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NOTE

THE IMPACT OF POST-*DOBBS* ABORTION BANS ON PRENATAL TORT CLAIMS

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In June 2022, the Supreme Court revoked Americans' fundamental right to abortion in Dobbs v. Jackson Women's Health Organization. *However, the Court said nothing about how its decision would impact tort claims related to reproductive care. Many states have since adopted near-total or early-gestational-age abortion bans, which has not only diminished access to reproductive care, but has also incidentally impaired the ability of plaintiffs to bring long-recognized prenatal tort claims. Prenatal tort claims—wrongful pregnancy, birth, and life—allow victims to recover when a medical professional negligently performs reproductive or prenatal care. This Note identifies the impact that post-*Dobbs *abortion bans and restrictions will have on each type of prenatal tort claim. This Note explains the purposes of prenatal tort claims and supplies an up-to-date, nationwide survey of the recognition of these claims. It then provides empirical evidence demonstrating the politicized nature of prenatal tort claims and analyzes the ways that abortion bans will impact them. Finally, it outlines potential constitutional, tort law, and nonlegal solutions to* Dobbs*'s impact on prenatal tort claims.*

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INTRODUCTION

In June 2022, the Supreme Court in *Dobbs v. Jackson Women's Health Organization* allowed states to pass complete and near-complete bans on abortion for the first time since before *Roe v. Wade*.[1] Fourteen states now have such bans in place.[2] The *Dobbs* decision also cleared the way for more severe abortion restrictions than existed under the *Roe* regime.[3] By overruling nearly fifty years of precedent, *Dobbs* has fundamentally changed constitutional law. But

1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

2. *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (May 5, 2023, 4:00 PM) [hereinafter *Tracking the States*], https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [perma.cc/6VMC-B3W5]. However, Wisconsin's ban is a nineteenth-century law that predates *Roe v. Wade*. *Id.* The Wisconsin Department of Justice is currently challenging this law. Sarah Lehr, *The Legal Challenge of Wisconsin's 1849 Abortion Ban Is Awaiting Its Day in Court. Where Does the Case Stand?*, WIS. PUB. RADIO (Sept. 30, 2022, 6:25 PM), https://www.wpr.org/legal-challenge-wisconsins-1849-abortion-ban-awaiting-its-day-court-where-does-case-stand [perma.cc/J2JC-QQUR].

3. States can now restrict abortion prior to viability, which was generally between 23 and 28 weeks under *Roe*. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). Nebraska, Arizona, Florida, Utah, and North Carolina now have gestational limits of 12, 15, 15, 18, and 20 weeks, respectively. *Tracking the States*, *supra* note 2.

few have commented on how *Dobbs* will impact tort law and, specifically, prenatal tort claims.[4]

In the decades following *Roe*, state courts began to widely recognize certain prenatal tort claims.[5] These claims address situations where a medical professional[6] fails to satisfy their duty of care by act or omission when providing genetic counseling or prenatal testing, administering contraception, or diagnosing infertility.[7] As medical malpractice actions, prenatal tort claims are governed primarily by state common law principles.[8] To prevail, plaintiffs must prove the same general elements of most medical malpractice claims: (1) the existence of a patient-physician relationship; (2) a violation of the standard of care; (3) that the failure to meet the standard of care was a substantial factor in causing the damage; and (4) actual damage.[9] In federal court, plaintiffs can bring suit under the Federal Tort Claims Act, but the claim remains governed by the same state law principles.[10]

Prenatal torts give rise to three distinct causes of action: wrongful pregnancy, wrongful birth, and wrongful life.[11] *Wrongful pregnancy* is an action

4. E. Travis Ramey noted some of the impact of *Dobbs* on wrongful birth claims. E. Travis Ramey, *Wrongful Birth After Dobbs*, SSRN (Oct. 31, 2022), https://dx.doi.org/10.2139/ssrn.4263215 [perma.cc/8RPM-UB6A]. The scope of this Note is broader. It evaluates wrongful pregnancy, life, and birth claims; proposes additional solutions; and provides a nationwide survey of where jurisdictions stand on prenatal torts.

5. See *infra* Section II.A.

6. In contexts outside the scope of this Note, the term "prenatal torts" refers to suits brought by a child against their mother for injuries sustained as a fetus attributed to the mother's negligence. Ron Beal, *"Can I Sue Mommy?" An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive*, 21 SAN DIEGO L. REV. 325, 325–26 (1984).

7. *See* Dov Fox, Essay, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 166–67 (2017).

8. *See* Hester *ex rel.* Hester v. Dwivedi, 733 N.E.2d 1161, 1163 (Ohio 2000) ("While these types of cases are commonly labeled 'wrongful life,' 'wrongful pregnancy,' 'wrongful birth,' or 'wrongful living' actions, they are not governed by statutory law as are wrongful death actions. They remain, at their core, medical negligence actions, and are determined by application of common-law tort principles."); Robak v. United States, 658 F.2d 471, 476 (7th Cir. 1981) ("[Wrongful birth] is little different from an ordinary medical malpractice action. It involves a failure by a physician to meet a required standard of care, which resulted in specific damages to the plaintiffs.").

9. *See* Gregg J. Gittler & Ellie J.C. Goldstein, *The Elements of Medical Malpractice: An Overview*, 23 CLINICAL INFECTIOUS DISEASES 1152, 1153 (1996). Courts have applied the elements of medical malpractice claims to prenatal tort claims. *See* Turpin v. Sortini, 643 P.2d 954, 960 (Cal. 1982); Boone v. Mullendore, 416 So. 2d 718, 720 (Ala. 1982); Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 616 (N.M. 1991).

10. *See* Simms *ex rel.* C.J. v. United States, 839 F.3d 364 (4th Cir. 2016); Pacheco v. United States, 21 F.4th 1183 (9th Cir. 2022).

11. Prenatal tort terminology is not uniform. Sometimes, wrongful pregnancy, wrongful birth, and wrongful life have been used to refer to entirely different situations. *See* Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 487 (Wash. 1983) (en banc) ("The epithet wrongful birth has been used to describe several fundamentally different types of action."). At other times, wrongful birth and wrongful pregnancy have at times been used interchangeably. *See* Cockrum v. Baumgartner, 447 N.E.2d 385, 386 (Ill. 1983). This Note will use the definitions provided in this paragraph.

that parents bring on their own behalf to recover damages from the birth of a nondisabled child who, but for the defendant's negligence, would not have been born.[12] Cases often arise from negligently performed sterilization procedures[13] or abortions,[14] or incorrectly administered[15] or inserted[16] birth control. *Wrongful birth* is an action by parents on their own behalf who suffered damages as a result of the birth of a child experiencing disability who, but for the negligence of the defendant, would not have been born, because had the parents known about the disability (or likelihood of disability) in time, they would have obtained an abortion or chosen not to conceive in the first place.[17] Typical wrongful birth cases involve a medical professional's failure to discover[18] or diagnose[19] a medical condition in the parents[20] or the fetus[21] through prenatal testing. *Wrongful life* is an action brought by a minor child experiencing disability who argues that, but for the defendant's negligence, they would not have been born.[22] While a wrongful life suit may seem redundant, it bears the advantage of allowing the child to sue for lifetime expenses, while wrongful pregnancy and birth claims only permit the parents to recover until their child's age of majority.[23]

All three types of prenatal tort claims are hotly contested,[24] politicized, and intertwined with abortion.[25] Courts have long grappled with prenatal tort

12. Smith v. Gore, 728 S.W.2d 738, 741 (Tenn. 1987).

13. *See, e.g.*, James G. v. Caserta, 332 S.E.2d 872, 875 (W. Va. 1985).

14. *See* Miller v. Johnson, 343 S.E.2d 301, 302 (Va. 1986).

15. *See Pacheco*, 21 F.4th 1183 (recognizing a wrongful pregnancy action where a medical professional gave the plaintiff a flu shot instead of a birth control shot); Jackson v. Bumgardner, 347 S.E.2d 743 (N.C. 1986) (recognizing the same where a medical professional failed to replace plaintiff's IUD).

16. *See* Clutter-Johnson v. United States, 242 F. Supp. 3d 477 (S.D.W. Va. 2017) (recognizing a wrongful pregnancy action for a negligently inserted IUD).

17. *Smith*, 728 S.W.2d at 741.

18. *See* Blouin v. Koster, No. PC-2015-3817, 2016 WL 3976926 (R.I. Super. Ct. July 19, 2016) (recognizing a wrongful birth action for failure to do genetic screening); Garrison v. Med. Ctr. of Del. Inc., 581 A.2d 288 (Del. 1989) (recognizing the same for failure to do timely amniocentesis).

19. *See* Keel v. Banach, 624 So. 2d 1022 (Ala. 1993) (recognizing a wrongful birth action for failure to identify fetal differences during sonograms).

20. *See* Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (recognizing a wrongful birth action for failure to warn pregnant mother with rubella of fetal risks).

21. *See Blouin*, 2016 WL 3976926; *Garrison*, 581 A.2d 288.

22. *Smith*, 728 S.W.2d at 741; Williams v. Univ. of Chi. Hosps., 688 N.E.2d 130, 133 (Ill. 1997); Thomas Keasler Foutz, Comment, *"Wrongful Life": The Right Not To Be Born*, 54 TUL. L. REV. 480, 485 (1980) (specifying that in a wrongful life claim, "[t]he child argues that *but for* inadequate advice, it would not have been born to experience the pain and suffering attributable to the deformity").

23. Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 117 n.3 (1999).

24. *See* DOV FOX, BIRTH RIGHTS AND WRONGS 44 (2019).

25. *See infra* Section II.B.

claims[26] and whether to recognize them.[27] Most states do not recognize all prenatal tort claims, some do not recognize any, and many limit their damages.[28] Although some scholars consider prenatal tort claims altogether inadequate and unsuccessful,[29] such characterizations are extreme. These claims sometimes enable plaintiffs to recover substantial damages for reproductive wrongs that would otherwise go unaddressed.[30] But the case law or published literature has not yet confronted the impacts of abortion bans on prenatal tort actions—a new wrinkle for these already controversial claims.

Another reason prenatal tort claims are controversial is because they regularly raise disability issues, so proper language is important.[31] The medical profession invented the label "defective," now considered derogatory, to describe a fetus that deviates from developmental expectations.[32] Many courts have used "defective"[33] or other language with negative connotations like "retarded,"[34] "deformed,"[35] and "impaired" to describe children experiencing disability in prenatal tort cases.[36] In an effort to avoid the stigmatization that these derogatory words cause, this Note will use the language "people experiencing disability."[37] In addition, this Note will use "nondisabled" to describe individuals who do not experience disability. It is also worth clarifying that the word "wrongful" in wrongful birth and wrongful life refers to the wrongfulness of

26. *See, e.g.*, Bishop v. Byrne, 265 F. Supp. 460, 463 (S.D.W. Va. 1967); Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971).

27. *See* Johnson v. Univ. Hosps. of Cleveland, 540 N.E.2d 1370, 1377 (Ohio 1989) ("[W]e comment that [whether to recognize a wrongful pregnancy action] has been one of the most difficult cases we have been called upon to decide.").

28. *See infra* Table 1.

29. Fox, *supra* note 7.

30. *See* Pacheco v. United States, 48 F.4th 976, 977 (9th Cir. 2022) (affirming award of $10,042,294.81 in wrongful pregnancy case); Phillips v. United States, 575 F. Supp. 1309, 1319 (D.S.C. 1983) (awarding $1,283,765.00 in economic damages, $212,500.00 in emotional distress damages to the mother, and $37,500.00 in emotional distress damages to the father, for a total of $1,533,765.00 for the wrongful birth of a child with Down Syndrome); Marciniak v. Lundborg, 450 N.W.2d 243, 246 (Wis. 1990) (allowing recovery in wrongful pregnancy action for "substantial" damages—the cost of raising a child until the age of majority).

31. See *infra* Section I.D. for a discussion of prenatal torts and disability.

32. *See* Lois Shepherd, *Protecting Parents' Freedom to Have Children with Genetic Differences*, 1995 U. ILL. L. REV. 761, 764 (1995).

33. Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 698 (Ill. 1987).

34. Becker v. Schwartz, 386 N.E.2d 807, 808 (N.Y. 1978).

35. Kush v. Lloyd, 616 So. 2d 415, 417 (Fla. 1992).

36. Smith v. Cote, 513 A.2d 341, 351 (N.H. 1986).

37. I recognize that, as disability language is constantly evolving and is a deeply personal decision, some may prefer other terms. *See* Erin E. Andrews, Robyn M. Powell & Kara Ayers, Commentary, *The Evolution of Disability Language: Choosing Terms to Describe Disability*, DISABILITY & HEALTH J., July 2022, Article No. 101328, https://www.sciencedirect.com/science/article/pii/S1936657422000681 [perma.cc/CDD3-N6WW].

the physician's negligence[38] and does not mean to imply that there is something wrong with a child who experiences disability.

This Note argues that prenatal tort claims have been seriously affected by abortion bans in at least some states. Part I is devoted to the background complexities of prenatal torts. It outlines justifications for and criticisms of prenatal tort claims and provides an updated national survey of state law regarding prenatal tort claim recognition. Part II provides empirical evidence on the politicization of prenatal tort claims and then analyzes the impact of abortion bans on each of the three types of actions. Part III suggests potential solutions to *Dobbs*'s impact on prenatal torts, including the constitutional right to interstate travel, access to medication abortion, and a reframing of the injury at issue, all of which would strengthen prenatal tort claims brought in states with near-total or early-gestational-age abortion bans.

I. BACKGROUND: JUSTIFICATIONS FOR PRENATAL TORT CLAIMS, CRITICISMS, AND WHERE STATE LAW STANDS

This Part details how prenatal tort claims accomplish tort law's fundamental goals of compensating victims and deterring tortious conduct,[39] and how they further gender equality and reproductive rights. It acknowledges that prenatal tort suits have often contributed to stigmatization of the disability community. With some adjustments, these claims, and tort law itself, can better serve people who experience disability. This Part also provides an up-to-date, nationwide survey of U.S. jurisdictions, which shows that before *Dobbs*, state courts and legislatures generally recognized wrongful pregnancy claims, about half recognized wrongful birth claims, and few recognized wrongful life claims.

