

How an Abortion Ban Would Impact Wrongful Birth Claims in the United States

MATTHEW RUSS*

Abstract: Recently, several USA states have enacted abortion laws that restrict women's reproductive freedom. These laws are generally being challenged and the United States Supreme Court is expected to hear cases about them in order to affirm whether they are constitutional or not. If the Supreme Court decided that these laws are constitutional and allowed states to establish strict regulations on abortion, then it would create issues concerning wrongful birth claims across the United States. In this context, also assuming hypothetical enactment of state-by-state or nationwide abortion bans, which would be the possible effects and the proposals to alleviate potential issues that these restrictions would arise?

Keywords: Abortion ban; wrongful birth claim; abortion right; conscience exemptions; medical liability.

Table of contents: 1. Introduction. – 2. Background. – 2.1. Wrongful Birth Claims. – 2.1.1. State's Views. – 2.1.2. Wrongful Birth Claims Around the World. – 2.2. Background on Abortion Rights in the United States. – 3. The Stigma Surrounding Wrongful Birth Claims. – 3.1. Arguments in Support of Wrongful Birth Claims. – 3.2. Arguments Opposing Wrongful Birth Claims. – 4. Conscientious Exemption in Healthcare. – 5. How Would an Abortion Ban Affect a Wrongful Birth Claim? – 5.1. State's Choice. – 5.1.1. Reform Medical Liability. – 5.1.2. Narrow the Scope of Conscience Exemptions. – 5.2. Nationwide Ban. – 6. Conclusion.

1. *Introduction*

Abortion is and always will be a topic that is a subject of extreme controversy. However, this article is not to argue why abortion should or should not be constitutionally protected. Nor is it to talk about the morals concerning bringing a wrongful birth claim. The aim is to present USA actual legal framework about wrongful birth claims and to discuss the hypothetical scenario of what would happen if there were abortion bans either in individual states or nationwide. In order to determine the possible outcomes, this article goes through the history of wrongful birth claims and the impact that *Roe v. Wade* had on this cause of action. Additionally, it will quickly consider abortion and wrongful birth laws around the world and look at how the two coexist with one another. Further, it will broadly underline arguments in support of wrongful birth as a cause of action and arguments opposing to it. Then, the analysis will look at various issues concerning wrongful birth claims in order to figure out the impact that a state-by-state or a nationwide abortion ban would have on wrongful birth claims. Following this assumption, some innovative solutions are proposed to continue granting a minimum of legal protection through wrongful birth claims.

2. *Background*

2.1. *Wrongful Birth Claims*

Wrongful birth claims are medical negligence claims where parents allege that a doctor deprived them of the opportunity to make an

informed decision on whether to terminate the pregnancy¹. This deprivation occurs when the doctor fails to inform the parents of a prenatal genetic test that might reveal the likelihood of their child having a genetic defect; to provide adequate genetic counseling; to interpret correctly the prenatal genetic test. The common consequence of these omissions or negligence is that the doctor does not properly inform the parents² on the real health status of the fetus, preventing them from taking an informed and free decision.

The most prominent method of prenatal genetic testing is amniocentesis and it is performed by extracting fluid from the amniotic sac within the first 14–20 weeks of pregnancy³. Then, the fetus's cells are tested to detect genetic diseases, chromosomes abnormalities, or neural tube defects⁴. If properly performed and read, this test should inform the doctor of a child's likelihood of being born with genetic pathologies. The failure, either to discover a defect or to inform the parents of the likelihood that their child could have a genetic defect, may result in the mother giving birth to a child born with pathologies that could severely affect the livelihood of the parents and the child. Following the birth, the parents could sue the doctor claiming that they did not have the possibility to take an informed and conscious decision due to the negligence of the health provider.

In wrongful birth cases, typically, the court awards the mother with medical expenses and emotional distress damages, however, most courts reject to expand damages to include the costs of raising a child⁵.

Historically, this claim goes back even before the Supreme Court's decision in *Roe v. Wade*. In fact, the first wrongful birth claim was in Minnesota in 1934. However, the state of Minnesota rejected parents'

* Matthew Russ is a Juris Doctor student at University of Mississippi School of Law and he had already cooperated with litigation firms as Maynard Cooper & Gale in Huntsville and Starnes Davis Florie LLP in Birmingham. He holds his Bachelor of Arts in Political Sciences from Mississippi State University.

1. See 62A Am. Jur. 2d, Prenatal Injuries § 73.

2. See *id.*

3. For a general description of the test, see American Pregnancy Association, *Amniocentesis*, available at <https://americanpregnancy.org/prenatal-testing/amniocentesis> (last visited April 26, 2020).

4. See *id.*

5. See Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 Harvard Civil Rights – Civil Liberties Law Review 141 (2005).

action in order to obtain damages after the birth of their child, reasoning that "the birth of a new child was a blessed event"⁶.

The first appellate court to rule on wrongful birth was the New Jersey Supreme Court in *Gleitman v. Cosgrove*⁷ in 1967. The New Jersey Supreme Court held that in order to prevail in wrongful birth claims, the plaintiff must establish that the healthcare provider *caused* the birth of a child with a preexisting condition⁸.

In 1974, Wisconsin was the first state to handle the first wrongful birth case post *Roe v. Wade*⁹, but the Wisconsin Supreme Court refused to recognize wrongful birth claims stating that this decision should be made by the residents of the state or their elected representatives¹⁰.

However, since *Roe v. Wade*, courts began to face more wrongful birth claims and a majority of states began to recognize wrongful birth causes. Texas became the first state to recognize a woman's right to collect damages for wrongful birth actions¹¹. For example, in *Jacobs v. Theimer*, Dortha Jacobs contracted rubella during her pregnancy and gave birth to a child whose major organs were defective¹². Jacobs brought a wrongful birth claim against her doctor¹³, who reassured her

6. Paola Frati, et al., *Preimplantation and Prenatal Diagnosis, Wrongful Birth and Wrongful Life: A Global View of Bioethical and Legal Controversies*, 23 *Human Reproduction Update* 338 (2017). See *Christensen v. Thornby*, 225 N.W. 620 (Minn. 1934).

