RECONSIDERING WRONGFUL BIRTH

*Luke Isaac Haqq**

INTRODUCTION

The tort action for "wrongful birth" has a history dating back at least to the 1960s, when it emerged along with the claims for "wrongful life" and "wrongful conception." Since their incipience, this trio of lawsuits has generated an expansive commentary, reaching into thousands of articles in the legal literature alone. With a divide among federal circuits on wrongful birth only beginning to gain visibility with *Doherty v. Merck & Co.*[1] in 2018 and *Zelt v. Xytex Corp.*[2] in 2019, the wrongful birth claim could potentially provide a site for the Supreme Court to revisit national abortion policy.

The extant literature has also typically been parochial in scope, most often focusing on a specific bill, law, or court decision in a given state or region. Rather than seeking to sift through the multifarious voices in the legal, medical, ethical, sociological, and other literatures opining on these actions for more than half a century, this Essay offers a brief and broader view, canvassing the state and federal terrain governing these actions in 2020. More specifically, this Essay calls into question the dominating role that the wrongful birth claim has come to play, with recent federal circuit decisions speaking to an urgent need for more concerted efforts to limit the scope of recovery in order to better reflect the benefits conferred on parents by unexpected children.

I. KEY POINTS IN THE HISTORY OF PRENATAL TORTS AND WRONGFUL BIRTH

As legal historians have noted, American law in the nineteenth century was characterized as one of the more "creative outbursts of modern legal history."[3] While eighteenth-century lawyers and judges viewed English common law and statutes with considerable deference, the creative "release of energy" of the nineteenth century more readily gave a functional or purposive analysis of legal

* History of Medicine Program, University of Minnesota, Twin Cities.

1 892 F.3d 493 (1st Cir. 2018).

2 766 F. App'x 735 (11th Cir. 2019).

3 DANIEL J. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 35 (1965).

rules,[4] including private law,[5] with judicial intervention or lack of it often justified as necessary for the law to keep pace with changing times.

The prenatal tort fell within these broader attitudes of using the law as a policymaking tool to adapt to a rapidly changing society in the late nineteenth century. First, it was an action devised by Oliver Wendell Holmes, Jr.,[6] who would become a central figure of the American legal realism movement, and who was among the first to publish a casebook attempting to place disparate tort actions into a systematic whole, looking to the pedagogical case method of Christopher Columbus Langdell.[7] Second, prenatal torts from their inception in the 1880s into the 1930s invariably revealed how aspects of U.S. industrialization and urbanization also operated as new sources of prenatal injury.[8] This line of precedent recognized both the preexisting history of legal rights accorded to the unborn and articulated the need to create more such rights.

Prior to the emergence of the prenatal tort in 1884, courts in the United States had followed the English common law in applying a fluid concept of personhood in other contexts like probate law, recognizing legal personhood at any point in gestation, if doing so was in the interests of a child actually born alive. English courts as early as the eighteenth century had interpreted the meaning of "children" in a will to include human life *en ventre sa mere*, for example, in cases where an heir was not born until after the testator died.[9] The Supreme Judicial Court of Massachusetts, following English precedent, extended this type of legal personhood to the unborn in a case where the testator died nearly nine months before the child's birth, meaning that the court recognized the existence of a legal person capable of taking under a will shortly after conception.[10] Another state's supreme court noted

---

4 JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 3 (1984).

5 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 1–3 (1977).

6 Judge Holmes devised the prenatal tort writing for the majority in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 16 (1884). *See also* Luke Isaac Haqq, *Protecting Health Information in Utero: A Radical Proposal*, 28 J.L. & POL'Y 1, 39 (2019).

7 *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 77–163 (1909); *see also* G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870–1930*, 11 U. ST. THOMAS L.J. 463, 470–75 (2014) (discussing Langdell's influence on Holmes).

8 *See, e.g.*, Allaire v. St. Luke's Hosp., 76 Ill. App. 441, 445–47, 450 (1898) (refusing to find that plaintiff's prenatal injury resulted from defendant negligently operating elevator); *Dietrich*, 138 Mass. at 14 (prenatal injury after fall on public highway); Nugent v. Brooklyn Heights R.R. Co., 154 A.D. 667, 667 (N.Y. App. Div. 1916) (alleging defendant was negligent in "starting a car while the mother, a passenger, was alighting, so that [the plaintiff] was born deformed").

9 *See, e.g.*, Wallis v. Hodson (1740) 26 Eng. Rep. 472; 2 Atk. 115; Doe v. Clarke (1795) 126 Eng. Rep. 617; 2 H. Bl. 399; Thellusson v. Woodford (1798) 31 Eng. Rep. 117; 4 Ves. Jun. 227.