A. *Compensating Victims*

Plaintiffs in prenatal tort cases deserve compensation. They often need it. In these cases, the plaintiffs have either an unplanned child as a result of wrongful pregnancy, or a child with unexpected medical needs due to wrongful birth. The annual cost of raising one child in the United States is about $17,000 according to an analysis of U.S. Department of Agriculture data from the 1990s to 2017.[40] In many wrongful pregnancy cases, the plaintiff did not

38. Deborah Pergament & Katie Ilijic, *The Legal Past, Present and Future of Prenatal Genetic Testing: Professional Liability and Other Legal Challenges Affecting Patient Access to Services*, 3 J. CLINICAL MED. 1437 (2014).

39. *See* Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 336 (2004).

40. Abha Bhattarai, Dan Keating & Stephanie Hays, *What Does it Cost to Raise a Child?*, WASH. POST (Oct. 13, 2022), https://www.washingtonpost.com/business/interactive/2022/cost-raising-child-calculator [perma.cc/Q4ZY-DJQF].

want a child—hence the vasectomy, sterilization, or abortion at issue[41]—so they may be less financially prepared for one. In addition, approximately 49% of people who seek abortions are poor, 75% are low-income, and 59% already have children.[42] In wrongful birth and life cases, child-rearing expenses can be magnified by the child's unique medical needs. Because the United States does not have universal healthcare, plaintiffs may be uninsured or underinsured, and costs of medical care can be prohibitively high.[43] Pregnancy and child rearing are demanding and time consuming.[44] They come with opportunity costs and can limit parents' educational and professional prospects for nine months or more.[45] Plus, the parent victim of a prenatal tort may already have other dependent children.[46] For example, in the Texas case of *Crawford v. Kirk*, plaintiff Tammy Crawford already had three children and underwent a sterilization procedure for financial reasons.[47] Crawford's doctor negligently performed the procedure, and Crawford later gave birth to twins after a complicated pregnancy that left her hospitalized for over a month.[48]

Compensation from prenatal tort suits also redresses *noneconomic* injuries:

> Reproductive negligence inflicts a distinct and substantial injury, however, that goes beyond any bodily intrusion or emotional distress. The harm is being robbed of the ability to determine the conditions under which to procreate. Determinations about having children tend more than most decisions in life to shape who people are, what they do, and how they want to be remembered. . . . That is why the wrongful frustration of reproductive plans disrupts personal and professional lives in predictable and dramatic ways.[49]

41. See, for example, *Dotson v. Bernstein*, 207 P.3d 911 (Colo. App. 2009), where the plaintiff suffered a negligent abortion and gave birth to an unwanted child, and *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982), where the plaintiff unexpectedly gave birth after being told that she was sterile and could not bear children.

42. Brief of Amici Curiae Economists in Support of Respondents at 23, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

43. David Pimentel, *A Cure for What Ails You: How Universal Healthcare Can Help Fix Our Tort System*, 100 OR. L. REV. 501, 503 (2022).

44. Fox, *supra* note 7, at 179–80. Because of these profound injuries, Dov Fox advocates for a doctrinal shift away from prenatal tort claims to a new claim of "reproductive negligence," as he believes that prenatal tort law does not adequately remedy these harms. I take up this argument *infra* Section III.C.

45. Fox, *supra* note 7, at 179–80.

46. *See, e.g.*, Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 396 (Iowa 2017); Simmerer v. Dabbas, 733 N.E.2d 1169, 1169 (Ohio 2000); Johnston v. Elkins, 736 P.2d 935, 937 (Kan. 1987).

47. Crawford v. Kirk, 929 S.W.2d 633, 634–35 (Tex. App. 1996).

48. *Id.* at 635.

49. Fox, *supra* note 7, at 155.

Parenthood or additional children can cause a family psychological and physical harm resulting from childbirth, child care, or having an unwanted child.[50] If the child experiences disability, the child may endure chronic pain—suffering that the rest of the family, in turn, must witness.[51] For the child who experiences disability, the compensation from a prenatal tort claim also means they can grow up in a family freed from the emotional burden of financial uncertainty.[52]

B. *Deterring Misconduct*

There is a great need to deter negligence in reproductive care and prenatal genetic testing.[53] Patients seeking these services are in no position to bargain or insure against bad outcomes.[54] In addition, these forms of medical care are poorly regulated and lack effective self-policing.[55]

Negligence law is often considered a means to deter careless behavior,[56] and prenatal tort liability may facilitate such deterrence.[57] In theory, the costs of litigation encourage health systems to invest in safety precautions.[58] There may also be some deterrent effects on individual medical professionals who do not wish to spend time defending a lawsuit,[59] suffer reputational harm,[60] or lose their jobs.[61] Consider the Virginia wrongful pregnancy case of *Miller v. Johnson*, where plaintiff Laura Johnson underwent an abortion and sterilization procedure and, after the fact, a pathology report showed that the abortion was unsuccessful.[62] However, the report was filed without ever being reviewed by a physician, so Johnson did not learn that she was still pregnant until

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50. *See* Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

51. *See* Alexander Morgan Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 641 (1979).

52. *See* Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 171 (2005).

53. *Id.* at 190.

54. Fox, *supra* note 7, at 152.

55. *Id.* at 163–64, 172–74.

56. William B. Schwartz & Neil K. Komesar, *Doctors, Damages and Deterrence: An Economic View of Medical Malpractice*, 298 NEW ENG. J. MED. 1282, 1282 (1978).

57. *See* Pollard, *supra* note 39, at 339 ("This factor alone—discouraging medical practitioners from carelessness in genetic testing and disclosure—warrants imposition of liability in wrongful life cases.").

58. Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1603 (2002).

59. *Id.* at 1603 n.41.

60. *See* Schwartz & Komesar, *supra* note 56, at 1287.

61. *See* David M. Studdert et al., *Changes in Practice Among Physicians with Malpractice Claims*, 380 NEW ENG. J. MED. 1247, 1251–52 (2019) (finding that physicians' odds of leaving clinical practice or shifting to a smaller practice increased with the number of their paid malpractice claims).

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

months later, when it was too late to undergo another abortion.[63] Due to an imbalance of medical knowledge, Johnson could not personally review the pathology report or check whether her physician had done so. At the time, Virginia had yet to recognize wrongful pregnancy actions.[64] If it had, there would have been a financial incentive for the defendant provider to institute precautions ensuring that physicians did not forget to consult pathology reports. The same deterrence rationale that incentivizes safety precautions may also encourage communication-and-resolution programs within health systems, where health care providers disclose unanticipated outcomes to patients and proactively seek resolutions such as an explanation, apology, and/or offer of compensation.[65] These programs improve patient care but are not universally available.[66]

Empirical evidence of medical error deterrence is hard to find,[67] and some believe that its benefits are minimal.[68] The medical community's prevailing approach to medical errors is to "deny and defend": deny that a mistake has occurred and vigorously defend against malpractice claims.[69] Furthermore, medical malpractice insurance, which most physicians carry,[70] blunts the force of deterrence.[71] The negligent physician may not even experience an increase in insurance premiums.[72] These flaws are not unique to prenatal tort claims, but rather are endemic to medical malpractice law.[73] Still, if prenatal tort liability provides even some deterrence, then it is worth maintaining; otherwise, patients who require reproductive or prenatal care would be less protected than other patients.

C. *Uplifting Reproductive Rights and Gender Equality*

In a world with reproductive rights, prenatal tort claims enforce them. These claims stand for the proposition that people capable of pregnancy should not be denied the right to make a decision to have an abortion based

63. *Id.* at 302.

64. *See infra* Table 1.

65. Michelle M. Mello et al., *Communication-And-Resolution Programs: The Challenges and Lessons Learned from Six Early Adopters*, 33 HEALTH AFFS. 20 (2014).

66. *Id.*

67. Mello & Brennan, *supra* note 58, at 1604.

68. *See, e.g.*, Patricia M. Danzon, *Liability for Medical Malpractice*, J. ECON. PERSPS., Summer 1991, at 51, 52.

69. Daniel Rocke & Walter T. Lee, *Medical Errors: Teachable Moments in Doing the Right Thing*, 5 J. GRADUATE MED. EDUC. 550 (2013).

70. B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467 CLINICAL ORTHOPAEDICS & RELATED RSCH. 339, 340 (2009); *see also* Schwartz & Komesar, *supra* note 56, at 1287.

71. Schwartz & Komesar, *supra* note 56, at 1287.

72. *Id.*

73. *See* Mello & Brennan, *supra* note 58, at 1603–04.

on facts that could have and should have been disclosed,[74] such as the person's pregnancy status or the fetus's health condition. Prenatal tort liability sends a signal to medical professionals and society at large that reproductive rights must be respected in a robust manner. Prenatal tort actions also encourage and protect procreation itself by giving people a civil remedy when a medical professional's negligence thwarts reproduction.[75]

Women are disproportionately harmed by reproductive negligence.[76] In wrongful pregnancy cases, women (or any people capable of pregnancy) are the ones to carry the unwanted pregnancy and undergo the birth. There are no statistics specific to families that have been victims of prenatal torts, but in general, mothers are far more likely to do care work than fathers.[77] Through prenatal tort claims, tort law can be a force for creating equality.[78] Otherwise, women's suffering may become invisible and their hardships may go unaddressed.[79]

The availability of prenatal tort claims also benefits men. Men are not "'distant,' 'vicarious,' or 'peripheral' actors in the reproductive process"; they suffer real harms.[80] Men have access to pregnancy-related medical malpractice claims as well, including failed vasectomy claims.[81] In other cases, a man's sperm may have been used without his consent, forcing him into parenthood.[82] Fathers have a legal obligation to support their children, so without prenatal tort liability, they may be required to pay one half or more of the child's costs.[83] Prenatal tort claims can provide male victims with resources to pay for their unexpected child.

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74. Tillman v. Goodpasture, 424 P.3d 540, 543 (Kan. Ct. App. 2018) (citing Arche v. United States, 798 P.2d 477 (Kan. 1990)).

75. *See* Carol Sanger, *The Lopsided Harms of Reproductive Negligence*, 118 COLUM. L. REV. ONLINE 29, 34 (2017).

76. *Id.* at 40.

77. *See* Darcy Lockman, *Too Often, Working Mothers Do Far More of the Childcare than Their Husbands. Here's How to Fix That*, TIME (May 16, 2019, 2:30 PM), https://time.com/5589770/parenting-working-women-domestic-balance [perma.cc/6H66-YBAB]; Shera Avi-Yonah, *Women Did Three Times as Much Child Care as Men During Pandemic*, BLOOMBERG (June 25, 2021, 12:00 AM), https://www.bloomberg.com/news/articles/2021-06-25/women-did-three-times-as-much-unpaid-child-care-as-men-during-covid-pandemic [perma.cc/2SJX-HWV2].

78. *See* Martha Chamallas, *Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 530 (1998).

79. *Id.* at 498.

80. Martha Chamallas, *Theorizing Damage Through Reproductive Torts*, JOTWELL (July 29, 2015), https://torts.jotwell.com/theorizing-damage-through-reproductive-torts [perma.cc/NSU3-TR62].

81. *See, e.g.*, Christensen v. Thornby, 255 N.W. 620, 620 (Minn. 1934).

82. Brown v. Wyatt, 202 S.W.3d 555, 562 (Ark. Ct. App. 2005).

83. Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 410 (Iowa 2017) (holding that a father can bring an independent wrongful birth claim in part because of his legal obligation to support his child experiencing disability).

D. *Centering Disability Justice*[84]

Without question, prenatal tort claims have stigmatized the disability community.[85] These claims often assume that disability is undesirable.[86] Some courts have declined to recognize wrongful birth and life claims because of the risks this assumption poses.[87] The disability community is large and diverse,[88] and people within it have complex and differing views on prenatal tort suits. Disability advocates have argued both for[89] and against[90] prenatal tort claims. This discord may be in part because wrongful birth and life claims are connected to prenatal testing and abortion—both already controversial issues within the disability community.[91] Prenatal tort claims can and must be reformed to lessen their negative impact on the disability community. One solution is to change the language of tort law more generally in approaching disability.[92]

1. Arguments in Favor of Prenatal Tort Claims for People Experiencing Disability

Wrongful birth and life claims can provide people experiencing disability with compensation that, for some, is much needed. In these cases, the real beneficiary of the recovery is the child, as the award will be used for their healthcare and other expenses[93]:

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84. The intersection between disability justice and prenatal torts is a rich and complex issue that cannot be fully explored here. For further reading, see Hensel, *supra* note 52, at 190, Sofia Yakren, "*Wrongful Birth*" *Claims and the Paradox of Parenting a Child with a Disability*, 87 FORDHAM L. REV. 583 (2018), and Kerry T. Cooperman, Essay, *The Handicapping Effect of Judicial Opinions in Reproductive Tort Cases: Correcting the Legal Perception of Persons with Disabilities*, 68 MD. L. REV. ONLINE 1, 14 (2008).

85. *See supra* notes 32–36 and accompanying text.

86. *See* Yakren, *supra* note 84, at 593–94; Sophie Zhang, *The Morality of Having Children with Disabilities: A Different Perspective on Happiness and Quality of Life*, 8 MCGILL J. MED. 85, 86 (2004).

87. Grubbs *ex rel.* Grubbs v. Barbourville Fam. Health Ctr., P.S.C., 120 S.W.3d 682, 690 (Ky. 2003) ("[W]rongful birth cases could slide quickly into applied eugenics.").

88. Approximately 26% of American adults experience disability. *Disability Impacts All of Us*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 15, 2023), https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html [perma.cc/8WX9-U3TR].

89. *See, e.g.*, Yakren, *supra* note 84 (supporting wrongful birth claims, subject to reforms); Cooperman, *supra* note 84 (supporting reproductive torts, subject to reforms).

90. *See, e.g.*, Hensel, *supra* note 52; Darpana M. Sheth, *Better Off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans with Disabilities Act*, 73 TENN. L. REV. 641 (2006).

