost. Only five states require insurers to provide comprehensive coverage for IVF treatments, meaning that many women will have to pay out-of-pocket for their IVF treatment regardless of whether it is in-state or not.[160] CNY Fertility, based in New York, is a particularly popular and cost-effective option for self-proclaimed "road warriors."[161] The clinic's communications director acknowledged as much in 2019: "In 2015, about 20 percent of our patients came from out of state. Today over 50 percent are out of state and 5 percent come internationally."[162] This situation may become even more common following the repeal of *Roe* and concerns about the personhood status of IVF embryos.[163] Additionally, genetic testing has long taken place outside of the state of care, given that large genetic testing companies handle testing and interpreting results for entire geographic regions. As Professor Hensel explains:

Laboratories that conduct genetic tests . . . may cater to clients in a multitude of jurisdictions. Depending on the fortuity of the

---

160. *See Is IVF Covered by Insurance in Your State?*, IVF OPTIONS, https://ivfoptions.com/ivf-coverage-by-state-2023 [https://perma.cc/2VQ4-HJUM] ("When a state has laws that requires some form of coverage, these states are typically referred to as 'mandated' states. . . . The states with the strongest mandates . . . are generally thought to be Massachusetts, Illinois, Connecticut, Rhode Island, and New Jersey.").

161. Angela Hatem, *Why So Many People Have to Travel for IVF Treatment*, MEDIUM (Jan. 8, 2020), https://medium.com/@angelahatem/why-so-many-people-have-to-travel-for-ivf-treatment-a7f24a0f83b0 [https://perma.cc/BG53-JPPU]. "Road warriors" not only have to endure IVF but must also travel away from home to undergo these treatments. *See id.* The label recognizes the strength and solidarity they share.

162. *Id.*

163. *See* Chabeli Carrazana & Jennifer Gerson, *IVF Patients Started Moving Their Embryos Out of States with Abortion Bans When Roe Fell*, 19TH NEWS (July 14, 2022), https://19thnews.org/2022/07/ivf-patients-moving-embryos-abortion-bans/ [https://perma.cc/C9UC-SJZT] ("A deluge of requests are now hitting fertility doctors in most states—those with potential personhood bills and those without, where the embryos could be moved.").

client's location, the identical negligent conduct may thus result in liability to the parents, immunity from liability for the child, liability for both, or liability for no one.[164]

A hypothetical helps to illustrate this scenario. Anna, a Kentucky resident, wants to begin IVF. Kentucky does not require insurers to cover IVF treatment, and the closest IVF specialist with extensive experience, Dr. Ben, has his practice in Illinois, a short drive over the border. She chooses to seek care from Dr. Ben. During the IVF process, Anna and Dr. Ben opt for preimplantation genetic testing, given her family history with the most fatal form of Gaucher disease. Dr. Ben informs her that all of the testing came back normal. She moves forward with IVF and eventually gives birth to her son Cam. At four months old, Cam is diagnosed with Gaucher disease. Kentucky does not recognize wrongful birth, but Illinois does. Anna wants to sue Dr. Ben for wrongful birth.

This fact pattern is similar to *Ginsberg ex rel. Ginsberg v. Quest Diagnostics*, a New Jersey case involving multiple defendants domiciled in New Jersey and New York.[165] While both states recognize wrongful birth, New York prohibits emotional distress damages. Unsurprisingly, the plaintiffs argued that New Jersey law should apply, and the defendants argued that New York law should apply.

The New Jersey Supreme Court first established that different states' laws may apply to different defendants in the same case. Next, the court defined New York as "the primary, if not exclusive state that is the place of injury."[166] The court's "focus must be on