10 *See* Hall v. Hancock, 32 Mass. (15 Pick.) 255 (1834); *see also* Hill v. Moore, 5 N.C. (1 Mur.) 233 (1809).

that a contingent remainder could vest in the unborn,[11] with another even recognizing a fetus as a tenant in common with its mother.[12]

In all of these cases, any sort of legal personhood that was given to the unborn only applied to a restricted set: those eventually born and having interests capable of being protected *in utero*. Judge Holmes, then on the Supreme Judicial Court of Massachusetts, would incorporate this reasoning into tort law through his doctrine of "conditional prospective liability" when creating the prenatal tort in *Dietrich v. Inhabitants of Northampton*.[13] In *Dietrich*, a case involving a pregnant woman who fell "upon a defective highway, [and was] delivered of a child, who survive[d] his premature birth only a few minutes," he explained that "an injury transmitted from [an] actor to a person through his own organic substance, or through his mother, before he became a person" could theoretically "stand[] on the same footing as an injury transmitted to an existing person through other intervening substances outside him . . . . [T]he argument would not be affected by the degree of maturity reached by the embryo at the moment of the organic lesion or wrongful act."[14] In other words, as in the probate context, the prenatally injured unborn could be treated as legal persons at any point of gestation, so long as a person was born who could then bring a lawsuit about personal interests that were infringed *in utero*.

State courts would dismiss prenatal tort cases from *Dietrich* into the early twentieth century, often because the plaintiff died from the prenatal injury before the litigation had concluded.[15] By the 1930s and 1940s, however, the social transition of childbirths from homes to hospitals also presented a new locus of liability, with the use of obstetric forceps emerging as a source of prenatal injury during delivery.[16] After the first federal court recognized the validity of a tort for prenatal injury in 1946 (injuries from forceps),[17] states across the country followed suit and permitted the action as well.[18] As the prenatal tort gained traction, Catholic and other religious

11 *See* Aubuchon v. Bender, 44 Mo. 560, 569–70 (1869).

12 *See* Biggs v. McCarty, 86 Ind. 352, 367 (1882).

13 *Dietrich*, 138 Mass. at 16.

14 *Id.* at 14, 16.

15 See William T. Muse & Nicholas A. Spinella, *Right of Infant to Recover for Prenatal Injury*, 36 VA. L. REV. 611, 612–619 (1950). For states that entertained prenatal injury cases in the early twentieth century but dismissed them—for example, refusing to extend Holmes's reasoning in Dietrich, or applying it and concluding that the plaintiff did not live long enough to count as being "born alive"—see Stanford v. St. Louis-S.F. Ry. Co., 108 So. 566, 566–67 (Ala. 1926); Smith v. Luckhardt, 19 N.E.2d 446, 451 (Ill. App. Ct. 1939); Bliss v. Passanesi, 95 N.E.2d 206, 207 (Mass. 1950); Newman v. City of Detroit, 274 N.W. 710, 711 (Mich. 1937); Buel v. United Rys. Co. of St. Louis, 154 S.W. 71, 72–73 (Mo. 1913); Drabbels v. Skelly Oil Co., 50 N.W.2d 229, 232 (Neb. 1951); Stemmer v. Kline, 26 A.2d 489, 491 (N.J. 1942); Drobner v. Peters, 133 N.E. 567, 568 (N.Y. 1921); Berlin v. J.C. Penney Co., 16 A.2d 28, 28 (Pa. 1940); Gorman v. Budlong, 49 A. 704, 707 (R.I. 1901); Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944, 950 (Tex. Comm'n App. 1935); Lipps v. Milwaukee Elec. Ry. & Light Co., 159 N.W. 916, 917 (Wis. 1916).

16 *See, e.g.*, Bonbrest v. Kotz, 65 F. Supp. 138, 139 (D.D.C. 1946); Scott v. McPheeters, 92 P.2d 678, 679 (Cal. Dist. Ct. App. 1939).

17 *See Bonbrest*, 65 F. Supp. at 139, 142–43.

18 *E.g.*, Amann v. Faidy, 114 N.E.2d 412, 418 (Ill. 1953) (overruling Allaire v. St. Luke's Hosp., 56 N.E. 638 (Ill. 1900)); Leal v. C.C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820, 822 (Tex.

hospitals would simultaneously find themselves targets for litigation over reproduction, among other rising players in the country's healthcare infrastructure. For example, litigants might have sought to challenge hospitals receiving Hill-Burton funding for refusing to provide surgical sterilization procedures.[19] Such litigation has ranged from hospitals refusing to permit use of their facilities for voluntary sterilizations based on reasons other than medical necessity,[20] to personnel objecting to participating in such procedures under state conscience laws,[21] to indigent petitioners asking courts whether "Medical Assistance for Needy Persons" included voluntary sterilization options for the poor.[22]

Similar to the resistance that many Catholic hospitals espoused in such situations, historian Daniel Williams has recently underscored the role of "Catholic New Deal liberals of the 1930s who first spoke out against abortion legalization,"[23] showing the formation of a constituency of Christian political views on reproductive policy that predated and was not merely reactionary to *Roe*. The tumultuous politics of the 1960s and 1970s, however, began more clearly to reveal new divergences between Catholic and Protestant voting and alignment with the Democrat and Republican parties.[24] Among other reasons, Catholicism had meshed well with Democratic values because many Catholics in the early twentieth century were

1967) (overruling Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944 (Tex. Comm'n App. 1935)). By 1955, enough states had signaled their decision to follow *Bonbrest* that William Prosser would conclude that the move to recognize the prenatal tort was a trend "so definite and marked as to leave no doubt that this will be the law of the future in the United States." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36, at 175 (2d ed. 1955).