91. Marsha Saxton, *Why Members of the Disability Community Oppose Prenatal Diagnosis and Selective Abortion*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 147 (Erik Parens & Adrienne Asch eds., 2000).

92. *See infra* notes 111–118 and accompanying text.

93. Capron, *supra* note 51, at 639.

> Given the limitations of the American health-care system, a political climate characterized by efforts to reduce access to health care, and the expense of raising a child with special medical needs, the wrongful birth claim remains an important means of securing resources for [parents] who have a child with a disability following inadequate prenatal care.[94]

Even prenatal tort claim critics acknowledge the "compelling" need to compensate people experiencing disability so they can secure necessary services.[95]

When people who experience disability are themselves the victims of a prenatal tort, they may experience more severe harm than nondisabled people. Consider a wrongful pregnancy case where plaintiff Kay Bushman was a survivor of polio and, when she became pregnant as the result of a failed vasectomy, became suicidal.[96] Childbirth was extremely difficult for her: she suffered greatly through her four previous deliveries due to spine and pelvis conditions.[97] Prenatal torts provide a means of redressing acute suffering like Bushman's.

Children experiencing disability benefit from their parents having time to prepare for them. Properly executed prenatal testing gives future parents the chance to "prepare their home or heart" for a baby experiencing disability that may need special care or have an increased likelihood of fetal or neonatal death.[98] Advanced notice enables parents to secure time-sensitive medical or surgical treatment that the fetus or child may need.[99] To the extent that potential tort liability incentivizes doctors to provide better care, prenatal tort claims may benefit the child who experiences disability.[100]

Prenatal tort claims give pregnant people the opportunity to consider whether to have an abortion. In certain circumstances, some parents may feel that an abortion is the compassionate choice. In Emily Rapp's recounting of her child's life with Tay-Sachs disease—an experience that includes daily seizures; the inability to swallow, move, speak, or see; and difficulty breathing—she writes of her love for her son.[101] But, she also believes "it would have been an act of love to abort him, knowing that his life would be primarily one of intense suffering."[102] Rapp identifies as a person experiencing disability herself and loves her life, yet she wishes that her child would not suffer.[103] Another mother, Lyndsay Werking-Yip, wrote of her decision to have an abortion even

94. Yakren, *supra* note 84, at 627.

95. Hensel, *supra* note 52, at 171.

96. Bushman v. Burns Clinic Med. Ctr., 268 N.W.2d 683, 687–88 (Mich. Ct. App. 1978).

97. *Id.* at 688.

98. FOX, *supra* note 24, at 45.

99. *Id.*

100. *See supra* Section I.B.

101. Emily Rapp, *Rick Santorum, Meet My Son*, SLATE (Feb. 27, 2012, 6:45 AM), https://slate.com/human-interest/2012/02/rick-santorum-and-prenatal-testing-i-would-have-saved-my-son-from-his-suffering.html [perma.cc/GR8N-2JUF].

102. *Id.*

103. *Id.*

though she is pro-life: "Our child would not be given a life of pain and suffering. . . . [Her diagnosis] was incompatible with a fulfilling life."[104] Prenatal tort claims encourage doctors to allow their patients to make an informed choice about this important decision to prevent unnecessary suffering.

2. Disability Arguments Against Prenatal Torts, and Necessary Reforms

Despite the aforementioned benefits, prenatal tort claims are also harmful to the disability community. The language underlying prenatal tort claims, and tort law as a whole, can be reformed to mitigate this harm.

Professor Wendy Hensel has argued that wrongful birth and life actions should not be recognized because their benefits are outweighed by the negative impact on the psychological wellbeing of people experiencing disability and the societal image of disability.[105] At the root of her concerns is that these tort claims convey the message that the child experiencing disability is an "injury," while the actual injury is the deprivation of the parent's choice whether or not to have an abortion or their ability to prepare for their child.[106] She concludes that the provided compensation is "benevolent paternalism . . . in which the nondisabled 'assume the role of protectors,' " which comes at a cost to the disability community[107]:

> Wrongful birth and life actions do not offer compensation to all individuals who suffer as a result of a defendant's negligence, nor do they compensate all individuals with disabilities in need of relief. Instead, assistance is provided only to those willing to openly disavow their self-worth and dignity. Children must testify that they should have been aborted by their mothers. Mothers must testify that they would have aborted their children or prevented conception if only the defendant had presented them the opportunity. No matter how compelling the need, or how gross the negligence involved, no assistance will be extended to the family who would have chosen to embrace or simply accept the impaired child prior to his birth.[108]

These concerns are warranted—the current process of litigating a wrongful birth or life claim requires that parents demean their children experiencing disability or that the child demean themself.

While Professor Hensel attributes these flaws to wrongful birth and life claims alone, they are problems of tort law generally.[109] Tort litigation requires people experiencing disability to present themselves in an often-tragic way

104. Lyndsay Werking-Yip, Opinion, *I Had a Late-Term Abortion. I Am Not a Monster*, N.Y. TIMES (Oct. 19, 2019), https://www.nytimes.com/2019/10/19/opinion/sunday/late-term-abortion.html [perma.cc/39DN-84P9].

105. Hensel, *supra* note 52, at 144–45.

106. *Id.* at 165–67.

107. *Id.* at 171 (quoting Harlan Hahn, *Feminist Perspectives, Disability, Sexuality, and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN'S STUD. 97, 106–07 (1994)).

108. *Id.* at 171–72 (footnote omitted).

109. *See* Anne Bloom with Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709 (2011).

that does not reflect how they see themselves.[110] These cases may also be hyperfocused on their bodies.[111] Tort law fosters stereotypes and forces plaintiffs experiencing disability to see themselves in harmful ways.[112] Because this is a broader tort law issue, Professor Hensel's suggestion to eliminate wrongful birth and life claims misses the real problem.

A better solution is to change how tort law generally approaches disability. Lawyers and judges should consider parties' disabilities in more nuanced ways that accurately reflect their lived experiences.[113] In prenatal tort cases specifically, courts must "consider the burdens that accompany all parenting" and "emphasize that the 'harm' of disability varies greatly depending on biological, familial, financial, attitudinal, and social factors."[114] This means that courts should stop making demeaning comments like, "We recognize the extremely severe nature of Child's impairment. It is difficult even to begin to describe the nature of Child's loss . . . ."[115] Courts must also not assume that disability connotes misfortune while a nondisabled child is a "blessing."[116] Disability status is not an accurate predictor of harm: countless people who experience disability enjoy fulfilling, happy lives—and many nondisabled people experience the opposite.[117] At the point in time of the prenatal tort suit, the court is unable to know or even predict the ultimate experience of the child; it can only consider their diagnosis.[118]

Changes in language and approach would reduce the negative impact that prenatal tort claims currently have on individuals experiencing disability. Disabilities should no longer be portrayed as strictly tragic. The language used in litigation and court decisions should focus instead on the defendant's tortious conduct.[119] These changes would require the cooperation of many stakeholders and may not happen overnight, but judicial training[120] and filing requirements[121] concerning disability language are effective steps worth pushing for. While no solution can fully cure the harm that these tort suits have caused the

110. *Id.* at 712–13.

111. *Id.* at 722–23.

112. *Id.* at 713.

113. Cooperman, *supra* note 84, at 14; Bloom with Miller, *supra* note 109, at 713.

114. Cooperman, *supra* note 84, at 18.

115. Willis v. Wu, 607 S.E.2d 63, 71 (S.C. 2004).

116. Cooperman, *supra* note 84, at 5, 15.

117. *See generally* Zhang, *supra* note 86.

118. *See* Cooperman, *supra* note 84, at 17.

119. Bloom with Miller, *supra* note 109, at 715–16.

120. Some states' judicial training on gender bias and sexual assault could serve as a model. *See* Suzanne J. Miller, Note, *Judicial Language in New Jersey Sexual Violence Cases*, 73 RUTGERS U. L. REV. 141, 149 (2020).

121. Linguistic rules regarding how parties discuss disability could be codified in filing requirements. For a similar example, see Rick Pluta, *Proposed Rule Would Require Michigan Courts to Respect Preferred Pronouns*, MICH. RADIO (Jan. 19, 2023, 5:25 PM), https://www.michiganradio.org/criminal-justice-legal-system/2023-01-19/proposed-rule-would-require-michigan-courts-to-respect-preferred-pronouns [perma.cc/7SXF-K64W].

disability community, this proposed change would be a step in the right direction toward permitting equitable relief for people experiencing disability.

E. *State Survey Results*

States have varied their approaches to prenatal tort claims. Many state courts and legislatures have embraced the aforementioned benefits of prenatal tort claims. Table 1 provides an up-to-date survey of the differing recognition of these claims. This new survey was necessary as existing tables are out of date,[122] incomplete,[123] incorrect,[124] or confuse prenatal tort terminology.[125] Other scholars have quoted data without verifying it,[126] thereby perpetuating erroneous information, or have failed to provide a citation for their figures.[127]

To summarize the survey: of the fifty states and the District of Columbia, thirty-seven states recognize wrongful pregnancy claims, twenty-three states and the District of Columbia allow wrongful birth claims, and four allow wrongful life claims. Conversely, five states and the District of Columbia prohibit wrongful pregnancy claims, sixteen prohibit wrongful birth claims, and thirty-seven prohibit wrongful life claims. Eight states have not yet weighed in on wrongful pregnancy claims, eleven have not decided on wrongful birth claims, and forty states and the District of Columbia have not addressed wrongful life claims. The most common combinations are for states to permit

122. *See e.g.*, FOX, *supra* note 24, at 43 (stating that wrongful life actions are "forbidden in every state except California, Maine, New Jersey, and Washington" while Rhode Island authorized them in 2016); *see also* Deborah Pergament & Katie Ilijic, *The Legal Past, Present and Future of Prenatal Genetic Testing: Professional Liability and Other Legal Challenges Affecting Patient Access to Services*, 3 J. CLINICAL MED. 1437, 1147–49 tbl.1 (2014) (providing no information about Ohio wrongful birth claims when there was 2006 case law recognizing such claims).

123. *See e.g.*, 3 JEROME H. NATES, CLARK D. KIMBALL, DIANA T. AXELROD & RICHARD P. GOLDSTEIN, DAMAGES IN TORT ACTIONS § 18.04 (2023) (leaving wrongful life boxes empty for Alabama, Connecticut, Delaware, Florida, Indiana, Maryland, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Texas, Virginia, and Wisconsin although there is relevant law for these states, and altogether omitting Hawaii, Kentucky, Montana, Nebraska, North Dakota, and South Carolina).

124. *See, e.g.*, FOX, *supra* note 24, at 43 (claiming that twenty-four states reject wrongful birth claims when the actual number is sixteen); *see also* Pergament & Ilijic, *supra* note 122, at 1147–49 tbl.1 (leaving Ohio's "wrongful birth" cell blank when that tort is authorized by case law; stating that Pennsylvania's statute prohibiting wrongful birth and wrongful life was found unconstitutional when, in reality, the cited case was overturned by the Pennsylvania Supreme Court; and falsely stating that there is no cause of action for wrongful birth in Wisconsin).

125. *See* Pergament & Ilijic, *supra* note 122, at 1147–49 tbl.1 (stating that Wyoming allows wrongful birth claims—in the common sense where the child is born with a negligently caused disability—when the case cited authorizes only wrongful pregnancy claims).

126. *See, e.g.*, Fox, *supra* note 7, at 166 n.98 (alleging that "[t]he only states that allow wrongful-life actions are California, New Jersey, and Washington," missing Rhode Island and citing to Pergament & Ilijic, *supra* note 122, at 1147–49 tbl.1, a study with numerous errors).

127. *See, e.g.*, FOX, *supra* note 24, at 43 (failing to provide a citation for the assertion that "[s]tatutes bar wrongful birth claims in a dozen states, while courts in another dozen reject them by common law," as well as for the assertion that wrongful life actions "are forbidden in every state except California, Maine, New Jersey, and Washington").

wrongful birth but not wrongful life claims (eighteen states),[128] allow only wrongful pregnancy claims (sixteen states),[129] outlaw all prenatal torts (four states),[130] authorize all three (three states),[131] or remain silent on all three (four states).[132] Wrongful pregnancy is the most accepted of the prenatal tort actions, possibly because it avoids the complicated issue of disability and is not explicitly tied to abortion, whereas wrongful birth and life claims require the recognition of a right to abortion.[133]

TABLE 1: STATE SURVEY OF PRENATAL TORT CLAIMS[134]

Key

√ = Tort claim explicitly recognized

X = Tort claim explicitly disallowed

* = Tort claim identified in case law but not explicitly recognized

[Blank] = no case law or statute

STATE	WRONGFUL PREGNANCY	WRONGFUL BIRTH	WRONGFUL LIFE
AL	√ *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982) (limiting damages)	√ *Keel v. Banach*, 624 So. 2d 1022 (Ala. 1993)	X *Elliott v. Brown*, 361 So. 2d 546 (Ala. 1978)
AK	√ *M.A. v. United States*, 951 P.2d 851 (Alaska 1998) (precluding damages for child rearing)		
AZ	X ARIZ. REV. STAT. § 12-719 (LexisNexis 2012) (precluding recovery unless grossly negligent or intentional)	X § 12-719 (precluding recovery unless grossly negligent or intentional)	X § 12-719 (precluding recovery unless grossly negligent or intentional)

128. *See infra* Table 1 (Alabama, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New York, Ohio, Oregon, Texas, Virginia, and Wisconsin).

129. *See infra* Table 1 (Alaska, Arkansas, Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, New Mexico, North Carolina, Pennsylvania, Tennessee, Utah, and Wyoming).

130. *See infra* Table 1 (Arizona, Kentucky, Oklahoma, and South Dakota).

131. *See infra* Table 1 (New Jersey, Rhode Island, and Washington).

132. *See infra* Table 1 (Hawaii, Mississippi, Montana, and Nebraska).

133. *See infra* Section II.B.