7. See *Gleitman v. Cosgrove*, 227 A.2d 689 (New Jersey 1967) (the plaintiff has rubella and the doctor informed her that her child would not be affected. However, the doctor was wrong and the child was born with defects caused by the plaintiff's infection. The court held that the plaintiff did not establish the essential elements of her case, therefore, the plaintiff's wrongful birth claim failed).

8. See *id.* at 192.

9. See *Slawek v. Stroh*, 215 N.W.2d 9 (Wisconsin 1974).

10. See *id.* at 22. See also *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (New York 1977) (parents sued a physician for failure to inform them of their child's risk of having Tay-Sachs disease). See also *Park v. Chessin*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (New York 1977) (the Court allowed parents of a child born with polycystic kidney disease to bring a wrongful birth claim).

11. Recently, Texas became the 12th U.S. state to outlaw abortion. See Madlin Mekelburg, *Bill to Prohibit 'Wrongful Birth' Lawsuits Unanimously Passes Texas Senate Panel*, *The Dallas Morning News*, available at <https://www.dallasnews.com/news/politics/2017/02/27/bill-to-prohibit-wrongful-birth-lawsuits-unanimously-passes-texas-senate-panel> (last visited April 26, 2020).

12. See *Jacobs v. Theimer*, 519 S.W.2d 846, 847 (Texas 1975).

13. See *id.*

that rubella would not have affected the child¹⁴. Jacobs claimed she would have terminated the pregnancy had she been aware of the risk of her child being born with a severe defect to his organs¹⁵. The Texas court decided that wrongful birth claims were not matter of public policy or expression of abortion¹⁶. Rather, the question was to be resolved concerning the misinformation that did not allow her thinking what she would have done, if she had known about her child's defect¹⁷. As a result, the plaintiff received damages for the cost of care for a child with disabilities, however, she did not receive damages for emotional distress¹⁸.

2.1.1. State's Views

In 2017, only 12 states have enacted laws preventing woman from recovering damages using a wrongful birth claim¹⁹, while 28 states recognize these claims either by statute or common law and 10 states have not ruled on the issue one way or the other. Iowa was the most recent state to recognize wrongful birth claims in the case *Plowman v. Fort Madison Community Hospital*²⁰. The court agreed with the plain-

14. See *id.*

15. See *id.*

16. See *id.* at 848.

17. See *id.*

18. See *id.*

19. These States are Texas, Arizona, Idaho, Indiana, Michigan, Minnesota, Missouri, North Carolina, North Dakota, Pennsylvania, South Dakota, and Utah. However, some states have never ruled on the issue of wrongful birth. See, for example, Jimmie E. Gates, *Bill Would Stop Wrongful Birth Suits*, The Clarion Ledger, available at <https://www.clarionledger.com/story/news/politics/2017/01/09/mississippi-wrongful-birth-lawsuits/96353220> (last visited April 26, 2020).

20. See *Plowman v. Fort Madison Community Hospital*, 896 N.W.2d 393 (Iowa 2017) (in this case, the suit arose when a doctor negligently interpreted, diagnosed, and communicated fetal abnormalities that were shown by a prenatal ultrasound. As a result, a mother gave birth to a child with severe brain defects. The mother sued the defendants claiming that had she known of the defects she would have terminated the pregnancy. The court held that wrongful birth claims fall in line with a traditional medical malpractice claim; therefore, the mother can recover damages. The court uses a comparison to highlight the similarities: "Imagine the case of a woman carrying a healthy fetus injured during the delivery because of a failure to diagnose a birthing issue, such as an umbilical cord wrapped around the neck. In that circumstance, we would have no problem assessing damages. More importantly we would not even consider

tiff that wrongful birth claims fit in line with traditional medical negligence claims²¹. Further, the court was persuaded by the fact that a majority of jurisdictions recognizes this claim²². On the other hand, Texas and Mississippi recently tried to introduce legislation to outlaw wrongful birth claims²³. However, neither of the bills were enacted into law, although, it is clear that these claims are still contested. The wrongful birth bills were generally commented with criticism. For example, an important representative of the Texas League of Women Voters said that abolishing wrongful birth claims would create an unreasonable restriction of a woman's constitutional right²⁴. On the other hand, some people underlined that the rarity of these types of cases makes this legislation meaningless. For example, one prominent Dallas attorney stated: "The thing is, I [ha]ve worked on medical malpractice for 30 years and I have never brought one of these[.] I know all the other experienced medical malpractice lawyers in Dallas, and I don't know any of them who have brought these lawsuits"²⁵. Another attorney claimed that even if someone approached them about this case, he believes that lawyers would be deterred from taking a wrongful birth claims because of various obstacles²⁶. On the other hand, a Texas state representative explained that even though these claims are rare, this law was enacted to protect doctors²⁷ and the same affirmed some Mississippi's senators²⁸. Although these bills were not enacted,

the theory that the joy of parenthood should offset the damages. Would anyone in their right mind suggest that where a healthy fetus is injured during delivery the joy of parenthood should offset the damages? There is no more joy in an abnormal fetus come to full term than a normal fetus permanently injured at delivery. Both are heart-breaking conditions that demand far more psychological and financial resources than those blessed with normal children can imagine").

21. See *id.* at 398.

22. See *id.*

23. See Madlin Mekelburg, *Bill to Prohibit 'Wrongful Birth' Lawsuits Unanimously Passes Texas Senate Panel* (cited in note 14).

24. See *id.*

25. See *id.*

26. See *id.*

27. See *id.*

28. See, for example, Mississippi Senate Bill 2034, Mississippi Legislature, 2017 Regular Session, available at <http://billstatus.ls.state.ms.us/documents/2017/html/SB/2001-2099/SB2034IN.htm> (last visited April 26, 2020).

they suggest that there are more states trying to get out on the forefront of this issue.

2.1.2. *Wrongful Birth Claims Around the World*

Wrongful birth claims exist all across the globe. Which should come as no surprise since a majority of countries recognize abortion as a right²⁹. Of these countries, most have laws regarding wrongful birth claims comparable to those in the United States. For example, the Supreme Court in Canada recognized wrongful birth in 1997 when a woman sued a doctor who failed to inform her of the risk of contracting chicken pox during her pregnancy³⁰. After the birth of a malformed baby, she claimed that, if she had known of the risks, it would have led her to decide to terminate the pregnancy³¹. In the United Kingdom, the court ruled in favor of the plaintiff after the doctor did not inform the mother of test results that showed her baby would likely be born with Down Syndrome³². The Netherlands, Australia, Spain, Italy, Belgium, Germany, and France are other examples of western countries that recognize wrongful birth as a cause of action³³.