19 Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308, 309–10 (9th Cir. 1974); Taylor v. St. Vincent's Hosp., 369 F. Supp. 948, 949 (D. Mont. 1973); Allen v. Sisters of St. Joseph, 361 F. Supp. 1212, 1213 (N.D. Tex. 1973).

20 *Allen*, 361 F. Supp. at 1213.

21 Swanson v. St. John's Lutheran Hosp., 615 P.2d 883, 884 (Mont. 1980).

22 Clink v. Lavine, 79 Misc. 2d 421, 422 (N.Y. Sup. Ct. 1974).

23 DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 9 (2016).

24 For example, Pew Research polls on current attitudes indicate that in respondents who identify as Catholic, 44% identify as Democrats and 37% as Republicans. Of Evangelical Protestants, on the other hand, 56% identified as Republican and 28% identified as Democrats. *See Party Affiliation*, PEW RES. CTR.: RELIGIOUS LANDSCAPE STUDY (2014), https://www.pewforum.org/religious-landscape-study/party-affiliation/. Similarly, Gallup pre-election polls from 1952 to 2000 consistently indicate that more than half of respondents identifying as Protestant expressed plans to vote for Republican presidents (except for 1964, 1968, and 1992). *See* Jeffrey M. Jones, *The Protestant and Catholic Vote*, GALLUP (June 8, 2004), https://news.gallup.com/poll/11911/protestant-catholic-vote.aspx. A majority of Catholic respondents expressed similar intentions in 1972, 1984, and 1988, but in all other election years a greater proportion instead favored Democratic candidates. *Id.*; s*ee also* Thomas B. Edsall, *In God We Divide*, N.Y. TIMES (Mar. 25, 2020), https://www.nytimes.com/2020/03/25/opinion/religion-democrats-republicans.html (noting findings that by 2018, "no religion" had become "the largest religious category, 28 percent, of the Democratic electorate, outnumbering once dominant Catholics at 21.8 percent").

immigrant workers, and also because government programs—from the New Deal to the Hill-Burton grants of the Truman administration—could facilitate charity to the poor and other philanthropic and humanitarian causes.[25]

Beyond such litigation over reproductive tools like contraception and voluntary sterilization, the wrongful life, wrongful conception, and wrongful birth actions also emerged in the 1960s and 1970s, diffracting the prenatal tort into four distinct actions. Perhaps religious groups missed the importance of challenging this altered terrain of medical practice—extending to hospitals, laboratories, general practitioners, surgeons, obstetricians, pediatricians, perinatologists, and genetic counselors, among others—in its early stages because of greater attention given to challenging *Roe* more directly. It is unsurprising that this new domain of litigation may have lacked social awareness and visibility in its incipient stages, but many questions have yet to be explored as to how deeply the prospect of wrongful birth liability dissuaded religious practitioners or medical students after *Roe* from ever pursuing such specialties in the first place.[26]

A myriad of factors contribute to the lack of a unified Christian view on reproductive politics emerging out of the 1960s and 1970s, from divergences in attitudes toward the sexual revolution, to differing views on civil rights, race, immigration, the economy, crime, class politics, regionality, and flight to the suburbs.[27] Importantly, numerous Christian denominations did indeed catalyze responses to federal reproductive policy in these decades, whether declaring doctrinal statements (e.g., the conclusions of the Pontifical Commission on Birth Control within the encyclical *Humanae Vitae* in 1968),[28] or working toward the objectives of political mobilization and institutional formation (with dozens of organizations pursuing pro-life goals founded in the 1960s and 1970s, including the

---

25 Williams writes that,

> Prior to *Roe*, the Democratic Party had been divided over abortion, because both pro-life and pro-choice Democrats could legitimately claim that their arguments were grounded in the party's historic liberal tradition. . . . [After *Roe* and into the Reagan era, however,] pro-lifers' alliance with the Republican Party was never a comfortable one . . . . As they became more narrowly focused on reversing *Roe*, pro-lifers began to lose interest in some of the earlier human rights causes, such as anti-poverty efforts, that had once been important to them.

WILLIAMS, *supra* note 23, at 8–9.

26 As historian Leslie Reagan notes, on the one hand, the first wrongful birth claims were brought against Catholic doctors, after they refused to perform a requested abortion when the procedure remained illegal. LESLIE J. REAGAN, DANGEROUS PREGNANCIES: MOTHERS, DISABILITIES, AND ABORTION IN MODERN AMERICA 117 (2010). On the other hand, "[b]y the late 1960s, the majority of the medical profession, including nearly half of Catholic physicians, followed the abortion rights and feminist movements and supported not only an expansion of the indications for therapeutic abortion but also repeal of the criminal abortion laws." *Id.* at 123–24.

27 *See, e.g.*, MATTHEW LASSITER, THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH 320 (2006) (describing social factors contextualizing the rise of "the Moral Majority and the Christian Coalition").

28 *See* Paul VI, Encyclical Letter *Humanae Vitae* (July 25, 1968), http://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae.html.