134. Last updated March 2023.

STATE	WRONGFUL PREGNANCY	WRONGFUL BIRTH	WRONGFUL LIFE
AR	√ *Wilbur v. Kerr*, 628 S.W.2d 568 (Ark. 1982) (limiting damages)	X ARK. CODE ANN. § 16-120-902 (2017) (precluding recovery unless intentional, reckless, or grossly negligent act or omission)	X § 16-120-902 (precluding recovery unless intentional, reckless, or grossly negligent act or omission)
CA		√ *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982)	√ *Turpin*, 643 P.2d 954
CO	√ *Dotson v. Bernstein*, 207 P.3d 911 (Colo. App. 2009)	√ *Lininger ex rel. Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988) (en banc)	X *Lininger*, 764 P.2d 1202
CT	√ *Ochs v. Borrelli*, 445 A.2d 883 (Conn. 1982)	√ *Rich v. Foye*, 976 A.2d 819 (Conn. Super. Ct. 2007)	X *Rich*, 976 A.2d 819
DE		√ *Garrison ex rel. Garrison v. Medical Center of Delaware*, 581 A.2d 288 (Del. 1989)	X *Garrison*, 581 A.2d 288
DC	X *Flowers v. District of Columbia*, 478 A.2d 1073 (D.C. 1984)	√ *Haymon v. Wilkerson*, 535 A.2d 880 (D.C. 1987)	
FL	√ *Fassoulas v. Ramey*, 450 So. 2d 822 (Fla. 1984) (prohibiting recovery for cost of raising child)	√ *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992)	X *Kush*, 616 So. 2d 415
GA	√ *Fulton-DeKalb Hospital Authority v. Graves*, 314 S.E.2d 653 (Ga. 1984) (prohibiting recovery for cost of raising child)	X *Atlanta Obstetrics & Gynecology Group v. Abelson*, 398 S.E.2d 557 (Ga. 1990)	
HI[135]			

135. While Hawaii has no case law on wrongful pregnancy claims (or wrongful birth or life claims), a negligent vasectomy case was permitted to proceed on the basis of lack of informed consent. Carr v. Strode, 904 P.2d 489 (Haw. 1995).

STATE	WRONGFUL PREGNANCY	WRONGFUL BIRTH	WRONGFUL LIFE
ID	√ IDAHO CODE § 5-334 (2010) (explicitly excluding negligent fertilization claims from statutory preclusion); *Conner v. Hodges*, 333 P.3d 130 (Idaho 2014) (characterizing case as a "medical malpractice" action)	X § 5-334	X § 5-334
IL	√ *Cockrum v. Baumgartner*, 447 N.E.2d 385 (Ill. 1983) (prohibiting recovery for cost of raising child)	√ *Clark v. Children's Memorial Hospital*, 955 N.E.2d 1065 (Ill. 2011) (precluding recovery of emotional distress damages)	X *Clark*, 955 N.E.2d 1065
IN	√ *Chaffee v. Seslar*, 786 N.E.2d 705 (Ind. 2003) (prohibiting recovery for cost of raising child)	√ *Bader v. Johnson*, 732 N.E.2d 1212 (Ind. 2000)	X *Cowe v. Forum Group*, 575 N.E.2d 630 (Ind. 1991)
IA	√ *Nanke v. Napier*, 346 N.W.2d 520 (Iowa 1984)	X IOWA CODE § 613.15B (2018) (precluding recovery unless grossly negligent)	X § 613.15B (precluding recovery unless grossly negligent)
KS	√ *Johnston v. Elkins*, 736 P.2d 935 (Kan. 1987) (limiting damages to those incurred before birth of child)	X KAN. STAT. ANN. § 60-1906 (2019)	X § 60-1906
KY	X *Schork v. Huber*, 648 S.W.2d 861 (Ky. 1983)	X *Grubbs v. Barbourville Family Health Center*, 120 S.W.3d 682 (Ky. 2003)	X *Grubbs*, 120 S.W.3d 682
LA	√ *Pitre v. Opelousas General Hospital*, 530 So. 2d 1151 (La. 1988)		X *Robinson v. Mitchell*, 53-958 (La. App. 2 Cir. 6/30/21), 323 So. 3d 982
ME	√ ME. STAT. tit. 24, § 2931 (1985) (limiting claims to failed sterilization and limiting damages)	√ § 2931 (limiting damages); *Thibeault v. Larson*, 666 A.2d 112 (Me. 1995) (confirming cause of action under statute)	X § 2931
MD	√ *Jones v. Malinowski*, 473 A.2d 429 (Md. 1984)	√ *Reed v. Campagnalo*, 630 A.2d 1145 (Md. 1993)	X *Kassama v. Magat*, 792 A.2d 1102 (Md. 2002)

STATE	WRONGFUL PREGNANCY	WRONGFUL BIRTH	WRONGFUL LIFE
MA	√ *Burke v. Rivo*, 551 N.E.2d 1 (Mass. 1990) (limiting claim to plaintiffs who sought sterilization for economic reasons)	√ *Viccaro v. Milunsky*, 551 N.E.2d 8 (Mass. 1990)	X *Viccaro*, 551 N.E.2d 8
MI	√ *Rouse v. Wesley*, 494 N.W.2d 7 (Mich. Ct. App. 1992); MICH. COMP. LAWS § 600.2971 (2000) (prohibiting damages for cost of raising child)	X § 600.2971 (precluding recovery unless grossly negligent or intentional)	X § 600.2971 (precluding recovery unless grossly negligent or intentional)
MN	√ *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *see* MINN. STAT. § 145.424 (2005) (allowing wrongful pregnancy actions by not explicitly precluding them)	X § 145.424	X § 145.424
MS[136]			
MO	√ *Girdley v. Coats*, 825 S.W.2d 295 (Mo. 1992) (prohibiting damages for cost of raising child)	X MO. REV. STAT. § 188.130 (1986)	X § 188.130
MT			
NE			
NV	X *Szekeres v. Robinson*, 715 P.2d 1076 (Nev. 1986)	√ *Greco v. United States*, 893 P.2d 345 (Nev. 1995)	X *Greco*, 893 P.2d 345
NH	√ *Kingsbury v. Smith*, 442 A.2d 1003 (N.H. 1982) (prohibiting recovery for cost of raising child)	√ *Smith v. Cote*, 513 A.2d 341 (N.H. 1986)	X *Smith*, 513 A.2d 341
NJ	√ *Betancourt v. Gaylor*, 344 A.2d 336 (N.J. Super. Ct. Law Div. 1975)	√ *Schroeder v. Perkel*, 432 A.2d 834 (N.J. 1981)	√ *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984)

136. No known "wrongful birth" and "wrongful life" lawsuits have ever been filed in Mississippi. Jimmie E. Gates, *Bill Would Stop Wrongful Birth Lawsuits in Mississippi*, CLARION-LEDGER (Jan. 9, 2017, 4:24 PM), https://www.clarionledger.com/story/news/politics/2017/01/09/mississippi-wrongful-birth-lawsuits/96353220 [perma.cc/A52F-CQ49].

STATE	WRONGFUL PREGNANCY	WRONGFUL BIRTH	WRONGFUL LIFE
NM	√ *Lovelace Medical Center. v. Mendez*, 805 P.2d 603 (N.M. 1991)		
NY	√ *Weintraub v. Brown*, 470 N.Y.S.2d 634 (N.Y. App. Div. 1983) (prohibiting damages for cost of raising child)	√ *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978)	X *Becker*, 386 N.E.2d 807
NC	√ *Jackson v. Bumgardner*, 347 S.E.2d 743 (N.C. 1986)	X *Azzolino v. Dingfelder*, 337 S.E.2d 528 (N.C. 1985)	X *Azzolino*, 337 S.E.2d 528
ND		* *B.D.H. ex rel. S.K.L. v. Mickelson*, 792 N.W.2d 169 (N.D. 2010) (holding that wrongful life statute does not preclude wrongful birth claim but declining to say whether claim is recognized)	X N.D. CENT. CODE § 32-03-43 (2022)
OH	√ *Bowman v. Davis*, 356 N.E.2d 496 (Ohio 1976)	√ *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Associates*, 844 N.E.2d 1160 (Ohio 2006) (prohibiting recovery for cost of raising child)	X *Hester ex rel. Hester v. Dwivedi*, 733 N.E.2d 1161 (Ohio 2000)
OK	X *Morris v. Sanchez*, 746 P.2d 184 (Okla. 1987)	X OKLA STAT. tit. 63, § 1-741-12 (2014)	X § 1-741-12
OR	√ *Zehr v. Haugen*, 871 P.2d 1006 (Or. 1994)	√ *Tomlinson v. Metropolitan Pediatrics*, 412 P.3d 133 (Or. 2018)	X *Tomlinson*, 412 P.3d 133
PA	√ *Mason v. Western Pennsylvania Hospital*, 453 A.2d 974 (Pa. 1982) (prohibiting damages for cost of raising child); *Hatter v. Landsberg*, 563 A.2d 146 (Pa. Super. Ct. 1989) (holding that 42 PA. STAT. AND CONS. STAT. ANN. § 8305 (West 1988)—prohibiting wrongful birth and life claims—did not apply to wrongful pregnancy claims)	X § 8305	X § 8305

STATE	WRONGFUL PREGNANCY	WRONGFUL BIRTH	WRONGFUL LIFE
RI	√ *Emerson v. Magendantz*, 689 A.2d 409 (R.I. 1997)	√ *Blouin v. Koster*, No. PC-2015-3817, 2016 WL 3976926 (R.I. Super. Ct. July 19, 2016)	√ *Blouin*, 2016 WL 3976926
SC			X *Willis v. Wu*, 607 S.E.2d 63 (S.C. 2004)
SD	X[137]	X S.D. CODIFIED LAWS § 21-55-2 (1981)	X § 21-55-2
TN	√ *Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987) (limiting damages); *Owens v. Foote*, 773 S.W.2d 911 (Tenn. 1989) (allowing recovery for wrongful pregnancy that resulted in child experiencing disability)	X TENN. CODE ANN. § 29-34-212 (2021)	X § 29-34-212
TX	√ *Crawford v. Kirk*, 929 S.W.2d 633 (Tex. App. 1996)	√ *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex. 1975)	X *Nelson v. Krusen*, 678 S.W.2d 918, 925 (Tex. 1984)
UT	√ *C.S. v. Nielsen*, 767 P.2d 504 (Utah 1988) (prohibiting recovery for cost of raising child)[138]	X UTAH CODE ANN. § 78B-3-109 (West 2008)	X § 78B-3-109
VT	√ *Begin v. Richmond*, 555 A.2d 363 (Vt. 1988)		
VA	√ *Miller v. Johnson*, 343 S.E.2d 301 (Va. 1986)	√ *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982)	X *Barnes v. Head*, 30 Va. Cir. 218 (1993)

137. There is no South Dakota case law on wrongful pregnancy claims, and they are arguably barred by state law. S.D. CODIFIED LAWS § 21-55-2 (1987) ("There shall be no cause of action or award of damages on behalf of any person based on the claim that, but for the conduct of another, a person would not have been permitted to have been born alive."); *see also* Lininger v. Eisenbaum, 764 P.2d 1202, 1208 n.9 (Colo. 1988) ("South Dakota bars any claims based on the birth of a child, whether or not impaired, and whether arising from the deprivation of an opportunity to abort a fetus *or from depriving the mother of the opportunity to avoid conception.*" (emphasis added)).

138. There is no wrongful pregnancy case law in Utah since § 70B-3-109 of the Utah Code was adopted in 2008, so the statute has not yet been applied to wrongful pregnancy claims. Prior versions of the statute did not bar wrongful pregnancy claims. C.S. v. Nielsen, 767 P.2d 504 (Utah 1988).

STATE	WRONGFUL PREGNANCY	WRONGFUL BIRTH	WRONGFUL LIFE
WA	√ *Pacheco v. United States*, 515 P.3d 510 (Wash. 2022)	√ *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983)	√ *Harbeson*, 656 P.2d 483
WV	√ *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985) (prohibiting recovery for cost of raising child)	√ *James G.*, 332 S.E.2d 872	
WI	√ *Marciniak v. Lundborg*, 450 N.W.2d 243 (Wis. 1990)	√ *Dumer v. Saint Michael's Hospital*, 233 N.W.2d 372 (Wis. 1975)	X *Dumer*, 69 N.W.2d 766
WY	√ *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo. 1982) (prohibiting damages after birth of child)		X *Beardsley*, 650 P.2d 288 (rejecting wrongful life claim brought by nondisabled children)

II. HOW *DOBBS* CHANGES THE LANDSCAPE FOR PRENATAL TORT CLAIMS

This Part will outline the historical connection between prenatal tort claims and abortion rights, as well as predict the effect of *Dobbs* on the future of these claims. Prenatal tort claims are politicized, with liberal states tending to recognize them and conservative states tending not to. Many conservative states already banned some or all prenatal torts prior to *Dobbs*, so abortion bans in these states do not affect these tort claims. But in states that have prenatal tort claims, abortion bans make it more difficult for plaintiffs to prove causation and injury and will reinvigorate public policy arguments against these tort claims. Bans may also invalidate prenatal tort precedent that is based on *Roe*'s fundamental right to abortion.

A. *Connection Between Prenatal Tort Claims and Abortion*

The right to abortion is central to wrongful birth and life claims, and sometimes to wrongful pregnancy claims.[139] Abortion arises in these claims in one of two contexts:

> (1) The alleged failure of a physician to effect a successful abortion, resulting in the birth of an unwanted or unhealthy child [i.e., wrongful pregnancy]; or

139. 1 PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 1.01 (2022).