On the other hand, for example, Chile does not recognize wrongful birth as a cause of action, due to the fact that the right of abortion is not recognized³⁴. The current view of the Chilean judicial system in regards to wrongful birth is articulated by a Chilean Professor who states that Chile believes that a child with a severe medical condition

29. Only 26 countries prohibit abortion altogether. See, for example, Center for Reproductive Rights, *The World's Abortion Laws*, available at <https://reproductiverights.org/worldabortionlaws> (last visited 26 April, 2020).

30. See *Arndt v. Smith*, 2 S.C.R. 539 (Canada 1997). See also Frati, et al., *Preimplantation and prenatal diagnosis, wrongful birth and wrongful life: A Global View of Bioethical and Legal Controversies* (cited in note 6).

31. See *id.*

32. See *Rand v. East Dorset Health Authority*, 56 BMLR 39, Lloyd's Reports Medical 181 (Queen's Bench Division 2000). See also Frati, et al., *Preimplantation and prenatal diagnosis, wrongful birth and wrongful life: A Global View of Bioethical and Legal Controversies* (cited in note 6).

33. See *id.*

34. See *id.*

should never be viewed as economically harmful³⁵. He even compares the valuing of a human life to the alternative of non-existence, stating that rewarding damages based on this comparison is deplorable³⁶. In addition, the professor states that wrongful birth claims are not possible in Chile because abortion is illegal³⁷.

Recently Ireland began to recognize wrongful birth, however, it only began doing so after amending the constitution to remove a sentence from the Eighth Amendment that granted the unborn the "right to life"³⁸. The 66.4 percent of voters said yes to the referendum that lifted the ban³⁹. Shortly after the referendum passed, Ireland's first wrongful birth claim was brought⁴⁰. In this case, a mother claimed that she was deprived of her right to reach the United Kingdom to get an abortion, after she was misinformed about test results concerning her unborn child⁴¹. The defendants conceded and settled the case, awarding the mother €1.8 million⁴². In a letter, the defense conceded the argument due to the referendum that passed, further, they waived their public policy argument⁴³.

35. See Alexis Mondaca Miranda, *Compared Panorama of the Wrongful Life, Wrongful Birth and Wrongful Conception. Its Possible Application in Chilean Law*, *Ius et Praxis*, available at https://scielo.conicyt.cl/scielo.php?script=sci_arttext&pid=S0718-00122015000100002&lng=en&nrm=iso&tlng=es. (last visited April 26, 2020).

36. See *id.*

37. See *id.*

38. See *The Guardian View on the Abortion Referendum: Ireland's Choice will have a Global Impact*, *The Guardian*, available at <https://www.theguardian.com/commentisfree/2018/may/23/the-guardian-view-on-the-abortion-referendum-irelands-choice-will-have-a-global-impact> (last visited April 26, 2020). See the official results of the referendum, *Abortion Referendum*, *The Irish Time*, available at <https://www.irishtimes.com/news/politics/abortion-referendum> (last visited April 26, 2020).

39. See *id.*

40. See Mary Carolan, *Mother Gets €1.8m in First Ever 'Wrongful Birth' Case*, *The Irish Time*, available at <https://www.irishtimes.com/news/crime-and-law/courts/high-court/mother-gets-1-8m-in-first-ever-wrongful-birth-case-1.3537490> (last visited April 26, 2020).

41. See *id.*

42. See *id.*

43. See *id.*

2.2. Background on Abortion Rights in the United States

Prior to 1867, abortion was legal in the United States⁴⁴. During this period, the most common form of abortion was by taking drugs that would terminate the pregnancy⁴⁵, known as "abortifacients"⁴⁶. Women would take abortifacients before quickening⁴⁷ to terminate their pregnancy⁴⁸. In the 1840s, the abortion industry was booming⁴⁹: women were purchasing abortifacients from physicians, pharmacists, and even through the mail⁵⁰ and, if the abortifacients did not work, they could find a doctor who performed instrumental abortions via advertisements in the paper⁵¹. However, the abortion industry took a hit in 1857 when the American Medical Association⁵² started to protest to make abortion illegal at every stage of pregnancy⁵³. The movement continued to grow until 1867 when Illinois became the first state to completely ban abortion⁵⁴. This led to a state-by-state ban on abortion, that was accomplished nationwide, which lasted over 100 years⁵⁵.

Although illegal, abortion was still widely available during this time period⁵⁶ and was performed by physicians, midwives in the homes all across the country⁵⁷. This was prominent until 1940s, when stricter restrictions on abortion were initiated, despite the increasing request of abortion practices by women in the United States⁵⁸. Such restric-

44. See Leslie Regan, *The Introduction to When Abortion was a Crime: Women, Medicine, and the Law in the United States 1867–1973* (University of California Press 1st ed. 1996).

45. See *id.*

46. See *id.*

47. See *id.*

48. See *id.*

49. See *id.*

50. See *id.*

51. See *id.*

52. See Robert D. Rondinelli, et al., *Guides to the Evaluation of Permanent Impairment* (American Medical Association 6th ed. 2007).

53. See *id.*

54. See *id.*

55. See *id.*

56. See *id.*

57. See *id.*

58. See *id.*

tive measures remained in place until 1973, when the Supreme Court handed down its decision in the landmark case, *Roe v. Wade*.

The Supreme Court held that a woman has the constitutionally protected right to decide whether she wants to terminate her pregnancy or not⁵⁹. This means that women across the United States have the freedom to get an abortion, regardless of the state they live in; however, there is still controversy about how much power individual states have in regulating abortion. For example, the Supreme Court has ruled that a state can refuse to fund abortion so long as it does not place additional obstacles in the path of the woman's exercise of her right⁶⁰; but which this threshold should be is not easy to be clarified.