National Right to Life Committee, Focus on the Family, Americans United for Life, and Concerned Women for America).[29] The point is that no unified position on reproductive policy emerged as the quintessentially Christian one in these decades in which the wrongful birth action first arose. Rather, while pro-life religious organizations have consistently advanced legislation on topics like fetal pain,[30] it appears that wrongful birth only seriously entered into congressional debates by 2014, in a bill that has been introduced in the House a handful of times since then but has always failed to pass.[31] Still, it has received support from both Catholics and Protestants. Beyond support from organizations like Americans United For Life, the representative who first introduced the "Every Child Is A Blessing Act," described as "a Catholic and a staunch pro-life supporter," explained his motivation in creating the bill "after 'coming across this disturbing trend of lawsuits'" alleging wrongful birth.[32]

Whatever the reasons may be that wrongful birth was not initially a central concern to pro-life organizations, through highlighting the significance of the wrongful birth claim next, this Essay suggests in the final Part that rethinking and challenging the action is a fruitful way for Christians to coalesce in shaping policy reform.

---

29 *See, e.g.*, *About*, AM. UNITED FOR LIFE, https://aul.org/about/ (last visited June 11, 2020); *About NRLC*, NAT'L RIGHT TO LIFE COMMITTEE, https://www.nrlc.org/about/ (last visited June 11, 2020); *Ministries & Shows*, FOCUS ON FAM., https://www.focusonthefamily.com/about/programs/ (last visited June 11, 2020); *Our History*, CONCERNED WOMEN FOR AM., https://concernedwomen.org/about/our-history/ (last visited June 11, 2020).

30 Granted, historians have underscored how fetal pain gained social visibility only by the Reagan era, within political efforts to deter abortion choices in the clinic. *See, e.g.*, KEITH WAILOO, PAIN: A POLITICAL HISTORY 123–24 (2014); SARA DUBOW, OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA 153–54 (2011). However, concerns about fetal pain were also central to political debates about live fetal research since at least the early 1970s, leading to the inclusion of protections for fetal research subjects in the National Research Act of 1974. *See* National Research Act, Pub. L. No. 93-348, 88 Stat. 202(a)(3)(b) (1974); *Examination of the Varying and Somewhat Controversial Issues Involved in Regard to the Ban on Fetal Research Contained in the National Research Act*, 93d Cong. (1974). For popular coverage of the topic at the time, see, for example, Victor Cohn, *Live-Fetus Research Debated*, WASH. POST, Apr. 10, 1973, at A1; Patricia Bartos, *Laboratory Gets Bodies of Aborted, Nurse Claims*, PITTSBURGH CATH., Mar. 17, 1972.

31 *See* Every Child Is a Blessing Act of 2017, H.R. 684, 115th Cong.; Every Child Is a Blessing Act of 2014, H.R. 281, 114th Cong. (2015); Every Child Is a Blessing Act of 2014, H.R. 4698, 113th Cong.

32 *See* Julia Willis, *Sponsor Says Aim of Bill on "Wrongful Birth" Suits to Protect Disabled*, CATH. HERALD (June 2, 2014), https://catholicherald.org/news/nation-and-world/sponsor-says-aim-of-bill-on-wrongful-birth-suits-to-protect-disabled/; *see also* Letter from Charmaine Yoest, President and CEO of Americas United for Life, to Unnamed Representative (May 20, 2014) (on file with author).

II. WRONGFUL BIRTH IN THE UNITED STATES TODAY: SOME EXAMPLES

This Essay does not aim to revisit the politics of abortion and contraception on their own, but rather seeks to highlight the wrongful birth action as a phenomenon that is continuing to gain traction yet raises potential problems about the public policy of unexpected children and the value of human life, whether congenitally healthy or anomalous. From the 1960s onward, tort litigation over reproductive outcomes became less singularly about physiological prenatal injuries and more often about claims of injury by parents who simply believed they already had a "more than sufficient [amount of] children."[33]

The new tort actions—the wrongful conception, wrongful birth, and wrongful life claims—reflected manifest impacts of the new federal reproductive rights. Courts entertaining them invariably refused to find them to be valid causes of action before the creation of the rights to contraception and abortion,[34] but then many began recognizing them shortly after *Roe*.[35] Prenatal torts at this stage, infused with a greater role of informed consent, came to be a deeply political domain, a chance for states to declare their own views about reproductive rights—for example, by opposing them.[36] Medical professionals have done similarly, but in states where wrongful birth actions are permitted, rather than finding support in a conscience law,

33 Custodio v. Bauer, 59 Cal. Rptr. 463, 466 (Ct. App. 1967).

34 *See* Gleitman v. Cosgrove, 227 A.2d 689, 691–92 (N.J. 1967).