> (2) The alleged failure of a physician to diagnose either the fact of pregnancy or probable birth defects in a timely manner, resulting in foreclosure of the parents' option to abort [i.e., wrongful birth or life].[140]

The constitutional right to an abortion was necessary for many prenatal tort suits to succeed. Wrongful birth and wrongful life actions only gained traction after 1973, when the Supreme Court established the right to a first-trimester abortion.[141] While *Roe* did not cause every state to recognize prenatal tort claims,[142] some state courts relied on *Roe* in their decisions legalizing such actions.[143] *Roe* did not directly speak to prenatal tort claims,[144] but some courts interpreted it to mean that physicians had a duty to give patients complete information about the risks of carrying a given pregnancy to term and to use medical technology in service of their patients' choices.[145]

Judges and state legislatures perceive prenatal tort claims as related to abortion. As Judge Richard J. Israel, perhaps the only judge to say it explicitly, put it:[146]

> Make no mistake. These cases are not about birth, or wrongfulness, or negligence, or common law. *They are about abortion.* For those who can accept that abortion is a legal choice for pregnant parents at pertinent times, there is no difficulty in finding room in the common law tort of negligence for claims of wrongful birth. For those who cannot accept that premise, no one should ever be compensated for injury just because the choice of abortion has been thwarted. For them, the tort of negligence will not fit for whatever reasons come to hand, whether it be lack of injury to a foreseeable plaintiff, or lack of proximate cause, or the novelty of the claim.[147]

Wrongful birth claims produced sharply differing judicial opinions that tended to adopt either "pro-choice" or "pro-life" perspectives on abortion.[148] For example, a federal district court in South Carolina refused to allow wrong-

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140. *Id.*

141. FOX, *supra* note 24, at 43; Hummel v. Reiss, 608 A.2d 1341, 1342 (N.J. 1992) ("[N]o wrongful-life cause of action exists for children who were born before *Roe v. Wade*.").

142. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 132 (2010).

143. *See, e.g.*, Azzolino v. Dingfelder, 337 S.E.2d 528, 535 (N.C. 1985) ("[P]regnant women have been recognized as having an absolute constitutional right, at least until a certain point in their pregnancy, to have an abortion performed for any reason at all or for no reason." (citing Planned Parenthood Ass'n of Kan. City v. Ashcroft, 462 U.S. 476 (1983); Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022))).

144. *See* Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

145. CHAMALLAS & WRIGGINS, *supra* note 142, at 135.

146. *See* FOX, *supra* note 24, at 44.

147. Schloss v. Miriam Hosp., No. C.A. 98-2076, 1999 WL 41875, at *4 (R.I. Super. Ct. Jan. 11, 1999) (emphasis added).

148. *See* CHAMALLAS & WRIGGINS, *supra* note 142, at 131.

ful life claims under state law due to state-specific policy considerations including "the preciousness and sanctity of human life."[149] State prenatal tort statutes are also politicized and ideological. In Utah, the statute banning wrongful birth and life claims, entitled "Right to life," states, "[I]t is the public policy of this state to encourage all persons to respect the right to life of all other persons . . . including . . . all unborn persons,"[150] suggesting that prenatal tort claims would somehow infringe the right to life of fetuses. The Pennsylvania statute that bans wrongful birth and life actions states, "A person shall be deemed to be conceived at the moment of fertilization,"[151] a tenet of pro-life beliefs.[152]

As shown in Table 2, a state's political leanings and views on abortion play a role in its decision to recognize or ban prenatal tort claims. Democratic states are more likely to recognize at least one prenatal tort claim, and included among these are the only states to recognize all three.[153] Republican states are more likely to ban all three types of claims. "Split" states, where one party controls the legislature and another controls the governorship (or where the state voted for the opposite presidential candidate in 2020), tend to lie somewhere in between. Similarly, states with legal abortion tend to recognize more prenatal tort claims than states with gestational limits, abortion bans, or an attempted abortion ban that was blocked by a state court. The political leanings of a state are not a perfect indicator of a state's view of prenatal tort claims; six red states recognize two of three.[154] Other influences may be at play, or the state's political composition may have changed over time. Even though a legislature could repeal, amend, or replace an earlier prenatal tort statute that it did not agree with, or overturn a conflicting judicial decision by statute, legislative wheels turn slowly.

149. Phillips v. United States, 508 F. Supp. 537, 543 (D.S.C. 1980).

150. UTAH CODE ANN. § 78B-3-109 (West 2023).

151. 42 PA. CONS. STAT. § 8305 (2023).

152. *See* Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 625 (1991).

153. *See infra* Table 2.

154. *See infra* Table 2.

TABLE 2: TOTAL PRENATAL TORTS RECOGNIZED BY POLITICAL LEANINGS AND ABORTION LAWS[155]

POLITICAL LEANINGS OR POSITION ON ABORTION[156]	TOTAL STATES	STATES RECOGNIZING 0 PRENATAL TORTS	STATES RECOGNIZING 1	STATES RECOGNIZING 2	STATES RECOGNIZING 3	AVERAGE NUMBER RECOGNIZED
Democratic States	18	1[157]	5[158]	9[159]	3[160]	1.78
"Split" States	12	2[161]	7[162]	3[163]	0	1.08
Republican States	21	7[164]	8[165]	6[166]	0	.95

155. Last updated July 2023. I designated each state as Democratic, Republican, or "Split" depending on the makeup of its state legislature as of the November 2022 election, its governor's political party as of the November 2022 election, and the state's 2020 presidential election results. For the designation of the District of Columbia, which has no governor or state legislature, I relied on its 2020 presidential election results alone. In addition, Nebraska's legislature is labeled as nonpartisan, so I relied on its governor and presidential election results. *See State Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (May 23, 2023), https://www.ncsl.org/about-state-legislatures/state-partisan-composition [perma.cc/F64N-LB8K]; NAT'L CONF. OF STATE LEGISLATURES, 2023 STATE AND LEGISLATIVE PARTISAN COMPOSITION (2023), https://documents.ncsl.org/wwwncsl/About-State-Legislatures/2023-State-Legislative-Partisan-Composition-2.28.23.pdf [perma.cc/RQ95-G85D]; *Live Election Results: Top Races to Watch*, N.Y. TIMES (Jan. 9, 2023), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-key-races.html [perma.cc/S4FP-A6EW]; *Presidential Election Results: Biden Wins*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html [perma.cc/KHC9-XQYA].

156. The five positions on abortion—Legal Abortion with New Protections, Legal Abortion, Gestational Limit, Ban Blocked, and Abortion Ban—are based on information contained in *Tracking the States*, *supra* note 2. The calculation of each number was performed by comparing the states in each of these five categories with the number of such states recognizing prenatal torts as established by Table 1.

157. *See supra* Table 1 (Hawaii).

158. *See supra* Table 1 (Delaware, District of Columbia, Michigan, Minnesota, and New Mexico).

159. *See supra* Table 1 (California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, New York, and Oregon).

160. *See supra* Table 1 (New Jersey, Rhode Island, and Washington).

161. *See supra* Table 1 (Arizona and Kentucky).

162. *See supra* Table 1 (Georgia, Kansas, Louisiana, Nevada, North Carolina, Pennsylvania, and Vermont).

163. *See supra* Table 1 (New Hampshire, Virginia, and Wisconsin).

164. *See supra* Table 1 (Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota).

165. *See supra* Table 1 (Alaska, Arkansas, Idaho, Iowa, Missouri, Tennessee, Utah, and Wyoming).

166. *See supra* Table 1 (Alabama, Florida, Indiana, Ohio, Texas, and West Virginia).

Political Leanings or Position on Abortion	Total States	States Recognizing 0 Prenatal Torts	States Recognizing 1	States Recognizing 2	States Recognizing 3	Average Number Recognized
Legal Abortion with New Protections	20	1[167]	7[168]	9[169]	3[170]	1.7
Legal Abortion	5	0	3[171]	2[172]	0	1.8
Gestational Limit	5	2[173]	2[174]	1[175]	0	.8
Ban Blocked	6	2[176]	2[177]	2[178]	0	1
Abortion Ban[179]	15	5[180]	6[181]	4[182]	0	.8

The correlation between political leanings, positions on abortion, and the tendency to recognize prenatal tort claims makes sense, as abortion is highly

167. *See supra* Table 1 (Hawaii); *Tracking the States*, *supra* note 2 (same).

168. *See supra* Table 1 (Delaware, Michigan, Minnesota, Nevada, New Mexico, Pennsylvania, and Vermont); *Tracking the States*, *supra* note 2 (same).

169. *See supra* Table 1 (California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, New York, and Oregon); *Tracking the States*, *supra* note 2 (same).

170. *See supra* Table 1 (Washington, New Jersey, and Rhode Island); *Tracking the States*, *supra* note 2 (same).

171. *See* supra Table 1 (Alaska, District of Columbia, and Kansas); *Tracking the States*, *supra* note 2 (same).

172. *See supra* Table 1 (New Hampshire and Virginia); *Tracking the States*, *supra* note 2 (same).

173. *See supra* Table 1 (Arizona and Nebraska); *Tracking the States*, *supra* note 2 (same).

174. *See supra* Table 1 (North Carolina and Utah); *Tracking the States*, *supra* note 2 (same).

175. *See supra* Table 1 (Florida); *Tracking the States*, *supra* note 2 (same).

176. *See supra* Table 1 (Montana and South Carolina); *Tracking the States*, *supra* note 2 (same).

177. *See supra* Table 1 (Iowa and Wyoming); *Tracking the States*, *supra* note 2 (same).

178. *See supra* Table 1 (Indiana and Ohio); *Tracking the States*, *supra* note 2 (same).

179. This includes Georgia, a state with a six-week gestational limit. *Tracking the States*, *supra* note 2.

180. *See supra* Table 1 (Kentucky, Mississippi, North Dakota, Oklahoma, and South Dakota); N.Y. Times, *Tracking the States*, *supra* note 2 (same).

181. *See supra* Table 1 (Arkansas, Georgia, Idaho, Louisiana, Missouri, and Tennessee); N.Y. Times, *Tracking the States*, *supra* note 2 (same).

182. *See supra* Table 1 (Alabama, Texas, West Virginia, and Wisconsin); *Tracking the States*, *supra* note 2 (same).

politicized and a state's view on abortion would influence its comfort with causes of action that are either about abortion (i.e., a botched-abortion wrongful pregnancy action) or would require a plaintiff to state that they would have had an abortion (a wrongful birth or life claim).[183] This correlation is important because it suggests that there may be future changes to the recognition of prenatal tort actions. As demographic and political changes occur over time,[184] prenatal tort claims may become recognized or barred. The correlation also implies that views on prenatal tort actions may not be objective, but rather are influenced by political beliefs, as Judge Israel suggested above. This politicization helps to explain the opposition to prenatal tort claims in the United States[185] and may be why wrongful birth actions are rarer here than in other "peer" countries such as Canada, Australia, and the United Kingdom.[186]

Where prenatal tort claims are legal, they have survived abortion *restrictions*. For example, the Alabama Supreme Court recognized a claim for wrongful birth in 1993,[187] at a time when the state had abortion restrictions and steadily declining abortion services.[188] A lower Alabama court continued to allow negligent abortion claims in 2006,[189] when there were further restrictions and even fewer in-state providers.[190] In other states, a pregnant person's ability to obtain an in-state abortion is, given abortion restrictions, a question of fact to be decided based on expert testimony.[191] Abortion restrictions may foreclose some prenatal tort claims but not all. The impact of a full abortion ban, however, can be more severe.

183. State political leanings are a difficult metric to represent precisely. The makeup of political offices does not always reflect the state's actual perspectives on abortion, as views on abortion are rapidly evolving. *See History of Abortion Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/History_of_abortion_ballot_measures [perma.cc/J5TA-QJ6S].

184. For example, Democrats won control of the Michigan legislature in November 2022, as well as the governorships of Arizona, Maryland, and Massachusetts, and Republicans obtained the Nevada governorship. David A. Lieb, *Flip of Michigan Legislature Highlights Role of Fair Maps*, AP NEWS (Nov. 22, 2022, 10:02 AM), https://apnews.com/article/michigan-legislature-government-and-politics-1dedf1cfb97cfee9c03d6a96c46fa126 [perma.cc/WAD8-SJWT]; *Governor Election Results*, N.Y. TIMES (Jan. 9, 2023), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-governor.html [perma.cc/THZ3-DQF3].

185. FOX, *supra* note 24, at 44.

186. *Id.*

187. Keel v. Banach, 624 So. 2d 1022 (Ala. 1993).

188. Brian Lyman & Evan Mealins, *A History of Abortion Law and Abortion Access in Alabama*, MONTGOMERY ADVERTISER (June 24, 2022, 9:59 AM), https://www.montgomeryadvertiser.com/story/news/2022/06/24/abortion-law-access-alabama-roe-vs-wade-history/7702753001 [perma.cc/N9E4-7KE9].

189. L.K.D.H. *ex rel.* J.L.D. v. Planned Parenthood of Ala., 944 So. 2d 153 (Ala. Civ. App. 2006).

190. Lyman & Mealins, *supra* note 188.

191. *See, e.g.*, Hall v. Dartmouth Hitchcock Med. Ctr., 899 A.2d 240, 245–46 (N.H. 2006).

B. *Effect of* Dobbs

The impact of *Dobbs* on prenatal tort claims is limited to states that have recognized one or more claims and further depends on whether the state has seized on its authority under *Dobbs* to ban abortion. When a state that allows prenatal tort claims bans abortion, it compromises its existing prenatal tort law.

Since *Dobbs* authorized state legislatures to implement abortion bans in late June 2022, fourteen states have done so.[192] Many of these laws do not, either formally or in practice, provide exceptions for rape, incest, or medical differences in the fetus.[193] Yet the impact of *Dobbs* on prenatal tort claims is not as profound as it could be: ten of the states with new abortion bans had already barred either all prenatal tort claims or at least those most reliant upon abortion rights (wrongful birth and wrongful life actions).[194] Four of the states with new abortion bans—Alabama, Texas, West Virginia, and Wisconsin—had case law authorizing wrongful pregnancy *and* wrongful birth claims before *Dobbs*.[195] Now, plaintiffs in those states will be unable to make out any wrongful birth and some wrongful pregnancy claims because their state legislatures

192. These states are Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin. Five additional states have a previability gestational limit: Arizona, Florida, Georgia, Nebraska, North Carolina, and Utah. *Tracking the States*, *supra* note 2.

193. *Id.*; Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted.*, N.Y. TIMES (Jan. 21, 2023), https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html [perma.cc/6G9Y-KNK9].