Further, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, abortion clinics and physicians challenged the constitutionality of two amendments that were made to Pennsylvania's abortion statute⁶¹. The amendments established various conditions that the woman's situation must meet in order to get an abortion⁶². In *Casey*, the court reaffirmed its decision in *Roe v. Wade*⁶³, but also established a new standard for determining whether the state's abortion statutes are unconstitutional⁶⁴. The Supreme Court shifted from the strict scrutiny standard in *Roe* to the undue burden standard⁶⁵. So, with this innovation, abortion statutes are only deemed unconstitutional if they impose an undue burden, not any burden, on the woman's right to terminate her pregnancy⁶⁶.

59. See *Roe v. Wade*, 410 U.S. 113 (1973).

60. See *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980) (there is an argument that refusal by the state to fund abortion is itself an additional obstacle placed in the woman's path to exercise her right to get an abortion).

61. See *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833 (1992).

62. *Id.* (for example, she would have to give her informed consent for the procedure and then must wait 24 hours before the procedure was performed. Also, she would be required to get consent from either her parents or, if she was married, she would have to get consent from her husband).

63. See *id.*

64. See Legal Background, *A History of Key Abortion Rulings of the United States Supreme Court*, available at <https://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court> (last visited April 26, 2020).

65. See *id.*

66. See *id.* See also, for example, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

Despite the Supreme Court reaffirming its decision that abortion is a constitutional right, several states are attempting to get the Supreme Court to reconsider the issue. Recently, some states enacted laws banning abortion, probably with the purpose of getting the Supreme Court to hear its case⁶⁷. For example, recent Alabama abortion law has been defined by some journals as the "most aggressive anti-abortion law in recent American history"⁶⁸. Generally, these laws have been deeply undermined or shot down by federal courts. In any case this new trend shows that the controversy surrounding abortion rights still rages on.

3. *The Stigma Surrounding Wrongful Birth Claims*

When first introduced, wrongful birth claims were met with backlash. For example, the court in *Gleitman* used strong language when deciding not to recognize these claims stating that they were not "talking about the breeding of prize cattle"⁶⁹. One scholar stated that "[j]udicial revulsion toward 'wrongful birth' claims harkens back to past generations that almost universally regarded as immoral 'the very notion that birth, even of a seriously deformed child, could provide a basis for claiming damages'"⁷⁰. Due to *Roe v. Wade* and the passage of time, wrongful birth claims became more accepted. Although, parents are still sometimes subject to widespread criticism if they bring these claims.

Several media outlets reported stories about mothers who sued their doctors under this claim. The headlines of these articles featured disparaging remarks that would shock the conscience of person; but probably, if the average person knew the full story, they might be more understanding.

67. See Tara Law, *Here are the Details of the Abortion Legislation in Alabama, Georgia, Louisiana and Elsewhere*, available at <https://time.com/5591166/state-abortion-laws-explained> (last visited April 26, 2020).

68. *Id.*

69. See *Gleitman*, 227 A.2d at 693.

70. Sofia Yakren, *Wrongful Birth Claims and the Paradox of Parenting a Child with a Disability*, 87 Fordham Law Review 583 (2018).

For example, in 2016 LifeNews.com reported a story about a mother, Kerrie Evans, that brought a wrongful birth claim against her doctor⁷¹. The headline of the story read "Mother Loses \$15 Million in Wrongful Birth Lawsuit, She Wishes Her Daughter Was Never Born?"⁷². The mother argued that she loved her child; however, this argument was attacked by the defense attorney. The attack was based solely on the fact that she was bringing the wrongful birth claim⁷³. The attorney's rebuttal to the mother saying she loved her child was that the mother should not be allowed to say she is glad her child was born and in the same breath argue that she would have terminated the pregnancy if she had known about her child's defects⁷⁴.

This high level of conflict between the parties and in public opinion is quite common in relation to wrongful birth claims.

3.1. *Arguments in Support of Wrongful Birth Claims*

Without considering here other relevant elements, the most important argument in support of wrongful birth claims seems to be that it is a way to provide financial support to parents who do not have the means to take care of a child with severe birth defects and who did not have the possibility to choose to terminate the pregnancy.

Quite often parents argue that they do not have enough finances to take care of a child with severe genetic defects and that they had been deprived of the necessary information in order to make a conscious and free decision whether to stop the pregnancy or not. As one scholar put it: "A healthy child is a so lovely creature that I can well understand the reaction of one who asks: how could his or her birth possibly give rise to an action for damages? But every baby has a belly to be filled and a body to be clothed. The law relating to damages is concerned with reparation in money terms and this is what is needed for the maintenance of a baby"⁷⁵.

71. See *id.* at 598.

72. *Id.*

73. *Id.*

74. See Yakren, *Wrongful Birth Claims and the Paradox of Parenting a Child with a Disability* (cited in note 70).

75. C.M. Thomas, *Claims for Wrongful Pregnancy and Child Rearing Expenses*, available at <https://www.massey.ac.nz/massey/fms/Colleges/College%20of%20>

3.2. Arguments Opposing Wrongful Birth Claims

One argument against the eligibility of wrongful birth claims could be that it violates rights of people considered in the Americans with Disabilities Act (ADA), signed into law by President Bush in 1990⁷⁶. The ADA protects individuals with mental or physical disabilities from being victims of discrimination, by providing them protection and equal opportunities⁷⁷. The ADA defines disability as a physical or mental impairment that impacts an individual's ability to perform at least one of life's major activities⁷⁸. A major life activity includes, but is not limited to, activities such as: being able to care for oneself, performing manual tasks, speak, hear, see, and even being able to walk⁷⁹. The ADA's main purpose is to prohibit discrimination in employment, public service, and accommodations⁸⁰.

In addition, title II of the ADA expanded the scope of the Act to include protections that Congress created for individuals with disabilities in the Rehabilitation Act of 1973, specifically, section 504⁸¹. Section 504 of the Rehabilitation Act was the United States first attempt to provide civil liberties to individuals with disabilities⁸². It prohibits programs that receive federal financial assistance from discriminating against individuals with disabilities⁸³. Section 504 uses the term

Business/School%20of%20Accountancy/Documents/Discussion%20Papers/213.pdf (last visited April 26, 2020).

76. See Randy Chapman, *The Americans with Disabilities Act: Civil Rights for Persons with Disabilities*, 19 Colorado Lawyer 2233 (1990).