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

36 *See* Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978) ("[T]he public policy of this State [is] to protect and preserve human life. The right of women in certain cases to have abortions does not alter the policy."). Similarly, the Illinois Supreme Court found legislative intent of a "strong public policy of preserving the sanctity of human life, even in its imperfect state," though it ultimately found reason to permit limited wrongful birth damages. Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 701, 707–08 (Ill. 1987) (citing to the Illinois Abortion Law of 1975); *see also* Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 689 (Ky. 2003) ("Although the parents in the instant cases allege that their injury was in being deprived of accurate medical information that would have led them to seek an abortion, we are unwilling to equate the loss of an abortion opportunity resulting in a genetically or congenitally impaired human life, even severely impaired, with a cognizable legal injury."); Taylor v. Kurapati, 600 N.W.2d 670, 687, 691 (Mich. Ct. App. 1999) ("While currently prevailing United States Supreme Court precedent recognizes a federal constitutional right to privacy, see *Roe v. Wade*, . . . this right to privacy 'implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.' . . . In particular, Michigan law provides for no right to an abortion and, in fact, makes a value judgment favoring childbirth. . . . We conclude that this intermediate appellate court should not continue to recognize the wrongful birth tort without the slightest hint of approval from the Michigan Supreme Court or our Legislature." (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)). Political contestations over these claims are also fueled by advocacy organizations and media outlets. *Compare* Yoest, *supra* note 32 (describing the "deeply troubling" trend favoring wrongful birth in the U.S. as a "chilling slide towards eugenics"), *with* Becca Andrews, *Texas Lawmakers Want You to Know that They Really, Really Hate Abortion*, MOTHER JONES (Mar. 24, 2017), https://www.motherjones.com/politics/2017/03/texas-senate-abortion-wrongful-birth/ (citing NARAL Pro-Choice Texas director Heather Busby's claim that a ban on wrongful birth lawsuits "allows doctors to lie to patients, plain and simple").

such practitioners might instead find themselves paying six- or seven-figure sums to a wrongful birth plaintiff.[37]

With this transformation of prenatal torts, the terrain came to be recast as one in which courts began treating children as injuries to their parents rather than focusing on the injuries of children.[38] One way courts have facilitated this transformation is by avoiding the wrongful life claim, recognizing the importance of redressing the plaintiff's suffering from congenital disease, but doing so by permitting recovery for special accommodations only under the wrongful birth or wrongful conception claims of the parents.[39] Since these suits sometimes involve parents seeking the costs of raising a healthy child to adulthood from actors like sterilization surgeons and abortion providers, one state's supreme court referred to the wrongful birth claim as a "medical paternity suit" in a decision banning the action.[40]

Examples abound of damages that wrongful birth plaintiffs have sought after the birth of a healthy child, whether stemming from a failed abortion or a failure to warn about risks or detection of congenital anomalies. In one case, a plaintiff sought over $600,000 in damages solely for lost earning potential as a consequence of having to raise the child, in addition to other damages.[41] Another claim for wrongful birth sought $250,000 in a parent's emotional damages because of a child's birth without a left hand, rather than being aborted.[42] Parents have sought similar scopes of damages in wrongful conception actions, as with one brought after a failed tubal ligation by a plaintiff who already had two children and did not want more; she

37 *See, e.g.*, Jury Verdict Summary, Confidential, No. S99-07-16, 1998 Jury Verdicts LEXIS 72413 (Cal. Super. Ct. Sept. 30, 1998) ($887,500 to plaintiffs in case involving wrongful birth and wrongful life actions against doctor for withholding Down syndrome risk).

38 Compassion for suffering children assisted in the success of early wrongful birth litigation. *See* REAGAN, *supra* note 26, at 130 (noting how Catholic jurors participating in one of the first wrongful birth awards explained that they "found that the child . . . deserved damages, which would help pay for her medical care").

39 *See, e.g.*, Rich v. Foye, 976 A.2d 819, 837 (Conn. Super. Ct. 2007) (recognizing the plausibility of the child's wrongful life claim but finding it less problematic to award the same damages under the parents' wrongful birth claim instead); *see also* Garrison v. Med. Ctr. of Del., Inc., 581 A.2d 288, 289 (Del. 1989) (denying wrongful life but permitting wrongful birth recovery after birth of child with Down syndrome); Kush v. Lloyd, 616 So. 2d 415, 423–24 (Fla. 1992) (per curium) (denying wrongful life but permitting wrongful birth recovery for extraordinary expenses associated with congenital impairment); *Siemieniec*, 512 N.E.2d at 702, 706 (same); Viccaro v. Milunsky, 551 N.E.2d 8, 13 (Mass. 1990) ("As long . . . as Adam's parents are entitled to recover against the defendant for the extraordinary costs they will incur because of Adam's genetic disease, Adam need not have his own cause of action for those expenses.").

40 Azzolino v. Dingfelder, 337 S.E.2d 528, 536 (N.C. 1985) (quoting Becker v. Schwartz, 386 N.E.2d 807, 819 (1978) (Wachtler, J., dissenting in part)).

41 *See* Jury Verdict Summary, Smith v. Tucker, No. TC013608, 2001 Jury Verdicts LEXIS 46368 (Cal. Super. Ct. Dec. 10, 2001).

42 *See* Jury Verdict Summary, Schwalm v. Doherty, No. CISCV172334, 2013 Jury Verdicts LEXIS 15510 (Cal. Super. Ct. Oct. 22, 2013).

alleged that part of her injury was that her unexpected child—who was five at the time of trial—had "emotional problems," and the lawsuit claimed childrearing costs would be between $200,000 and $300,000.[43]

Phillips v. United States exemplifies how damages could be apportioned, a wrongful birth case in which the court found that the defendant "breached the applicable standards of medical care by failing to advise, counsel, and test the parents concerning the risk that their offspring would be afflicted with Down's syndrome."[44] Consider some of the economic factors that the court relied on in its calculations:

> **$450,202**—the cost of raising a child with Down syndrome to age eighteen
>
> **$(-62,500)**—offset indicating "the cost of raising a 'normal' child" to eighteen
>
> **$771,394**—cost of group home from eighteen to age forty
>
> **$500,000**—parents' emotional suffering and "sadness" for having child with Down syndrome
>
> **$(-250,000)**—offset indicating "the 'benefits' flowing [to parents] from the child's birth"[45]

These are the calculations for one plaintiff in a consolidated action, with multiple parents of children with Down syndrome bringing suit against the same doctor and ultimately recovering over $1.5 million combined in their wrongful birth claims.[46] By contrast, all of the children's own wrongful life actions had been dismissed significantly earlier in the course of the litigation.[47]

On the one hand, this itemization of damages indicates that the court recognized an offset of $250,000 to denote the benefit that parents receive by being able to enjoy their child's existence. On the other, the figures also reflect how courts have been willing to award damages allocated to pain and suffering to compensate people for having to raise rather than abort children with Down syndrome, a condition that typically would not be expected to preclude such children from leading happy, fulfilling lives.[48] Courts have opportunities through these actions to respond to the phenomenon of disability-selective abortions,[49] to address what has

---

43 Jury Verdict Summary, Stellhorn v. Victory Med. Grp., No. NCC27633, 1990 Nat. Jury Verdict Review LEXIS 1057 (Cal. Super. Ct. Apr. 17, 1990).

44 Phillips v. United States, 575 F. Supp. 1309, 1311 (D.S.C. 1983).

45 *Id.* at 1317–20.

46 *Id.* at 1320.

47 *See, e.g.*, Phillips v. United States, 508 F. Supp. 537, 544 (D.S.C. 1980) (granting defendant's motion for summary judgment on the plaintiff's wrongful life claim but maintaining parent's claims).

48 *E.g.*, Brian Skotko et al., *Self-Perceptions from People with Down Syndrome*, 155 AM. J. MED. GENETICS 2360, 2368 (2011).

49 *See, e.g.*, Tamsen M. Caruso et al., *Impact of Prenatal Screening on the Birth Status of Fetuses with Down Syndrome at an Urban Hospital 1972–1994*, 1 GENETICS MED. 22, 27 (1998); Mathias B. Forrester & Ruth D. Merz, *Epidemiology of Down Syndrome (Trisomy 21), Hawaii, 1986–97*, 65 TERATOLOGY 207, 210 (2002); Ralph L. Kramer et al., *Determinants of Parental Decisions After the Prenatal Diagnosis of Down Syndrome*, 79 AM. J. MED. GENETICS 172, 173 (1998); Caroline Mansfield et al., *Termination Rates After Prenatal Diagnosis of Down Syndrome,*

been described as an entrenchment of post-*Roe* eugenics.[50] In one case before the Iowa Supreme Court, for instance, though defendants argued the wrongful birth action might come as an affront to people with disabilities, the court denied this argument and recognized wrongful birth for the first time in 2017.[51] In doing so, it dismissively noted that "given Z.P.'s severe cognitive disabilities, there is nothing in the record to indicate he will someday understand his parents sued over their lost opportunity to avoid his birth."[52]

Finally, beyond ethical problems with awarding damages to parents for "having" to raise unexpected but healthy children, and with some requests for damages suggestive of potentially problematic attitudes toward children unexpectedly born with anomalies, a 2015 case reflects possible dangers in failing to make more concerted efforts to limit the scope of permissible recovery in these actions, especially general damages for pain and suffering[53] (though possibly allowing them for extreme distress from lethal conditions like Tay-Sachs disease).[54] In *Wuth v. Laboratory Corporation of America*, parents sought over $20 million in a wrongful birth claim allocated to their emotional damages for being unable counterfactually to abort their child, who was born with a chromosomal anomaly but still had an expected lifespan of seventy years.[55] Consequently, Lab Corporation of America ("LabCorp") had strong incentives to argue that the child's existence posed no such emotional harm, with parents having a contrary incentive to downplay the benefits they receive by their child's existence and instead stress his burdensomeness.

To this end, the court noted that "LabCorp cited undisputed evidence" from depositions that:

> 1. Brock and Rhea were proud, loving, and devoted parents to Oliver.
>
> 2. Oliver was a happy child who brings joy to his family's lives.
>
> 3. Brock and Rhea would miss Oliver if he was gone from their lives.
>
> 4. Brock and Rhea enjoyed watching Oliver grow and develop and play with his brother.

Spina Bifida, Anencephaly, and Turner and Klinefelter Syndromes: A Systematic Literature Review, 19 PRENATAL DIAGNOSIS 808, 810 (1999); Jaime L. Natoli et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995–2011)*, 32 PRENATAL DIAGNOSIS 142, 150 (2012).

50 *See, e.g.*, TROY DUSTER, BACKDOOR TO EUGENICS (2d ed. 2003).

51 See Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 406–07 (Iowa 2017).

52 *Id.* at 407.

53 Wuth v. Lab Corp. of Am., 359 P.3d 841 (Wash. Ct. App. 2015).

54 *See generally Tay-Sachs Disease*, U.S. NAT'L LIBR. OF MED. (May 26, 2020), https://ghr.nlm.nih.gov/condition/tay-sachs-disease. *See also* Naccash v. Burger, 290 S.E.2d 825, 830–31, 833 (Va. 1982) (jury verdict of nearly $200,000 in wrongful birth claim involving Tay Sachs, awarded in part in contemplation of such damages for severe emotional distress).