194. *See supra* Tables 1 & 2. Abortion bans are correlated with prenatal tort bans: 71% of states with abortion bans ban wrongful birth or wrongful life claims, compared to only 19% of states without abortion bans. Of the states with abortion bans or gestational limits on abortion, 50% ban both wrongful birth and life claims, and 85% ban at least one of these two claims, while none of these states allow wrongful life claims, and only 15% permit wrongful birth claims. Of the states (including the District of Columbia) with legal abortion of some kind, only 16% ban both wrongful birth and life claims, 68% ban at least one of these two claims, while 12.9% permit wrongful life claims and 61% allow wrongful birth claims. However, having prohibited prenatal torts by statute or common law is not a necessary condition for an abortion ban: Alabama, Texas, West Virginia, and Wisconsin all have abortion bans but authorize wrongful birth claims. Other states do not outlaw abortion but have forbidden all prenatal torts (Arizona and Utah) or wrongful birth claims (Kansas, Michigan, Minnesota, North Carolina, and Pennsylvania). *See supra* Tables 1 & 2.

195. *See supra* Table 1.

have prohibited abortion in almost all circumstances,[196] and the right to abortion is a necessary part of the claim.[197] In addition, some wrongful pregnancy claims in Alabama, Arkansas, Idaho, Louisiana, Missouri, Tennessee, Texas, West Virginia, and Wisconsin will be affected as these states authorize such claims.[198] These are the states where *Dobbs*'s impact on prenatal torts is currently felt, and the affected populations are sizable, amounting to 12.6% of the U.S. population.[199]

Prenatal tort actions in additional jurisdictions may be affected by *Dobbs* over time as more state legislatures contemplate and pass abortion bans. At-risk states are conservative ones, including Florida, Indiana, and Ohio,[200] as they all currently authorize wrongful birth claims. Arkansas, Idaho, Missouri, and Tennessee[201] have adopted abortion bans, but they only recognize wrongful pregnancy claims as of now, so only plaintiffs who suffer negligent abortions would be affected. Wrongful life claims are unlikely to be affected as they are only recognized in California, New Jersey, Rhode Island, and Washington—all states with strong abortion protections.[202]

1. Wrongful Birth

Post-*Dobbs*, many plaintiffs will no longer be able to satisfy the elements of a wrongful birth claim. Alabama, Texas, West Virginia, and Wisconsin prohibit abortion even when fetuses exhibit developmental anomalies.[203] In many wrongful birth cases, the causation prong is predicated on the right to abortion (arguing "but for the defendant's negligence, I would have had an abortion").[204]

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196. Alabama Human Life Protection Act, ALA. CODE §§ 26-23-h-1 to -8 (2019); TEX. HEALTH & SAFETY CODE ANN. §§ 170.001–171.212 (West 2019); Unborn Child Protection from Dismemberment Abortion Act, W. VA. CODE § 16-20-1 (2022); WIS. STAT. § 940.04 (2023). These laws do authorize abortion if the mother's life is in danger. Abortion laws are constantly changing, however, and are subject to ongoing litigation. For example, in *Fund Texas Choice v. Paxton*, No. 1:22-CV-859-RP, 2023 WL 2558143 (W.D. Tex. Feb. 24, 2023), the court granted a preliminary injunction of the state's pre-*Roe* abortion laws and held that Texas laws prohibiting abortion do not regulate abortions outside of the state of Texas.

197. *See infra* Sections II.B.1, II.B.2.

198. *See infra* Sections II.B.1, II.B.2.

199. Texas is the second largest state in the country with a population of 29,145,505. Wisconsin and Alabama are mid-sized states with populations of 5,893,718 and 5,024,279, respectively, and West Virginia's population is 1,793,716. Texas, Wisconsin, Alabama, and West Virginia's populations total 41,857,218. This figure divided by the total U.S. population (331,449,281) equals 12.6%. *2020 Population and Housing State Data*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/visualizations/interactive/2020-population-and-housing-state-data.html [perma.cc/Q9K9-V8T5].

200. *See supra* Tables 1 & 2.

201. *See supra* Tables 1 & 2.

202. *See supra* Tables 1 & 2.

203. *See supra* note 196.

204. *See, e.g.*, Provenzano v. Integrated Genetics, 22 F. Supp. 2d 406 (D.N.J. 1998).

Previously, Texas courts presumed causation where plaintiffs alleged that they would have sought an abortion had they known about the fetus's developmental disability.[205] Plaintiffs can still prove causation in some wrongful birth actions, namely where the medical professional's negligence was the failure to inform the parents of their genetic markers that could cause developmental disabilities in their offspring.[206] In those cases, the parents can allege that they would have used birth control to avoid *conceiving* the child had the doctor properly informed them,[207] not that they would have had an abortion.

Plaintiffs in states that ban abortion may also be unable to prove a legal injury for a prenatal tort claim. The injury in wrongful birth and wrongful life cases was traditionally conceptualized as a medical professional having denied a parent their constitutional right to terminate a pregnancy in the first trimester.[208] Without that right, there is no injury from infringement. The harm in wrongful birth cases would have to be reformulated to a much smaller injury, such as the loss of chance to prepare for the birth of a child experiencing disability. But plaintiffs may still prevail if the court does not engage in a rigorous injury analysis or is otherwise inattentive.

Finally, *Dobbs* may have a chilling effect on bringing a wrongful birth claim. To litigate those claims, plaintiffs must be willing to openly allege in court that they would have had an abortion.[209] While abortion remains popular and arguably won the "culture war,"[210] plaintiffs in conservative states may be nervous to make such a public proclamation. *Dobbs* subjects people who

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205. Jacobs v. Theimer, 519 S.W.2d 846, 948 (Tex. 1975) ([W]e assume that Mrs. Jacobs could and would have terminated the pregnancy by lawful means . . . ."); Nelson v. Krusen, 678 S.W.2d 918, 928 (Tex. 1984) (Robertson, J., concurring) ("Since the parents allege that they would have sought an abortion had they known Mrs. Nelson was a genetic carrier of Duchenne muscular dystrophy, proximate cause must be presumed.").

206. *See, e.g.*, *Nelson*, 678 S.W.2d at 919 (finding that a doctor negligently advised plaintiffs that they were not genetic carriers of muscular dystrophy).

207. *See id.*

208. *See* FOX, *supra* note 24, at 43 ("[Wrongful birth and wrongful life] actions tie harm to the lost chance to abort . . . ."); Greco v. United States, 893 P.2d. 345, 346 (Nev. 1995) ("[A] mother has a tort claim in negligent malpractice against professionals who negligently fail to make a timely diagnosis of gross and disabling fetal defects, thereby denying the mother her right to terminate the pregnancy.").

209. *See* Fox, *supra* note 7, at 152 ("Stigma associated with infertility, childlessness, and premarital sex keeps many of these mistakes in the shadows. Coming forward would reveal that victims had resorted to abortion, voluntary sterilization, or assisted reproduction.").

210. *See* Linda Greenhouse, Opinion, *Does the War over Abortion Have a Future?*, N.Y. TIMES (Jan. 18, 2023), https://www.nytimes.com/2023/01/18/opinion/abortion-culture-wars.html [perma.cc/U53W-UA4N].

seek abortions to increased scrutiny and blame.[211] The majority in *Dobbs* proclaimed that *Roe* was "egregiously wrong from the start."[212] This strong language suggests to the American public that pregnant people having and exercising their right to choose was fundamentally wrong. The majority also repeatedly emphasized that Americans have "sharply conflicting"[213] or "passionate and widely divergent"[214] views on abortion, signaling to people that if they were to have an abortion (or to claim in court that they would have had one if they could), many would strongly disagree with their decision. *Dobbs* also authorized states to criminalize abortion,[215] leading people who seek abortion to be marked as potential criminals.

2. Wrongful Pregnancy

Similarly, wrongful pregnancy claims will be difficult to bring in states where abortion is now almost entirely illegal—Alabama, Arkansas, Georgia, Idaho, Louisiana, Missouri, Tennessee, Texas, West Virginia, and Wisconsin.[216]

In these states, negligent abortion cases may disappear altogether because many abortions will no longer be performed at all.[217] Still, some physicians may continue to perform abortions. Physicians may intentionally break abortion laws if they believe that it is in their patient's best interest and that complying with the law would breach their duty to their patients.[218] History gives an indication of what will come to pass: before *Roe*, people regularly violated laws prohibiting abortion.[219] However, even assuming that the practice of abortion continues, victims of negligently performed illegal abortions are unlikely to prevail in court. The defendant may be able to rely on the unlawful conduct defense, under which an allegedly negligent physician is not liable for damages suffered by patients as a result of crimes committed by those patients

211. Dang Nguyen, Simar S. Bajaj, Danial Ahmed & Fatima Cody Stanford, *Protecting Marginalized Women's Mental Health in the Post-*Dobbs *Era*, PNAS (Sept. 23, 2022), https://www.pnas.org/doi/full/10.1073/pnas.2212012119 [perma.cc/F74W-KNCY].

212. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

213. *Id.* at 2240.

214. *Id.* at 2242.

215. *See id.* at 2318 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("Enforcement of all these draconian restrictions will also be left largely to the States' devices. A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of today's decision, a state law will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion.").

216. *See supra* Tables 1 & 2; *Tracking the States*, *supra* note 2.

217. *See* Gianna Melillo, *Legal Abortions Dropped 6 Percent in Months After Roe Was Overturned: Research*, HILL (Oct. 31, 2022), https://thehill.com/changing-america/respect/accessibility/3712250-legal-abortions-dropped-6-percent-in-months-after-roe-was-overturned-research [perma.cc/AFF5-6AV9].

218. *See* Diane E. Hoffmann, *Physicians Who Break the Law*, 53 ST. LOUIS U. L.J. 1049, 1064 (2009).

219. *Id.* at 1067.

(including obtaining an illegal abortion).[220] Alternatively, the court may find that holding the defendant negligent would violate public policy.[221] And in wrongful pregnancy cases where the physician failed to diagnose the pregnancy and thus deprived the parent of their right to abortion,[222] plaintiffs will face the same causation and injury problems as in wrongful birth cases.[223]

Plaintiffs in failed abortion cases will also be unable to prove the duty-of-care element because the physician's duty flows from the legal right to the procedure.[224] In negligently performed sterilization cases, plaintiffs may also be unable to prove their claims as the right not to procreate was based in part on the fundamental right recognized in *Roe* and stripped away in *Dobbs*.[225] Even if courts still recognize the right not to reproduce, this right may not last long. In his *Dobbs* concurrence, Justice Thomas urged the Court to reconsider *Griswold v. Connecticut*,[226] the case that recognized the fundamental right of married couples to use birth control[227] and more broadly stands for the right to choose not to procreate.[228]

To the extent that wrongful pregnancy claims in states without a constitutional or statutory right to abortion are founded on the constitutional right not to procreate, Justice Thomas's call to action presents a serious risk to those claims.[229] The right not to procreate relies on the longstanding belief that an individual is sovereign over their own body.[230] Specifically, bodily autonomy protects the right not to be a *gestational* parent, as opposed to the legal or genetic parent.[231] In American constitutional law, this right was based on the

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220. Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. REV. 43, 62–63 (2008).

221. Barker v. Kallash, 459 N.Y.S.2d 296, 299 (N.Y. App. Div. 1983).

222. *See, e.g.*, Butler v. Rolling Hill Hosp., 555 A.2d 205 (Pa. Super. Ct. 1989).

223. *See supra* Section II.B.1.

224. *See* Miller v. Johnson, 343 S.E.2d 301, 304 (Va. 1986) ("Within specified limits a woman is entitled to have an abortion if she so chooses. . . . Under traditional tort principles, it is clear that a physician who performs an abortion or sterilization procedure owes a legal duty to the patient." (citations omitted)).

225. *See* Bowman v. Davis, 356 N.E.2d 496, 499 (Ohio 1976) ("The choice not to procreate, as part of one's right to privacy, has become (subject to certain limitations) a Constitutional guarantee. For this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations *except* those involving sterilization would constitute an impermissible infringement of a fundamental right." (citations omitted)).

226. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold* . . . . Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents." (citations omitted)).

227. Griswold v. Connecticut, 381 U.S. 479 (1965).

228. Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 798 (2012).

229. *See, e.g.*, *Bowman*, 356 N.E.2d at 499.

230. I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1156 (2008).

231. *Id.* at 1138.

abortion cases of *Roe* and *Casey*,[232] and is arguably also grounded in the contraception cases of *Griswold*, *Eisenstadt*, and *Carey*.[233] *Roe* and *Casey* are now officially overturned,[234] and they might have taken the right not to be a gestational parent down with them. Even if the right can be said to rest on the contraception cases instead of the abortion ones, the former, too, are at risk of becoming bad law.[235] Despite the established idea of personal autonomy, courts may be wary to continue to recognize wrongful pregnancy claims.

3. Potential to Invalidate Precedent

Dobbs may even affect states where there is no imminent risk of an abortion ban. Just as wrongful pregnancy claims rely on constitutional rights, if case law establishing a prenatal tort claim was based on *Roe*, its rationale is now vulnerable to attack. Prenatal tort law in some states had a constitutional dimension; courts stated that failing to recognize a cause of action would infringe on the constitutional rights of conception and procreation.[236] Of the thirty-seven states that have authorized wrongful pregnancy claims, seven relied on *Roe* to some extent in their decisions.[237] Seven of the twenty-four states that allow wrongful birth claims similarly cited *Roe*.[238]

For these states where prenatal tort precedent was based on *Roe*, *Dobbs* may be lethal. This is because, for some courts, *Roe* was the deciding factor. In

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232. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

233. Cohen, *supra* note 230, at 1148; Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

234. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) ("We hold that *Roe* and *Casey* must be overruled.").