77. See Americans with Disabilities Act (ADA), Pub L No 101-336, 104 Stat 327, as amended at 42 U.S.C. § 12101 et seq. (1990), available at <https://www.ada.gov/pubs/adastatute08.pdf> (last visited April 26, 2020).

78. See *id.*

79. See *id.*

80. See Disability Rights Education & Defense Fund, *A Comparison of the ADA, IDEA, and Section 504*, available at <https://dredf.org/legal-advocacy/laws/a-comparison-of-ada-idea-and-section-504> (last visited April 26, 2020).

81. See *id.*

82. Disability Rights Education & Defense Fund, *Section 504 of the Rehabilitation Act of 1973*, available at <https://dredf.org/legal-advocacy/laws/section-504-of-the-rehabilitation-act-of-1973> (last visited April 26, 2020).

83. See *id.*

"handicapped individual"⁸⁴ rather than "disability"; however, the two terms can be used interchangeably⁸⁵. As soon as a child with a genetic defect is born, they are immediately covered by the ADA⁸⁶. Furthermore, the Supreme Court stated "[] the central purpose of section 504, which is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals"⁸⁷. The ADA provides equal opportunity for individuals with disabilities, but – in any case – it does not prohibit abortion, neither if the baby presents genetical defects or disease. The question that arises, however, is:

84. U.S. Dept. of Education, *The Civil Rights of Students With Disabilities Under Section 504 of the Rehabilitation Act of 1973*, available at <https://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html> (last visited April 26, 2020) (handicapped individuals are defined as: "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment. The regulation further defines a physical or mental impairment as (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities").

85. See Darpana M. Sheth, *Better off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans with Disabilities Act*, 73 *Tennessee Law Review* 641, 655 (2006).

86. See *United States v. University Hospital, State University of New York at Stony Brook*, 729 F.2d 144, 155 (2d Cir. 1984) (the issue, in this case, is whether a baby is protected under Section 504 the Rehabilitation Act of 1973. The court held that since the baby presently had the severe defects, and will be severely impaired for the rest of her life, she is considered a "handicapped individual" and is protected under Section 504. Notwithstanding this ambiguity in the phrase "major life activities", we hold that Baby Jane Doe falls within the definition of a "handicapped individual". The record indicates that Baby Jane Doe's rectal, bladder, leg, and sensory functions are all presently impaired. Further, the record suggests that, with or without corrective surgery, Baby Jane Doe will experience severe mental retardation for however long she lives. Absent any explicit indication in the statute or regulations that "major life activities" should be defined only with reference to adults, under these circumstances it would defy common sense to rule that she is not presently *regarded* as handicapped). See also *Flight v. Goeckler*, 878 F. Supp. 424, 426 (N.D. N.Y. 1995).

87. *Traynor v. Turnage*, 485 U.S. 535 (1988). See also *Alexander v. Choate*, 469 U.S. 287 (1985) ("Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance").

"Does a wrongful birth claim discriminate against an individual who may be born with a genetic disability?". Whether anyone may agree with abortion or not, the idea of wrongful birth claims seems to violate the ADA, which, as stated above, aims to provide individuals with disabilities equal protection under the law⁸⁸. Of course, also a healthy baby can be aborted, but the effective existence of undetected or not-considered disabilities of the child seems to be the central condition allowing parents to sue the doctor with a wrongful birth claim and so leading to an unjustifiable disparate treatment on babies born with defects⁸⁹.

Disparate impact occurs when there is a policy that is neutral on its face but has a discriminatory impact. In regards to wrongful birth claims, it is argued that wrongful birth claims have a different impact on children born with severe disabilities⁹⁰. It has been said this tort claim damages the dignity of the disabled community⁹¹. Further, it has been argued that wrongful birth claims discriminate individuals with disabilities because it encourages parents to abort their disabled-child⁹², pushing them to consider the child himself a damage. Essentially, the argument is that wrongful birth claims belittle the individuals with handicaps, which is in direct opposition to the purpose that the ADA was established to provide.

88. See Disability Rights Education & Defense Fund, *Section 504 of the Rehabilitation Act of 1973* (cited in note 82).

89. See Darpana M. Sheth, *Better off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans with Disabilities Act* (cited in note 89) at 660–661 (a state Senator from Pennsylvania highlighted the issues that wrongful birth claims have on their goal to eliminate discrimination of individuals with disabilities. He stated that the intent of legislation barring wrongful birth and wrongful life claims is to stop a court-engendered policy which views the birth of a child, be that child handicapped or otherwise, as a damaging event for which someone should be punished in order to prevent this quality of life ethic from becoming so pervasive that a handicapped child is routinely considered better off dead and of less value than what we would call "a normal child" and to prevent the practice of medicine from becoming coerced into accepting eugenic abortion as a condition for avoiding such lawsuits).

90. See *id.* at 659.

91. See *id.*

92. See *id.* at 658.

4. *Conscientious Exemption in Healthcare*

Another debated and relevant issue, related to wrongful birth claims, is conscientious exemption in healthcare. Once a healthcare provider accepts a person as a patient, they enter into a fiduciary relationship⁹³. This relationship means that the healthcare provider is obligated to maintain that an "undivided loyalty to a patient should guide a physician's decisions, and [] any influence on a physician's decisions - other than the patient's welfare - must be disclosed to the patient"⁹⁴. This loyalty includes providing the patients with as much information as possible to allow them to take an informed decision⁹⁵. However, this relationship could operate in tension with the conscience exemptions that are recognized in healthcare law.

Conscience exemption rules arose following the Supreme Court's decision in *Roe v. Wade*. Congress passed the Health Programs Extension Act of 1973, known as the Church Amendment⁹⁶, which allowed individuals and entities to refuse to provide facilities or perform abortions or sterilization procedures, if those procedures were in

93. See Sarah M. Stephens, *Freedom from Religion: A Vulnerability Theory Approach to Restricting Conscience Exemptions in Reproductive Healthcare*, 29 *Yale J.L. Feminism* 93, 97 (2017).