164. Hensel, *supra* note 31, at 192.

165. 117 A.3d 200, 207 (N.J. Super. Ct. App. Div. 2015). *Ginsburg* is a factually complex case. "Ari Ginsberg, a New York domiciliary at the time, requested a blood test from his New York doctor in order to determine whether he was a carrier of Tay-Sachs. . . . The doctor sent the blood sample to the defendant Quest, a New Jersey-based corporation that did business in New York, which in turn sent the sample to a New York hospital, Mt. Sinai. Erroneously concluding that Ari was not a carrier of the disease, the hospital transmitted the test results to Quest, which in turn transmitted them to Ari's doctor who conveyed them orally to Ari. Shortly thereafter, Ari married Tamar, then a New Jersey domiciliary. Tamar was also tested for Tay-Sachs in New Jersey and was found to be a carrier. She consulted with her New Jersey gynecologist and then received counseling from a geneticist at a New Jersey hospital (HUMC). In these consultations, Tamar informed the gynecologist and the geneticist that her husband was not a carrier of Tay-Sachs. The couple subsequently moved to New York, where Tamar gave birth to a child who later was diagnosed with Tay-Sachs." Symeon C. Symeonides, *Choice of Law in the American Courts in 2015*, 64 AM. J. COMP. L. 221, 268 (2016).

166. *Ginsberg*, 117 A.3d at 217.

the decision to continue the pregnancy" when it defines the state of injury.[167] "[A]t the time of Tamar's pregnancy, the couple lived in New York," so "the decision, or lack thereof, to terminate the pregnancy could have been made only in New York."[168] New Jersey follows the Restatement (Second) of Conflicts of Law, so "the law of the state of injury (here New York) presumptively applies, unless another state has a more significant relationship under the principles of Section 6."[169] Section 6 of the Restatement provides factors to consider in determining the applicable rule of law, including "the relevant policies of the forum," "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue," and "the protection of justified expectations."[170]

The court then conducted its defendant-by-defendant analysis. For the New Jersey defendants, the court determined that New Jersey did in fact have a more significant relationship because "[p]rofessionals and their patients have a reasonable expectation that the laws of the state of licensure will govern the professional licensee's activities within the state where the services were provided," and because New Jersey has a strong interest in regulating its healthcare professionals. For the New York defendants, the presumption in favor of applying New York law was strengthened by looking to the factors of Section 6, as the state had a strong interest in regulating its own healthcare providers. Thus, in sum, the law of a defendant's place of business will generally control, assuming that the Section 6 factors will overcome the presumption in favor of the law of the place of injury.

This finding fits nicely with a larger trend: "In the vast majority of tort conflicts involving medical malpractice, the courts apply the law of the state where the medical services were rendered, rather than the state in which the patient was domiciled."[171] There are compelling policy reasons for this choice. It would be "wholly unreasonable . . . [to] require hospitals and physicians to be aware of and be bound by the laws of all states from which patients came to them for treatment."[172] Furthermore, as the *Ginsberg* court

167. *Id.* at 218.
168. Symeonides, *supra* note 165, at 270.
169. *Id.*
170. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969).
171. Symeonides, *supra* note 165, at 267.
172. *Id.* (quoting Troxel v. A.I. DuPont Inst., 636 A.2d 1179, 1181 (Pa. Super. Ct. 1994), *appeal denied*, 647 A.2d 903 (Pa. 1994)).

noted, patients are on notice that going to another jurisdiction exposes them to the laws of that territory.[173]

This approach benefits a certain class of potential plaintiffs (those who live in a state without wrongful birth but receive medical care in a state that does recognize the tort) while closing off recovery to another class (those who live in a state that recognizes wrongful birth but receive medical care in a state that does not recognize the tort). Yet given the overlap between states that refuse to recognize wrongful birth and those that have banned abortion,[174] it is reasonable to assume that this outcome benefits more plaintiffs than it harms.

Turning back to the earlier hypothetical, Anna should be able to sue Dr. Ben for wrongful birth using Illinois law: although the injury took place in Kentucky (where Anna lived during the critical window in which she could have decided to abort), Illinois' interest in applying its own laws against its healthcare providers overcomes the presumption in favor of Kentucky law. Illinois allows wrongful birth in part to deter negligent medical care,[175] and applying a different state's laws would undermine that goal. Applying the patient's domicile's law would also create a perverse incentive for doctors to prioritize patients who live in defendant-favorable states. This concern feels particularly important given the possibility that women from abortion-ban states may seek their prenatal care in other states. If doctors know patients from Kentucky cannot sue, they may prioritize them over patients from Illinois, whether intentionally or subconsciously.