235. *Id.* at 2301 (Thomas, J., concurring) ("[W]e should reconsider all of this Court's substantive due process precedents, including *Griswold* . . . ."); *id.* at 2332 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("If the majority is serious about its historical approach, then *Griswold* and its progeny are in the line of fire too."). *But see id.* at 2277–78 (majority opinion) ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."); *id.* at 2260 ("*Griswold* and *Eisenstadt*[] were critically different for a reason that we have explained: None of those cases involved the destruction of what *Roe* called 'potential life.'"); *id.* at 2309 (Kavanaugh, J., concurring) ("I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents [including *Griswold*], and does *not* threaten or cast doubt on those precedents.").

236. *See, e.g.*, Keel v. Banach, 624 So. 2d 1022, 1026 (Ala. 1993).

237. Ochs v. Borrelli, 445 A.2d 883, 885 (Conn. 1982); Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 654 (Ga. 1984); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 175 (Minn. 1977); Betancourt v. Gaylor, 344 A.2d 336, 339 (N.J. Super. Ct. Law Div. 1975); Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 612 (N.M. 1991); Bowman v. Davis, 356 N.E.2d 496, 499 (Ohio 1976); Miller v. Johnson, 343 S.E.2d 301, 304 (Va. 1986). In addition, one concurring opinion cited *Roe*. Boone v. Mullendore, 416 So. 2d 718, 725 (Ala. 1982) (Faulkner, J., concurring).

238. *Keel*, 624 So. 2d at 1024; Rich v. Foye, 976 A.2d 819, 830 (Conn. Super. Ct. 2007); Haymon v. Wilkerson, 535 A.2d 880, 882 (D.C. 1987); Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 400 (Iowa 2017); Greco v. United States, 893 P.2d 345, 349 (Nev. 1995); Smith v. Cote, 513 A.2d 341, 344 (N.H. 1986); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 491 (Wash. 1983) (en banc).

New Jersey, the state's Supreme Court initially rejected wrongful birth and life claims,[239] but it reversed course after *Roe*.[240] *Dobbs* created an opening for some state courts to overturn prenatal tort case law because they can construe precedent to be based on "bad" constitutional law, even though *Roe* is not, and need not be, the justification for prenatal tort claims. As discussed in Part I, there are numerous policy reasons for allowing prenatal tort claims, and they are consistent with ordinary medical malpractice principles.[241] States whose courts authorized a prenatal tort claim while holding that *Roe* was irrelevant to their decision[242] are arguably the only ones safe from this line of reasoning.

Alternatively, courts may use broader public policy justifications to stop recognizing prenatal tort claims. Public policy arguments against abortion in prenatal tort cases generally lost force in the wake of *Roe,* as both the law and public sentiment changed.[243] Some courts held that public policy arguments against wrongful birth claims were not valid after *Roe* legitimized public policy that supported abortion.[244] Now that *Dobbs* has overturned *Roe*, politicized arguments on prenatal tort claims and abortion could reemerge in states with abortion bans or states that are silent on abortion rights under new state public policy. These concerns do not apply to states that have affirmatively passed abortion protections or recognized abortion as a right under the state constitution,[245] as courts would have to concede that state public policy still favors

239. *See* Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967).

240. Hummel v. Reiss, 608 A.2d 1341, 1343–44 (N.J. 1992) ("After the Supreme Court's decision in *Roe v. Wade*, which established a woman's qualified right to terminate her pregnancy, this Court recognized causes of action of both parents and infants harmed by doctors' negligence in failing to inform parents of conditions that would bear on informed choice regarding whether to carry the pregnancy to full term. In a trilogy of cases discussed below, we recognized causes of action for wrongful birth . . . and wrongful life . . . ." (citations omitted)).

241. *See* Fox, *supra* note 7.

242. Cockrum v. Baumgartner, 447 N.E.2d 385, 391 (Ill. 1983); *see* Johnston v. Elkins, 736 P.2d 935, 939 (Kan. 1987); *see also* Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 377 n.6 (Wis. 1975) (authorizing a wrongful birth claim where the facts predated *Roe*).

243. *See* Capron, *supra* note 51, at 635.

244. Keel v. Banach, 624 So. 2d 1022, 1026 (Ala. 1993); Bowman v. Davis, 356 N.E.2d 496, 499 (Ohio 1976).

245. The California Supreme Court recognized the right to abortion under its state constitution prior to *Roe*. People v. Belous, 458 P.2d 194 (Cal. 1969). The Alaska, Montana, Minnesota, and South Carolina Supreme Courts have held that their state constitutions protect the right to abortion. Valley Hosp. Ass'n v. Mat-Su Coal. for Choice, 948 P.2d 963 (Alaska 1997); Armstrong v. State, 989 P.2d 364 (Mont. 1999); Women of the State v. Gomez, 542 N.W.2d 17 (Minn. 1995); Planned Parenthood of S. Atl. v. State, 822 S.E.2d 770 (S.C. 2023). The Florida Supreme Court recognized the right to abortion, but in 2022, the Florida legislature enacted a fifteen-week ban that is currently being challenged. *In re* T.W., 551 So. 2d 1186 (Fla. 1989); FLA. STAT. § 390.0111 (2023). Colorado, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New York, Oregon, Rhode Island, and Washington state laws protect abortion. COLO. REV. STAT. 25-6-403 (2022); DEL. CODE ANN. tit. 24, § 1790 (2017); HAW. REV. STAT. § 453-16 (1970); 775 ILL. COMP. STAT. 55 (2019); ME. STAT. tit. 22, § 1598 (1979); MD. CODE ANN., HEALTH-GEN. § 20-103 (West 2020); MASS. GEN. LAWS ch. 112, §§ 12k to 12r (2020); NEV. REV. STAT. § 442.250 (1973); N.Y. PUB. HEALTH LAW § 2599-AA, 2599-BB (McKinney 2019); OR. REV. STAT. § 659.880

abortion and prenatal torts, even though the national public policy, at least in Justice Kavanaugh's mind, is "neutral[]."[246]

III. POTENTIAL SOLUTIONS

The problems that abortion bans pose for prenatal tort claims are not easy to remedy. This Part starts the conversation regarding possible solutions. It recommends legal approaches, such as invoking the constitutional right to interstate travel or the right to medication abortion, or pushing for doctrinal change from existing prenatal tort standards towards "reproductive negligence." It also suggests nonlegal approaches, like advocating for widespread abortion rights, encouraging people to seek reproductive and prenatal care in states where abortion remains legal, and raising awareness about prenatal tort claims and the impact that abortion bans have already had and will continue to have on them.

A. *Constitutional Right to Travel*

One legal solution to the causation and injury problems that plaintiffs in wrongful birth, wrongful life, and some wrongful pregnancy cases now confront is to presume causation based on the constitutional right to travel and maintain an injury based on that right. The constitutional right to interstate travel "protects the right of a citizen of one State to enter and leave another State."[247] Courts widely recognize this right.[248] In the abortion context, it means the right to travel to another state for abortion care. The Supreme Court has yet to rule on this right with regard to abortion, but in his *Dobbs*

(2017); 23 R.I. GEN. LAWS § 23-4.13-2(2019); WASH. REV. CODE § 9.02.100 (2022). Michigan voters put the right to abortion into the state constitution after *Dobbs*. Alice Miranda Ollstein, *Michigan Votes to Put Abortion Rights into State Constitution*, POLITICO (Nov. 9, 2022, 3:43 AM), https://www.politico.com/news/2022/11/09/michigan-abortion-amendment-results-2022-00064778 [perma.cc/UHF5-NVG3]. Kansas voted after *Dobbs* to retain its constitutional abortion protections. Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protections in Its Constitution*, N.Y. TIMES (Aug. 2, 2022), https://www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html [perma.cc/4BED-SAMP].

246. *Dobbs* did not make abortion legal or illegal; rather, it left its legality up "to the people's elected representatives." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022); *id.* at 2310 (Kavanaugh, J., concurring) ("The Court's decision today properly returns the Court to a position of judicial neutrality on the issue of abortion . . . .").

247. Saenz v. Roe, 526 U.S. 489, 500 (1999).

248. I. Glenn Cohen, Melissa Murray & Lawrence O. Gostin, *The End of* Roe v. Wade *and New Legal Frontiers on the Constitutional Right to Abortion*, 328 J. AM. MED. ASS'N 325 (2022); *see also* Shapiro v. Thompson, 394 U.S. 618, 629 (1969) ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land . . . ."); Smith v. Turner, 48 U.S. 283, 492 (1849) ("For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.").

concurrence, Justice Kavanaugh voiced his support for a right to interstate travel for the purpose of seeking an abortion.[249]

For prenatal tort claims, the legal injury could be based on the infringement of this constitutional right to travel instead of the right to abortion. State courts could presume causation based on this right: had the physician informed the plaintiff of their pregnancy or the fetus's medical condition, they would have traveled to another state to obtain an abortion. Presuming causation would be a logical inference—some people live close to the border of a state with legal abortions, and others may be able to fly to another state with funding from an abortion fund[250] or their employer.[251] Unfortunately, this solution poses accessibility issues, as some people are unable to travel due to financial constraints, work, childcare responsibilities, domestic abuse, or a disability.[252] It is possible that leveraging this right would only assist more affluent plaintiffs, but this can be tempered by the work of existing abortion funds and employer abortion benefits. In any event, a presumption would be easier to administer than assessing each plaintiff's capabilities.

Before *Dobbs*, Texas was the only state that presumed the plaintiff would have obtained an abortion had they been properly informed of the medical situation,[253] so other states would have to elect to adopt a similar presumption, either via common law or statute. Texas courts may be reluctant to continue making this presumption now that the state has adopted an abortion ban, but they should. It is no greater a leap to presume that plaintiffs would have traveled out of state to obtain an abortion than to presume that plaintiffs would have obtained an in-state abortion during years with heavy abortion restrictions, such as the 2000s and 2010s.[254]

Presuming that a plaintiff would have traveled out of state for abortion services raises the question of how to determine the point after which the physician has deprived the plaintiff of the right to travel. Previously, the right to

249. *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring) ("[M]ay 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.").

250. *See, e.g.*, NAT'L NETWORK OF ABORTION FUNDS, https://abortionfunds.org [perma.cc/VMV7-JEAV].

251. Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (Aug. 19, 2022), https://www.nytimes.com/article/abortion-companies-travel-expenses.html [perma.cc/542Q-XMQV].

252. Cohen et al., *supra* note 248.

253. *See supra* note 205.

254. When abortion was legal in Texas, the state had restrictions such as a mandatory waiting period, required sonogram, and limitations on who could be an abortion provider. Additionally, standard health insurance plans did not cover abortion. *A Recent History of Restrictive Abortion Laws in Texas*, ACLU OF TEX., https://www.aclutx.org/en/recent-history-restrictive-abortion-laws-texas [perma.cc/MPH9-944H].

abortion was infringed if the physician failed to inform the patient of the pregnancy or the fetus's birth defect until after the state's abortion cutoff,[255] or after the child was born, if prenatal testing was never performed.[256] If the physician performs testing belatedly, what constitutes "too late" for purposes of liability? After the deadline to have an abortion in a neighboring state? Or, more generously to plaintiffs, after a later abortion deadline in a more distant state? Plaintiffs would have to track the abortion restrictions and bans of other states and argue which should apply.

Another complication is that some courts may be hesitant to presume causation because they want to leave the issue up to the jury. In a Florida wrongful birth case, the defendants inaccurately performed an ultrasound, failing to diagnose the fetus as missing three limbs.[257] The defendants argued that the plaintiff could not have obtained an abortion even if the test had been correctly performed because it was conducted during the plaintiff mother's third trimester, after the state's abortion deadline.[258] The trial court prohibited defendants from making this argument, reasoning that the mother could have traveled out of state for an abortion.[259] But the appellate court reversed: it held the ability of a plaintiff to obtain an abortion out of state was not a valid reason to exclude evidence that third-trimester abortions are generally illegal in Florida.[260] The jury on remand could still find that the plaintiff would have traveled out of state, but this case shows that courts may be reluctant to presume causation based on interstate travel. Still, the argument is worth making in other courts, especially with Justice Kavanaugh's signal of approval.

B. *The Abortion Pill*

Another legal solution is a right to medication abortion, which could mitigate causation and injury problems in certain wrongful pregnancy cases. Medication abortion, the two-drug combination of Mifepristone and Misoprostol, currently accounts for more than half of all abortions in the United

255. *See, e.g.*, Garrison v. Med. Ctr. of Del. Inc., 581 A.2d 288 (Del. 1989) (allowing wrongful birth claim where plaintiff did not receive testing to reveal fetus's Down Syndrome diagnosis until the third trimester, after the state's second trimester abortion deadline).

256. *See, e.g.*, Rich v. Foye, 976 A.2d 819, 830 (Conn. Super. Ct. 2007).

257. OB/GYN Specialists of the Palm Beaches, P.A. v. Mejia, 134 So. 3d 1084, 1086 (Fla. Dist. Ct. App. 2014).

258. *Id.* at 1086–87.

259. *Id.* at 1087.

260. *Id.* at 1091.

States.[261] The FDA approved this medication twenty-three years ago[262] and currently allows it to be sent by mail,[263] although the FDA has always placed Mifepristone under a Risk Evaluation and Mitigation Strategy (REMS), including a Patient Agreement Form, provider certification, and most recently pharmacy certification, which did away with the in-person dispensing requirement.[264] After *Dobbs*, Attorney General Merrick Garland took the stance that "[s]tates may not ban Mifepristone" based on preemption theory—FDA rulings take precedence over state determinations—but the ongoing legal battles will take time to resolve.[265] Preemption theory could exempt Mifepristone from abortion bans or at least protect Mifepristone from state overregulation,[266] but preemption theory did not stop Wyoming from becoming the first state to outlaw abortion pills.[267]

The existence of a right to medication abortion is contested and likely to be subject to ongoing litigation.[268] In the first of these anticipated cases, *Alliance for Hippocratic Medicine v. FDA*, filed in the Northern District of Texas

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261. Rachel K. Jones et al., *Medication Abortion Now Accounts for More than Half of All US Abortions*, GUTTMACHER INST. (Feb. 24, 2022), https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions [perma.cc/PPD7-BBTZ].