94. *Id.*

95. See *id.*

96. See Church Amendment, 42 U.S.C. § 300a-7 (1973): "Sterilization or abortion. (a) [] (b) Prohibition of public officials and public authorities from imposition of certain requirements contrary to religious beliefs or moral convictions The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act [], the Community Mental Health Centers Act [] or the Developmental Disabilities Services and Facilities Construction Act [] by any individual or entity does not authorize any court or any public official or other public authority to require (1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or (2) such entity to (A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or (B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel []".

opposition to their religious beliefs⁹⁷. This Act proved to be the first domino to fall creating a ripple effect for states to pass their own conscience exemption laws. Now almost all 50 states have their own conscience exemption laws that protect healthcare providers, healthcare facilities, and healthcare institutions that refuse to perform certain reproductive medical procedures⁹⁸. In addition, recently, conscience exemption rights have been expanded⁹⁹. Some healthcare providers are not even required to give their patients full information about their situation if they have a conscience exemption, and they are not required to refer them to another doctor¹⁰⁰. Further, pharmacists have the "right to refusal", meaning that they can refuse to fill abortifacient prescriptions for patients, including birth control, if filling the prescription would conflict with their religious beliefs¹⁰¹.

For example, South Dakota is one of the most restrictive states in regard to "reproductive freedom"¹⁰². In fact, it is stated by law a conscience clause that provides individuals and healthcare institutions with a wide exemption from informing about prenatal diagnoses and practice abortion intervention¹⁰³. Even social workers and counselors are protected under this conscience clause. Further, South Dakota does not recognize wrongful birth as a cause of action.

97. See *id.*

98. See *id.* (conscience exemptions apply to more than just reproductive medical procedures. Alaska, Minnesota, and New Jersey have conscience laws that have been enjoined as unconstitutional when they apply to public, quasi-public, non-sectarian or non-profit institutions. Some states have written very narrow conscience legislation, only exempting individual doctors and religiously-affiliated medical entities if they object in writing. More restrictive states, however, have promulgated broad refusal legislation, which allows almost any individual or entity to exclude abortion from its services, health care plans, or counseling programs on the basis of moral beliefs). See also Julia Lichtman, *Restrictive State Abortion Laws: Today's Most Powerful Conscience Clause*, 10 *Georgetown Journal on Poverty Law & Policy* 345, 350 (2003).

99. See *id.* at 101.

100. See *id.*

101. See Claire Marshall, *The Spread of Conscience Clause Legislation*, available at https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2013_vol_39/january_2013_no_2_religious_freedom/the_spread_of_conscience_clause_legislation (last visited April 26, 2020).

102. Lichtman, *Restrictive State Abortion Laws* (cited in note 98).

103. See *id.*

In contrast, Connecticut allows individuals to refuse to participate in any phase of the abortion process, but does not allow healthcare institutions the right to refuse to inform patient about, to practice prenatal screening and abortion interventions¹⁰⁴. However, even though Connecticut is more liberal regarding reproductive freedom, the law does not require each doctor to informed the patient about all available abortion practices, nor to refer the patient to another doctor¹⁰⁵. Even though this is the case, the fact that institutions as a whole cannot refuse to participate in the abortion process can mitigate some of the problems that could arise by an individual healthcare provider refusing to properly assist a patient about abortion interventions.

In 2017, Alabama introduced legislation to adopt a conscience clause. The goal of the bill was to protect healthcare providers from being obligated to perform procedures that they had a moral or religious objection to¹⁰⁶. The bill would protect all individuals, but not institutions¹⁰⁷, who decline to perform any of the following health services: sterilization procedures, abortion, human cloning and embryonic stem-cell research¹⁰⁸. An important issue in Alabama's bill is the necessity for medical staff to object in writing and in advance in order to be exempted from performing the procedures¹⁰⁹. Although this is not maybe the perfect solution, but it does inform patients that the healthcare provider is not going to perform the procedure and gives them the opportunity to find another doctor that will help them. However, what if the patient does not have the financial capabilities to find a new healthcare provider? This could put the patient in an unfair situation that can be fixed with careful planning by state legislatures via reform of medical liability laws.

104. See Legislative Tracker, *Connecticut Refusal Clause*, available at <https://rewire.news/legislative-tracker/law/connecticut-abortion-refusal-clause> (last visited April 26, 2020).

105. See *id.*

106. See Alabama Policy Institute, *Guide to the Issues*, available at <https://www.alabamapolicy.org/wp-content/uploads/2017/03/Guide-to-the-Issues-The-Right-of-Conscience-of-Health-Care-Providers.pdf> (last visited April 26, 2020).

107. This is different from most conscience clauses. Most states protect institutions.

108. See Alabama Policy Institute, *Guide to the Issues* (cited in note 106).

109. See *id.*

An issue with Conscience Clauses in healthcare is deception by healthcare providers in order to impose their beliefs on a patient. Although courts have deemed the methods unethical and illegal¹¹⁰, several state legislatures passed legislation that is titled "Woman's Right to Know Act (WRKA)"¹¹¹. North Carolina's WRKA requires that healthcare providers inform all women that seek to get an abortion of every detail about it, including physical, psychological, and additional medical risks that are associated with abortions¹¹². Further, the healthcare provider must give the potential mother information about free ultrasounds, and various agencies that can assist the mother during childbirth and with the costs of raising the child¹¹³. The WRKA also asks that the woman waits 24 hours after receiving this information before making her decision whether or not to have an abortion¹¹⁴. On its face, the WRKA could be seen as a potential burden on healthcare providers to ensure that women have all the information available to them in order to make an informed decision, but, on the other hand, the information provided to the mother seem trying to convince her to not terminate the pregnancy.

5. *How Would an Abortion Ban Affect a Wrongful Birth Claim?*

As before said, recently several states have enacted laws restricting abortion as an attempt to get the Supreme Court to reconsider the

110. See *Wood v. University of Utah Medical Center*, 67 P.3d 436 (2002).

111. Minnesota Department of Health, *Woman's Right to Know Act*, available at <https://www.health.state.mn.us/people/wrtk> (last visited April 26, 2020) (this is an example of Minnesota's Right to Know Act. Several states have enacted similar legislation).

112. See North Carolina Department of Health and Human Services, *Woman's Right to Know Act*, available at <https://wrtk.ncdhhs.gov> (last visited April 26, 2020).