The one notable exception is New Mexico, which follows the *lex loci deliciti* rule[176] and the "last event" rule from the First Restatement of Conflict of Laws, which holds that "[t]he place of the wrong . . . is the location of the last act necessary to complete the injury."[177] Thus, in a wrongful birth case, presumably the last

---

173. *See* Ginsberg *ex rel.* Ginsberg v. Quest Diagnostics, Inc., 117 A.3d 200, 207 (N.J. Super. Ct. App. Div. 2015); *see also* Symeonides, *supra* note 165, at 267 ("In the vast majority of tort conflicts involving medical malpractice, the courts apply the law of the state where the medical services were rendered, rather than the state in which the patient was domiciled.").

174. Out of the twenty-four states that have banned or restricted abortion following *Dobbs*, only six recognize wrongful birth: Alabama, Florida, Louisiana, Texas, West Virginia, and Wisconsin. *See supra* pp. 13–14.

175. *See* Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 705 (Ill. 1987).

176. The law of the place where the tort is completed controls. Symeonides, *supra* note 165, at 267.

177. *Id.* (quoting Montano v. Frezza, 352 P.3d 666, 670 (N.M. 2007)).

act necessary to complete the injury is birth: the moment the mother could no longer seek an abortion in any state. New Mexico's differing approach is significant given that women from Texas have been seeking obstetric care in New Mexico following *Dobbs*.[178] While New Mexico courts have yet to address wrongful birth, an exceptionally liberal ruling in a wrongful conception case[179] suggests that the state may recognize the cause of action.

Of course, an added complication is that personal jurisdiction must be established before even reaching choice of law questions. Whether the patient can sue in her home state will depend on the state's long-arm statute and the doctor's minimum contacts (or lack thereof) with the forum state and its residents. Revisiting the earlier hypothetical, Kentucky's long-arm statute allows for jurisdiction over non-residents if the non-resident causes "tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct . . . in this Commonwealth."[180] Thus, if Dr. Ben regularly advertises his practice to Kentucky residents or solicits their business in any other way, Anna may very well be able to establish personal jurisdiction over him in Kentucky. If not, she will have to sue in Illinois. While this is likely not prohibitively burdensome in Anna's case, for women who travel further for care and do not have the time and money to sue in that state, this jurisdictional issue may bar the suit.

178. *See* Janelle Bludau, *"It Is Ridiculous. It Is a Lot." Texas Women Describe Traveling to New Mexico for Abortions*, KHOU 11 (Aug. 25, 2022), https://www.khou.com/article/news/local/texas/texas-women-travel-abortion/285-c4fd74bf-089c-43cf-a30c-b740a078e7d0 [https://perma.cc/EC8Q-KWQY] (documenting the experiences of several Texas women who have traveled to New Mexico to seek an abortion). To avoid allegations of aiding and abetting abortions, many Texas doctors have used cryptic phrases in advising patients with high-risk pregnancies to seek abortions in New Mexico. *See* Simmons-Duffin, *supra* note 86 ("I have colleagues who say cryptic things like, 'The weather's really nice in New Mexico right now. You should go check it out.' Or, 'I've heard traveling to Colorado is really nice this time of year,' says Miller's OB-GYN.").

179. *See* Provencio v. Wenrich, 261 P.3d 1089, 1096 (N.M. 2011) ("In a seminal opinion, we held that New Mexico would . . . recognize damages resulting from the birth of an unplanned, yet healthy child. . . . [D]amages could include the costs of raising an unexpected child to the age of majority.") (citations omitted) (citing Lovelace Med. Ctr. v. Mendez, 806 P.2d 603, 612, 616–17 (N.M. 1991)).