55 *Wuth*, 359 P.3d at 846–852, 864.

> 5. Neither parent had received counseling since Oliver's birth and both had returned to work.[56]

Since he was happy to exist, his parents were glad to have him, both had not been so inconvenienced that they could not return to work, and other reasons, LabCorp concluded that "Oliver has brought a net increase in the quality of their lives."[57] Not ultimately persuaded by this evidence, the Washington appellate court affirmed the jury's $50 million verdict for the plaintiffs ($25 million for special damages under Oliver's wrongful life action, and the same amount in emotional damages to parents, a request piggybacking on the success of his claim),[58] finding that "the jury could have concluded either that Oliver's birth brought a 'net increase' or a 'net loss' to his parents."[59]

III. WHY IT MATTERS TO LIMIT WRONGFUL BIRTH DAMAGES IN 2020

The wrongful birth and wrongful conception claims fundamentally transformed the terrain of prenatal torts. A single jurisprudential thread from the 1880s into the 1960s was concerned solely with compensation to prenatally injured plaintiffs. The wrongful *life* claim continued this thread into the 1960s and today in a handful of states, but it has been banned in the vast majority as inimical to public policy.[60] Consequently, the old jurisprudence has been overtaken by the public

---

56 *Id.* at 855.

57 *Id.*

58 *Id.* at 846. The wrongful life component originally sought $20,628,306 in special damages, and then requested "nothing less than an amount equal to the award to Ollie" for their own emotional damages. *Id.* at 852.

59 *Id.* at 855.

60 For states recognizing wrongful life, see Curlender v. Bio-Science Labs., 165 Cal. Rptr. 477, 489 (App. Ct. 1980); Procanik v. Cillo, 478 A.2d 755, 764 (N.J. 1984); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 486 (Wash. 1983) (en banc). Though banned in most states by statutory or case law, some states have no controlling law, and some have expressed openness. For examples of bans, see ARK. CODE ANN. § 16-120-902(b) (2017) ("A person is not liable for damages in a civil action for wrongful life . . . ."); Lininger v. Eisenbaum, 764 P.2d 1202, 1212 (Colo. 1988) (en banc) ("We do not question that Pierce will face substantial expenses throughout his life with respect to his blindness. We merely conclude that his life, however impaired and regardless of any attendant expenses, cannot rationally be said to be a detriment to him when measured against the alternative of his not having existed at all."). For courts expressing openness in dicta, see Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1157–58 (La. 1988) (finding defendant "doctor did not owe a duty to protect the child from the risk of albinism," but willing to consider graver cases of congenital injury); Viccaro v. Milunsky, 551 N.E.2d 8, 13 (Mass. 1990) (court justifying no recovery for wrongful life plaintiff by permitting same damages under parents' wrongful birth claims, but "not totally discount[ing] the possibility that we might impose [wrongful life] liability" if the plaintiff must begin supporting himself). Some states have also treated conditions like cystic fibrosis and Down syndrome under broader principles of negligence, without finding it necessary to recognize wrongful life as a new prenatal tort. *See, e.g.*, Blouin v. Koster, C.A. No. PC-2015-3817, 2016 R.I. Super. LEXIS 81, at *15–16, *23 (Sup. Ct. July 19, 2016); Owens v. Foote, 773 S.W.2d 911, 913 (Tenn. 1989).

policy forged by wrongful conception claims—permitted in virtually every state,[61] and the policy of wrongful birth—permitted in half.[62]

That half the states have opted to recognize wrongful birth is significant in its own right, a majority view that might be joined by future states that have not yet decided on the validity of the claim. Additionally, it may be underappreciated that federal circuits have shown renewed interest in this arena of public policy in recent years. Since the Eighth Circuit approved of the wrongful conception tort in 1978,[63] many other circuits have moved in the same direction, with the Seventh,[64] Ninth,[65] and Tenth Circuits[66] all favoring wrongful birth in the 1980s and 1990s. The Fourth Circuit continued this trend in 2016.[67]

However, the First Circuit in 2018 and the Eleventh in 2019 challenged this uniform support. The first of these upheld a statutory ban on wrongful birth recovery after the birth of healthy children,[68] created by the Maine Legislature.[69] The second upheld a judicial ban, that of the Georgia Supreme Court, on wrongful birth recovery.[70] By leaving state law undisturbed (rather than, for example, construing it as conflicting with the federal reproductive rights), these 2018 and 2019 cases therefore create at least initial traces of federal division on the issue of wrongful

61 *But see, e.g.*, S.D. CODIFIED LAWS §§ 21-55-2, -3 (1981).