113. See *id.*

114. See Ryan Bakelaar, *The North Carolina Woman's Right to Know Act: An Unconstitutional Infringement on a Physician's First Amendment Right to Free Speech*, 20 Michigan Journal of Gender & Law 187 (2013) (in addition to the WRKA affecting the woman's rights, there is also a scholarship about the effect it has on the healthcare providers rights. The argument is that by requiring the healthcare provider to tell their patients about specific tests, it infringes upon their right to free speech).

issue¹¹⁵. Governor of Alabama, Kay Ivey, affirmed that in the present legal framework these laws are likely unenforceable¹¹⁶. Considering this, Ivey admits that the reason for enacting this law is to get the Supreme Court to reconsider abortion laws in the United States¹¹⁷. Ivey stated that "[t]he sponsors of this bill believe that it is time, once again, for the U.S. Supreme Court to revisit this important matter, and they believe this act may bring about the best opportunity for this to occur"¹¹⁸.

One of the ripple effects of restricting or banning abortion in the United States is the impact it would have on wrongful birth claims. Let's imagine two scenarios, one where the Supreme Court allows each state to choose its abortion law, and the other where the Supreme Court rules that abortion is unconstitutional and bans abortion nationwide.

5.1. *State's Choice*

If the Supreme Court allowed states to make their own abortion laws, there could be several states passing laws against abortion altogether. This would create an issue with wrongful birth claims. In order to explain this issue let's suppose that Alabama passes a legislation that makes abortion illegal in the state and that wrongful birth claims are not recognized. In addition, let's suppose that Tennessee does not enact a ban on abortion and recognizes wrongful birth claims. Given this hypothetical situation, a mother in Huntsville, Alabama, gives birth to a child with Down Syndrome and wants to sue the doctor alleging that, if she had known of the likelihood of the child being born with Down Syndrome, she would have terminated the pregnancy. Considering the existing legal context in this example, the mother would not have been able to terminate the pregnancy in Alabama, therefore, the doctor would argue that there is no damage, because she could not have legally terminated the pregnancy. On the other hand,

115. See Tara Law, *Here are the Details of the Abortion Legislation in Alabama, Georgia, Louisiana, and Elsewhere* (cited in note 71) (this includes the States of Alabama, Missouri, Louisiana, Georgia, and Mississippi).

116. See *id.*

117. See *id.*

118. *Id.*

the mother would rebut and argue that she could have crossed state lines into Tennessee and obtained a legal abortion; therefore, she was damaged due to the doctor's failure to give her adequate information. It is likely the mother would lose this lawsuit and that she would not have any kind of economical restoration.

In addition to that, another scenario could arise where, given a context such as the one depicted above, the mother travels to Tennessee to see a healthcare provider. Considering the cause of action will accrue in Tennessee, and the defendant is domiciled in Tennessee, the mother will be able to bring a wrongful birth claim in Tennessee.

The outcome in those two scenarios are rather simple procedurally; however, it could establish a situation where healthcare providers simply choose not to inform mothers of prenatal testing available to them, or where healthcare providers are not meticulous in their interpretation of the results of prenatal tests because there is no legal action against their negligence. Further, in situations where healthcare providers have a conscientious objection to abortion, they may intentionally withhold information from a patient that they know may go across state lines to receive an abortion.

Looking at a more complicated scenario, imagine an instance where the lawsuit involves more than just two parties. For example, assume that the woman is poor and lives in rural Tennessee. The healthcare provider performs a prenatal test on the mother and sends the lab results to a facility in Alabama that gets her test mixed up with another woman's test and sends it back to the healthcare provider. Let's suppose the results show that the baby is perfectly healthy. The mother then gives birth to a baby which has severe birth defects. She finds out that her test results got mixed up and wants to sue for wrongful birth. This creates a complicated scenario because the healthcare provider was not negligent, the lab in Alabama was negligent; however, if she were to sue the lab in Alabama, she could not recover wrongful birth damages. She would need to sue the lab in Tennessee but that may not be feasible. Therefore, the woman may not be able to recover any damages¹¹⁹.

119. See Demetrios C. Batsides and Melissa S. Geller, *The Cross-Border Dilemma: Wrongful-Birth and -Life Litigation in NJ*, 115 *New Jersey Law Journal* (1996) (there is a real-world issue that poses a conflict of laws problem highlighted by the differences

In addition to these hypotheticals, there are numerous other complicated cases that could arise if there was a state-by-state wrongful birth ban. Looking at just the hypotheticals above, it is clear to see the issues that could arise regarding wrongful birth claims. However, giving a similar scenario, there would be fair solutions to this issue that benefit the child's mother while also continuing to protect healthcare providers and prevent a rise in the cost of healthcare by ensuring that there is not an increase in healthcare providers fear of litigation.

5.1.1. *Reform Medical Liability*

Assuming this scenario, one solution to protect women from not being able to recover damages, if their healthcare provider is negligent, is reforming medical liability. This reform would require all healthcare providers to openly communicate all the objective and available information about possible prenatal screenings and abortion practices, giving less protection to conscientious exemption.

Every medical liability reform is focused on a balance between protecting healthcare institutions from uncountable litigations and allowing people to obtain satisfaction in case of negligence of the

in state laws between New York, New Jersey, and Pennsylvania. New Jersey has a very liberal approach and rewards the most money out of the three states. New York is more restrictive than New Jersey, but not as restrictive as Pennsylvania. Considering this, residents tend to go to New Jersey for their healthcare needs. Consequently, a case arose where the court had to undergo a complicated conflicts of laws analysis: "[P]laintiffs in these cross-border cases will seek to file in New Jersey whenever possible. However, counsel on both sides should be aware that New Jersey courts generally have been reluctant to apply New Jersey law to out-of-state defendants in wrongful-birth cases, given the claims' sensitive and controversial nature []. [T]his presented a dilemma for the [New Jersey] Superior Court, which had to apply conflicts-of-law principles to determine whether New York or New Jersey law should apply in a case involving New Jersey residents who, at the time of injury, were New York residents; a New York hospital; several New Jersey health-care providers; and a medical testing company headquartered in New Jersey, but which performed all relevant actions in New York. The Superior Court ruled that New Jersey law should apply to all defendants. Last year the Appellate Division reversed, for the first time approving the practice of applying the law of different states in the same case, and held that New York law should apply against defendants whose only contact with the plaintiffs occurred in New York, and the law of New Jersey against the medical professionals practicing in New Jersey").

providers. It is true that with the increased risk of litigation for healthcare providers comes an increase in healthcare costs. A balanced increase in the risk or fear of litigation would push healthcare providers to do their best to avoid being sued by their patients. Also keeping healthcare costs low, one way to slightly increase this sensitive balance in favor of patients, is to require higher standards of communication for physicians. So, subsequently capping the damages that a patient could receive in a lawsuit where the physician's negligence was minor or patient's damage was insignificant or even nonexistent, would mean that a physician can be held strictly liable for failing to properly communicate with their patient.