180. KY. REV. STAT. ANN. § 454.210 (2019).

IV. POLICY IMPLICATIONS

Arguing for increased liability for doctors at a time like this may seem misguided. A number of states have passed legislation that imposes criminal liability on doctors who aid and abet an abortion.[181] Idaho, Oklahoma, and Texas have passed laws that allow private citizens to sue anyone who aids and abets an abortion.[182] Given the restrictive laws and potential for liability in abortion-ban states, there is already anecdotal evidence that doctors are unwilling to work in those states.[183] This trend could exacerbate existing maternity care deserts, which disproportionately plague large swaths of the south and Midwest where abortion is most restricted.[184] Perhaps the priority should be on *protecting* doctors from these criminal and civil laws rather than expanding existing civil liability via wrongful birth. Negligent care could be better than no care at all, which is an increasingly real possibility in many counties.

Furthermore, there have long been concerns that medical malpractice negatively impacts doctors' mental health and the actual standard of care, and obstetrics physicians are particularly impacted by the threat of liability. In Massachusetts, for example, from 1994 to 2003, 24% of OB-GYN doctors made settlement payments arising from a medical malpractice claim.[185] This is compared to only 15% for general surgeons and 4% for internal

181. The states are Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, and Texas. *Abortion is Now Illegal in 11 States*, CTR. FOR REPROD. RTS. (Aug. 30, 2022), https://reproductiverights.org/abortion-illegal-11-states/ [https://perma.cc/TQ7K-CU4T].

182. *See* Tracy Cole et al., *Post-Roe Criminal Implications for Multistate Entities*, BAKER HOSTETLER (July 11, 2022), https://www.jdsupra.com/legalnews/post-roe-criminal-implications-for-9444433/ [https://perma.cc/ZG96-X237].

183. *See* Christopher Rowland, *A Challenge for Antiabortion States: Doctors Reluctant to Work There*, WASH. POST (Aug. 6, 2022, 12:05 PM), https://www.washingtonpost.com/business/2022/08/06/abortion-maternity-health-obgyn/ [https://perma.cc/KZ7Z-4RGX] ("One large medical recruiting firm said it recently had 20 obstetrician-gynecologists turn down positions in red states because of abortion laws.").

184. Counties are classified as maternity care deserts "if there [are] no hospitals providing obstetric care, no birth centers, no OB/GYN and no certified nurse midwives." *Nowhere to Go: Maternity Care Deserts Across the U.S.*, MARCH OF DIMES (2022), https://www.marchofdimes.org/sites/default/files/2022-10/2022_Maternity_Care_Report.pdf [https://perma.cc/C5GL-9Q8N].

185. Beomsoo Kim, *The Impact of Malpractice Risk on the Use of Obstetrics Procedures*, 36 J. LEGAL STUDS. 79, 82 (2007).

medicine.[186] A 2003 survey found that 14% of respondents left obstetrics because of these risks.[187]

There are also debates in the literature about whether medical malpractice suits actually serve their claimed purpose of deterrence. One study found that while "treatment quality may improve upon reforms that expect physicians to adhere to higher quality clinical standards," there is no evidence indicating that "treatment quality may deteriorate following reforms to liability standards that arguably condone the delivery of lower quality care."[188] These results suggest that if wrongful birth were to be eliminated via legislation or judicial precedent, the standard of care may very well not drop; but at the same time, an expansion of wrongful birth to encapsulate even parents who would not have aborted might improve the quality of treatment.

Yet there are still concerns that the risk of litigation may actually worsen the care provided. For example, "an increase in risk may discourage doctors from treating people with certain conditions or conducting risky (but potentially beneficial) procedures."[189] Another concern is that the risk of litigation may cause doctors to perform unnecessary tests and procedures:

Defining legal duties according to medical custom also means that there is a dialectical relationship between law and medicine through which the practice of defensive medicine may create a self-defeating 'race to the bottom.' The more tests physicians order to prevent liability, the more likely it is that they will create a legal duty to offer these tests, regardless of whether testing is otherwise well advised.[190]

The result would be that the cost of healthcare would increase without a commensurate increase in positive outcomes for patients.