262. Devan Cole, *What to Know About the Lawsuit Aiming to Ban Medication Abortion Drug Mifepristone*, CNN (Mar. 13, 2023, 5:15 PM), https://www.cnn.com/2023/02/10/politics/fda-medication-abortion-lawsuit-mifepristone/index.html [perma.cc/P733-EMAD].

263. Pam Belluck, *F.D.A. Will Permanently Allow Abortion Pills by Mail*, N.Y. TIMES (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/health/abortion-pills-fda.html [perma.cc/42RT-EL44].

264. Davis S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 41), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335735 [perma.cc/3YWW-BRPX].

265. *Attorney General Merrick B. Garland Statement on Supreme Court Ruling in* Dobbs v. Jackson Women's Health Organization, U.S. DEP'T OF JUST. (June 24, 2022), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s [perma.cc/ZDW6-Z8WR]; Lauren Collins, *The Complicated Life of the Abortion Pill*, NEW YORKER (July 5, 2022), https://www.newyorker.com/science/annals-of-medicine/emile-baulieu-the-complicated-life-of-the-abortion-pill [perma.cc/VHX7-4PF8]. In January 2023, a mifepristone drug manufacturer filed a lawsuit in West Virginia challenging the state's abortion ban based on this preemption theory. Cohen et al., *supra* note 264 (manuscript at 48). On the same day, an abortion provider challenged North Carolina's law that permits abortion but that places restrictions on mifepristone that the FDA does not require, again based on preemption theory. *Id.*

266. Cohen et al., *supra* note 264 (manuscript at 48).

267. David W. Chen & Pam Belluck, *Wyoming Becomes First State to Outlaw the Use of Pills for Abortion*, N.Y. TIMES (Mar. 17, 2023), https://www.nytimes.com/2023/03/17/us/wyoming-abortion-pills-ban.html [perma.cc/J7MP-FGZE].

268. *See, e.g.*, Christine Vestal, *Abortion Medications Set to Become Next Legal Battlefield*, PEW CHARITABLE TRS. (July 13, 2022, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/13/abortion-medications-set-to-become-next-legal-battlefield [perma.cc/8H8U-QHS7]; Abbie VanSickle, *Supreme Court Ensures, for Now, Broad Access to Abortion Pills*, N.Y. TIMES (Apr. 21, 2023), https://www.nytimes.com/2023/04/21/us/politics/supreme-court-abortion-pill-access.html [perma.cc/4HYS-7WG4].

in November 2022, the plaintiffs claim that the FDA did not adequately review the scientific evidence or follow proper protocols when it approved the drug in 2000 and that it has since ignored the medication's safety risks.[269] If the plaintiffs prevail here, it will become illegal for the manufacturer to sell medication abortion nationwide, even in states where it is legal,[270] as FDA approval is required by law.[271] At the time of writing, the Supreme Court has stayed a Fifth Circuit ruling that largely affirmed the district ruling staying FDA approval of mifepristone, and mifepristone remains available while the case makes its way through the courts. But it is unclear what the ultimate outcome of this case will be, as there are serious questions regarding the plaintiffs' standing and the validity of their arguments.[272]

Assuming that there is a legal right to abortion by medication, it could benefit plaintiffs in wrongful pregnancy cases where the doctor failed to diagnose the pregnancy in time. Plaintiffs could argue (1) that the physician should have diagnosed their pregnancy prior to the eleven-week mark (made possible by blood tests, with detection as early as ten days after ovulation); [273] (2) that the failure to diagnose caused the resulting child, because had the plaintiff been informed, they would have obtained a medication abortion; and (3) that this failure deprived the plaintiff of the legal right to choose to have a medication abortion.

A right to medication abortion would be unhelpful in wrongful birth and life cases for timing reasons. Pregnant people can only use the abortion pill up to eleven weeks after the first day of their last menstrual period,[274] while fetal health screenings do not occur until eleven to thirteen weeks at the earliest, and some tests not until the second trimester.[275] As a result, those plaintiffs cannot argue that had their physician performed the testing correctly, or on time, or at all, they would have obtained a medication abortion from a local or

269. VanSickle, *supra* note 268; Complaint at 3, 55, All. for Hippocratic Med. v. U.S. Food & Drug Admin., No. 2:22-cv-00223-Z, 2023 WL 282571 (N.D. Tex. Apr. 7, 2023).

270. Cohen et al., *supra* note 264 (manuscript at 12–13).

271. *Unapproved Drugs*, U.S. FOOD & DRUG ADMIN. (June 2, 2021), https://www.fda.gov/drugs/enforcement-activities-fda/unapproved-drugs [perma.cc/A6MA-U8ZL].

272. Pam Belluck, *Lawyers to Face Off Before Judge in Closely Watched Abortion Pills Case*, N.Y. TIMES (Mar. 15, 2023), https://www.nytimes.com/2023/03/15/health/abortion-pills-case-texas.html [perma.cc/D2KE-V6JZ].

273. *How Soon Can You Tell You're Pregnant?*, CLEVELAND CLINIC (Sept. 28, 2022), https://health.clevelandclinic.org/how-early-can-you-tell-if-you-are-pregnant [perma.cc/QHB2-WHYE].

274. *The Abortion Pill*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/abortion/the-abortion-pill [perma.cc/U3A7-3PQS].

275. *Diagnosis*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/birthdefects/diagnosis.html [perma.cc/5RRH-KZC6].

international provider.[276] Still, wrongful pregnancy plaintiffs may have more success in proving the elements as listed above.

C. *Reframing the Injury: "Reproductive Negligence"*

Before and unrelated to *Dobbs*, Professor Dov Fox proposed the recognition of a new cause of action, "reproductive negligence," for when misconduct imposes procreation (including wrongful pregnancy), confounds it (including wrongful birth), or deprives it (a category of wrongs that none of the three prenatal tort claims currently address).[277] Professor Fox argued that such doctrinal development is necessary because tort law and other areas of the law do not allow plaintiffs to prevail often enough or to recover the full extent of the damages caused.[278] His new framework would better serve plaintiffs in prenatal tort cases, allowing them to recover more frequently and with more damages in total. But a claim for reproductive negligence cannot evade the impacts of an abortion ban. Reproductive negligence claims are, like existing prenatal torts, still rooted in negligence: the "negligent imposition of pregnancy and/or parenthood"[279] or "negligently confounded" procreation.[280] As a result, some reproductive negligence claims will still face the but-for causation problems that abortion bans create.

On the other hand, reproductive negligence claims get around abortion ban injury issues by reframing the injury. The injury is not deprivation of the right to abortion, based on *Roe*, but the more expansive "lost control over reproductive plans."[281] Alternatively, the injury could be framed as "the loss of what the plan meant to produce."[282] Litigants could use this language to move away from injury claims based on *Roe*.

However, courts may not accept reproductive negligence as a theory of harm. In arguing for doctrinal change, Professor Fox did not address the feasibility of implementation. Professor Carol Sanger critiqued reproductive negligence as politically difficult, given current abortion politics: "[T]ort reforms that might otherwise extend notions of liability for reproductive negligence may be seen as dangerous or unacceptable because of their explicit recognition that not all children are wanted and that people will take steps to prevent their

276. *See* Aatish Bhatia, Claire Cain Miller & Margot Sanger-Katz, *A Surge of Overseas Abortion Pills Blunted the Effects of State Abortion Bans*, N.Y. TIMES: THEUPSHOT (Nov. 1, 2022), https://www.nytimes.com/2022/11/01/upshot/abortion-pills-mail-overseas.html [perma.cc/PG6Y-V5UH].

277. Fox, *supra* note 7, at 153.

278. *See id.* at 153–54, 168.

279. *Id.* at 187.

280. *Id.* at 201.

281. *Id.* at 188.

282. Sanger, *supra* note 75, at 36, 38 ("I am suspicious of the claim that control is really at the heart of the matter. I think disappointed plaintiffs as a factual matter are distressed that they didn't get what they bargained and paid for—competent medical treatment—toward a reproductive goal.").

births."[283] It is time to argue that America is now ready for reproductive negligence. A loss of control over reproduction as a tangible injury can help plaintiffs circumvent disagreements over abortion.

D. *Nonlegal Solutions*

Given the legal and economic limitations of the other suggestions, the best option for protecting prenatal tort claims is to lobby for widespread abortion rights. Resisting future abortion bans and seeking to change current bans is the most effective way to prevent unintended effects on prenatal tort law. Prenatal tort claims are inseparable from abortion rights, as abortion is embedded in causation and injury for many prenatal tort claims.[284] Even if separation were possible, that may not be desirable, as one of the purposes of prenatal tort claims is to enforce the right to abortion.[285] The challenge here is that abortion is a divisive political issue, and keeping abortion legal until viability is not politically feasible in some conservative states. There is still hope, as a majority of Americans support the right to abortion.[286] There has been strong pushback to *Dobbs*, even in certain conservative states.[287]

A second possibility is to encourage patients to seek medical care in states with both abortion rights and prenatal tort claims. When out-of-state patients receive reproductive or prenatal care in such states, they are covered by that state's laws. If negligence occurs, these patients will have standing to sue in that state under its prenatal tort laws.[288] Being an out-of-state litigant is not necessarily more expensive or burdensome for the plaintiff.[289] Obtaining prenatal care out-of-state is less accessible, but it may be possible for a one-time genetic counseling or abortion appointment, especially for those who live

283. *Id.* at 46.

284. *See supra* Section II.B.

285. *See supra* Section I.C.

286. As of a 2022 poll, 61% of U.S. adults believe abortion should be legal in most or all cases, and 37% believe that it should be illegal in all or most cases. Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should Be Legal in All or Most Cases*, PEW RSCH. CTR. (June 13, 2022), https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2 [perma.cc/AG3J-3D3U].

287. *See, e.g.*, Alice Miranda Ollstein, *Kansas Voters Block Effort to Strip Abortion Protections from State Constitution*, POLITICO (Aug. 3, 2022, 6:30 PM), https://www.politico.com/news/2022/08/02/kansas-voters-block-effort-to-ban-abortion-in-state-constitutional-amendment-vote-00049442 [perma.cc/UHF5-NVG3]; Sarah McCammon, *Kentucky High Court Upholds State Abortion Bans While Case Continues*, NPR (Feb. 16, 2023, 11:18 AM), https://www.npr.org/2023/02/16/1156192879/abortion-kentucky-supreme-court-bans-roe-dobbs [perma.cc/XK7A-USNY].

288. *See* Bal, *supra* note 70, at 341.

289. *See* Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 250–53 (2014).

close to such a border state.[290] Cross-border travel, born out of necessity, is already a common practice for abortions post-*Dobbs* for those who can manage it.[291] Genetic counseling may be provided virtually by a counselor in another state.[292]

Another avenue is to raise awareness of the importance of prenatal tort claims and the way they have been impacted by *Dobbs*. People trying to get pregnant or to avoid pregnancy should be aware of their rights in their state and how to best protect themselves. State legislatures should be forced to consider how abortion bans without exceptions will impact the state's preexisting tort law.

CONCLUSION

Abortion bans detrimentally affect prenatal tort claims in serious ways. Prenatal tort claims serve essential interests, but *Dobbs* has changed the landscape of pursuing them in certain states. Prenatal tort claims are worth saving, and greater attention to prenatal torts may illuminate further solutions.

290. *See, e.g.*, Allison McCann, *What It Costs to Get an Abortion Now*, N.Y. TIMES (Sept. 28, 2022), https://www.nytimes.com/interactive/2022/09/28/us/abortion-costs-funds.html [perma.cc/8D2F-VRRP].

291. For example, abortion providers in Colorado and Oklahoma have seen the number of patients traveling from Texas increase 1000% and nearly 2500% compared to previous years, respectively. Oriana González, *Texans Overwhelmingly Traveled Out-of-State to Get Abortions After Ban Took Effect*, AXIOS (Mar. 5, 2022), https://www.axios.com/2022/03/05/texas-abortion-ban-planned-parenthood-roe [perma.cc/GTS6-BZAW]. Illinois abortion providers regularly treat patients from the border states of Wisconsin, Missouri, and Kentucky, as well as those from Ohio, Tennessee, and Texas. Angie Leventis Lourgos, *Abortions in Illinois for Out-of-State Patients Have Skyrocketed*, DETROIT NEWS (Aug. 4, 2022, 2:36 PM), https://www.detroitnews.com/story/news/nation/2022/08/04/abortions-state-illinois/50564151 [perma.cc/LD5Y-KQPM]. Maryland clinics provide care to patients from the neighboring states of Virginia and West Virginia, plus other further states. Abby Zimmardi, *Maryland Becomes Haven for Out-of-State Abortion Seekers, Providers*, CAP. NEWS SERV. (Sept. 15, 2022), https://cnsmaryland.org/2022/09/15/maryland-becomes-haven-for-out-of-state-abortion-seekers-providers [perma.cc/97JB-CFGC].

292. Wendy R. Uhlmann, Andrew J. McKeon & Catharine Wang, *Genetic Counseling, Virtual Visits, and Equity in the Era of COVID-19 and Beyond*, 30 J. GENETIC COUNSELING 1038 (2021).

NOTE

DEINSTITUTIONALIZATION, DISEASE, AND THE HCBS CRISIS

*Jacob Abudaram**

Primarily funded by Medicaid, home- and community-based services (HCBS) allow disabled people and seniors to receive vital health and personal services in their own homes and communities rather than in institutions like nursing homes and other congregant care facilities. The HCBS system is facing a growing crisis of care nationwide; more than 600,000 people are waitlisted for services, thousands of direct care workers are leaving the industry, and states are not committed to deinstitutionalization. The COVID-19 pandemic has highlighted and exacerbated these problems, as people in institutional settings face infection and death at far higher rates than those housed outside them.

This Note offers solutions to the HCBS crisis. In particular, it explores two strategies that could help expand access to HCBS, regardless of whether the federal government increases its funding: (1) expanding and creatively using Olmstead*, a landmark disability rights case, to force states to deinstitutionalize; and (2) adding a new title to the Americans with Disabilities Act focused on emergency relief. Together, these two solutions would help get people out of institutions while creating a more resilient healthcare infrastructure for future emergencies.*

TABLE OF CONTENTS

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