62 *See* Keel v. Banach, 624 So. 2d 1022, 1029 (Ala. 1993); Turpin v. Sortini, 643 P.2d 954, 962 (Cal. 1982) (in bank); *Lininger*, 764 P.2d at 1203; Rich v. Foye, 976 A.2d 819, 824 (Conn. Super. Ct. 2007); Garrison v. Med. Ctr. of Del., Inc., 581 A.2d 288, 292 (Del. 1989); Kush v. Lloyd, 616 So. 2d 415, 424 (Fla. 1992) (per curium); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 706 (Ill. 1987); Bader v. Johnson, 732 N.E.2d 1212, 1216 (Ind. 2000); Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 396 (Iowa 2017); Reed v. Camagnolo, 630 A.2d 1145, 1152 (Md. 1993); *Viccaro*, 551 N.E.2d at 10 n.4, 11; Greco v. United States, 893 P.2d 345, 348 (Nev. 1995); Smith v. Cote, 513 A.2d 341, 348 (N.H. 1986); Schroeder v. Perkel, 432 A.2d 834, 838 (N.J. 1981); Becker v. Schwartz, 386 N.E.2d 807, 813 (N.Y. 1978); Schirmer v. Mt. Auburn Obstetrics & Gynecology Assocs., Inc., 844 N.E.2d 1160, 1169 (Ohio 2006); Tomlinson v. Metro. Pediatrics, LLC, 412 P.3d 133, 147 (Or. 2018); *Blouin*, 2016 R.I. Super. LEXIS 81, at *14–16; Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975); Naccash v. Burger, 290 S.E.2d 825, 830 (Va. 1982); *Harbeson*, 656 P.2d at 488; James G. v. Caserta, 332 S.E.2d 872, 882 (W. Va. 1985); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 377 (Wis. 1975); Beardsley v. Wierdsma, 650 P.2d 288, 293 (Wyo. 1982).

63 *See* Bergstreser v. Mitchell, 577 F.2d 22, 26 (8th Cir. 1978).

64 *See* Robak v. United States, 658 F.2d 471, 473 (7th Cir. 1981).

65 *See* Harbeson v. Parke Davis, Inc., 746 F.2d 517, 525 (9th Cir. 1984).

66 *See* Duplan v. Harper, 188 F.3d 1195, 1203 (10th Cir. 1999).

67 *See* Simms v. United States, 839 F.3d 364, 366 (4th Cir. 2016).

68 *See* Doherty v. Merck & Co., 892 F.3d 493, 495 (1st Cir. 2018).

69 *See* ME. CODE ANN. Ins. § 2931 (West 1985).

70 *See* Zelt v. Xytex Corp., 766 Fed. App'x 735, 742 (11th Cir. 2019) (finding Georgia law controlling). There has been some confusion in this litigation over whether it can be categorized as involving wrongful birth. *See, e.g.*, Brief of Amici Curiae Law Professors of Tort Law, Family Law, and Health Law in Support of Plaintiff-Petitioners' Petition for Certiorari, Norman v. Xytex Corp., Case No. S19C1486 (Ga. July 2019). The Georgia Supreme Court has recently granted cert on the question of whether its precedent that limits wrongful birth recovery was properly applied. *See* Norman v. Xytex Corp., Case No. S19C1486 (Ga. Jan. 27, 2020).

birth. Given the U.S. Supreme Court's recent shift in composition, should the opportunity provide itself, this domain of public policy might soon merit its attention.

Finally, Christians, both Catholic and Protestant, could coalesce in tending to the needed goal of recalibrating the terrain of these actions by collaborative activism addressing wrongful birth, since many of the concerns that such litigation raises in the register of the sanctity and value of existence can be addressed without needing to wade into more traditional debates between the political right and left over abortion politics today. One could leave the bare rights to contraception and abortion untouched, for example, affirming them as women's or parental rights, while still objecting to the scope of allowable damages. Legislative action toward this end could provide a backstop against the way in which wrongful birth troublingly continues to expand the federal reproductive rights.

This would be less quixotic than many of today's efforts by Christian organizations to scale back the influence of federal abortion law. These efforts have often included specious science or misleading claims when attempting to regulate early abortions,[71] and federal abortion jurisprudence prevents the possibility of prohibiting later abortions as well, even when objections rely on more robust science. Indeed, all attempts to ban abortion after *Roe* have inevitably been found unconstitutional, except for a singular procedure that the Court permitted to be banned in 2007.[72] Without needing to ban abortions, revisiting wrongful birth damages could still fundamentally alter the public policy of reproductive rights vis-à-vis the value of unexpected children.

Unexpected but healthy children and children unexpectedly born with anomalies can create real costs for parents, and sometimes these outcomes can legitimately be imputed to the negligent or intentional acts of clinical actors, like failures to detect vertically transmittable diseases, or deliberately withholding information out of a fear that it will motivate a patient to abort. Costs attending congenital disease, however, could still be addressed in a recalibrated terrain, for example, by only permitting recovery under a child's claim of wrongful life, rather than the wrongful birth or wrongful conception claims of parents. By returning to the original policy of the prenatal tort of tending to the needs of injured children, Christian and other pro-life organizations need not challenge the federal reproductive rights directly yet can still make significant strides in recalibrating and redirecting reproductive policy in a better direction.

---

71 *See, e.g.*, Jessica Glenza, *Doctors' Organization: Calling Abortion Bans "Fetal Heartbeat Bills" Is Misleading*, GUARDIAN (June 5, 2019), https://www.theguardian.com/world/2019/jun/05/abortion-doctors-fetal-heartbeat-bills-language-misleading.

72 Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (upholding Nebraska's ban on partial birth abortions).