Yet scholarship suggests these concerns may be exaggerated. One study concluded that malpractice risk does not have a significant impact on the behavior of obstetricians, finding that amniocentesis was the only "diagnostic procedure that is used substantially more as malpractice risk increases."[191] This suggests

186. *Id.*
187. *Id.* at 80–81.
188. Michael Frakes & Anupam B. Jena, *Does Medical Malpractice Law Improve Healthcare Quality?*, 143 J. PUB. ECON. 142, 142 (2016).
189. Kim, *supra* note 185, at 80.
190. Ossorio, *supra* note 17, at 312.
191. Kim, *supra* note 185, at 84.

that doctors do not shy away from treating riskier cases and do not order useless tests for fear of liability—they are simply following the established standard of care, indicating that wrongful birth is serving its purpose effectively.[192] Even if an increase in tests were to increase the overall cost of care to patients, it is also true that the cost of nearly all medical care is increasing; singling out prenatal care for censure would be arbitrary at best, if not outright sexist.

Lastly, amidst concerns that insurance companies may stop covering prenatal screening, wrongful birth claims may only be brought by those willing and able to pay out-of-pocket for testing. Given the significant cost of screening, this may mean that most of the women able to bring these claims are wealthy. While wealthy women may have received negligent care, women who cannot afford care would have received no testing at all. This undermines the rationale that wrongful birth provides much-needed resources that enable families to financially provide for their disabled children. But common sense strongly suggests that not all women who screen for fetal anomalies are wealthy—they could simply have a family history that makes them particularly susceptible to certain conditions or a personal medical history of high-risk pregnancies.[193] And even if wrongful birth claims were only brought by well-off women, that would not render the cause of action pointless—its deterrent purpose would still be fulfilled.

CONCLUSION

Despite valid and important critiques from disability scholars, wrongful birth has always been a vital, if painful, cause of action for parents who face the unexpected challenge of raising a child with disabilities. When these claims succeed, the damages

192. The study was published in 2007, before noninvasive prenatal screening and genetic testing truly became part of the standard of care. Presumably, in 2023, these routine tests are treated similarly to amniocentesis was in 2007. Yet this does not mean that doctors are ordering unnecessary tests—the conditions tested for are carefully selected based on the patient's age, medical history, and family history, among other factors.

193. Low-income women, however, may find it challenging to navigate the legal system: "[W]hile a parent with lower income and few to no assets would benefit the most from recovering monetary damages . . . that same parent . . . is also significantly less likely to have meaningful access to the courts or an attorney with sufficiently specialized knowledge of tort law to consider asserting such claims, let alone to do so successfully." Lydia X. Z. Brown, *Legal Ableism, Interrupted: Developing Tort Law & Policy Alternatives to Wrongful Birth & Wrongful Life Claims*, 38 DISABILITY STUDS. Q. 1, 7 (2018).

received can enable parents to care for their child without incurring excessive debts. The damages awarded in wrongful birth cases also act as a helpful deterrent that maintains the standard of care. The tort takes on increased importance as birth defects become more common, but *Dobbs* casts doubt on the continued existence of the cause of action in abortion-ban states.

While other scholarship has suggested that wrongful birth will die alongside *Roe* and that parents should prepare to channel their claims into less-protective torts or contract claims, this Note argues that wrongful birth remains a viable cause of action post-*Roe*. Specifically, women can still recover under three different theories: (i) through an expanded version of wrongful birth that covers parents who would not have aborted at all and parents who would have traveled to another state for an abortion; (ii) through certain abortion exceptions for medically futile pregnancies; and (iii) using favorable choice of law when prenatal care crosses state lines. Although strengthening civil liability against doctors may seem misguided given that doctors are already concerned with avoiding criminal and abortion-bounty liability, ultimately mothers' need for protection must outweigh these concerns.

In 2017, Dortha Biggs met with Jennifer Gann, a journalist who was in the process of suing her doctor for wrongful birth after her son Noah was born with cystic fibrosis. Like many other mothers, they discussed their children. Unlike many other mothers, they discussed the guilt they feel for birthing children doomed to suffer. Every decision they made, from the doctors they chose to the decision to forego IVF, continues to haunt them. Dortha plainly described the guilt as "a life sentence."[194] Women like Dortha and Jennifer need and deserve legal recognition of and compensation for their life sentences, and the next generation of mothers deserve medical care sufficient to prevent this suffering. Wrongful birth provides the best pathway to a future without these life sentences, and that is worth fighting for.

194. Gann, *supra* note 45.