It would be important that healthcare providers are held to a higher standard than the current one, because very often wrongful birth claims arise from a lack of communication. Holding healthcare provider's strictly liable for failing to communicate with their patients is beneficial for patients and will probably cause little harm to healthcare providers that simply do already their job at best. Potentially, holding healthcare providers to a higher standard of communication, could be beneficial to them as well because they know from the first meeting with the patient that they are required to be completely open and transparent about the tests and procedures available to them.

For example, a healthcare provider that is visiting a pregnant woman should be required to inform the woman of all the prenatal tests that are available to her already at their first meeting. If the doctor fails to do so at the initial examination, the woman may recover nominal damages from the doctor, even without the presence of any subsequent damage that resulted from her negligence. This medical liability reform would create a new tort with a form of strict liability. The patient would only need to prove that the tort occurred and that the healthcare provider was responsible. This would create a duty on the healthcare provider to be thorough in their communication with the mother, in order to avoid also creating risks of litigation. In a "strict abortion ban scenario", the strict liability could be an answer to ensure women a minimum legal and economical protection in case of unlucky pregnancies, also in a context where they do not have possibility to legally choose abortion. In fact, the mother would sue the doctor not for preventing her take an informed decision whether or not to terminate the pregnancy, assuming that a similar decision would

be not legally available; but for having simply not making her aware of the possible complications or risks of the pregnancy, regardless whether a decision could had been taken or not.

On the surface, it seems that choosing strict liability would increase the fear of litigation, therefore, increasing medical costs. However, by taking a closer look at the potential effects of this type of reform, it would likely to bring beneficial to both parties, healthcare institutions and patients. For instance, all that would be required of healthcare providers would be to meet statutory guidelines of communication. Next, if a healthcare provider fails to follow the guidelines, even though they would still be liable absent any concrete damage occurring to the patient, the patient would be able to recover nominal damages. Considering this, the lawsuit would serve as a "wake-up call" to the healthcare provider that they need to follow the statutory guidelines. Further, a similar reform would protect healthcare providers from committing negligent acts that could be costly to them, also if any damage occurred to the patient. By establishing clear statutory requirements of communication, healthcare providers would not be sued if they simply meet those requirements. Because of the guidelines, healthcare providers would be more likely to meet the communication requirements, therefore they would be less likely to be sued because of negligently failing to properly communicate with their patient.

At the beginning, the effect of reforming medical liability and establishing strict liability against healthcare providers could create ambiguities on standards of communication. Although the standards would be higher than it currently is, forcing healthcare providers to be proficient in their communication and get in a routine of meeting these higher standards. Meeting these standards could be accomplished via recorded verbal communication and by a standardized written document that the doctor explains to the patient. The healthcare provider will be required to get the patient to sign this document that indicates she is aware of all the testing methods available to her, as well as, of her rights to either get an abortion or the doctor's conscientious objection.

Except for the first period, reforming medical liability to create a strict liability tort for a health provider's failure to properly communicate with the patient would maybe paradoxically decrease the amount of litigation for healthcare providers, rather than raise the amount

because of a higher standard. This is because of the clear and unambiguous communication requirement that would be established. Rather than healthcare providers exercising their own discretion about what information they should share with a patient, they would have precise and binding statutory guidelines that lay out a roadmap explaining what information they are required to supply with the patient. The healthcare providers could avoid litigation simply by meeting the guidelines required by law. Therefore, medical liability reform could both create a higher standard for healthcare providers and, at the end, decrease the risk of litigation in the case of meticulous application of the rules.

5.1.2. Narrow the Scope of Conscience Exemptions

Always in a "strict abortion ban scenario", another viable solution would be to focus on the doctors' and health providers' duty to inform clearly and in advance of their own attitude to prenatal screening and abortion. It could be required the doctor to apply for "conscience exemption status". This would mean that if the doctor has a moral or religious belief that abortion should not be practiced, they should be required to apply for a special status that gives them the right not to disclose information that may contribute to the patient's decision to get an abortion. As well, the healthcare providers should be required to disclaim this status on their website and inform the patient at the first meeting. This is beneficial in two ways. First, it prevents the doctor from committing negligence, and then out of convenience, raising a conscientious exemption defense in order to escape liability. Second, it allows the patient to understand from the outset that the doctor has a conscious objection to abortion. This would ensure that the patient has the opportunity to either continue seeing the doctor or find a new doctor. Further, the process to get conscience exemption status is similar to the process to obtain conscientious objector status in the army. The army allows individuals who oppose war based on moral or religious beliefs to opt-out if they are called to arms¹²⁰. To

120. See Selective Service System, *Conscientious Objection and Alternative Service*, available at <https://www.sss.gov/consobj> (last visited April 26, 2020) (the most famous example of an individual who had a conscientious objection to war is

achieve this status, the individual must appear before a local board and explain his beliefs to the board¹²¹. Healthcare providers could achieve this status following a similar process.

In this proposed solution, each state will have its own board that governs conscientious exemption status within its state. If healthcare providers want to achieve this status, they must appear in front of the state board and give their case. They will explain their beliefs, religious or moral, and the board will decide whether to give them the status or not. The individual may use their own oral testimony, written statements from family and friends, evidence of membership in a church or religious group, along with statements from pastors or priests that they are associated with. The boards granting of this status should be liberal in the sense that the individuals would not be held to high standard when proving involvement in a religious group or showing evidence of their beliefs against abortion or other medical procedures.

Next, the conscientious exemption status would have various levels of exemption. For example, some individuals may be exempt from all aspects of the abortion process. This means that they do not have to provide any information regarding abortion, nor they have to refer patients to other doctors. However, others could only ask and receive exemption from the performance of the abortion or similar medical procedures. So, they could be required to provide the patient with information about abortion including, risks, long-term effects, and referral to a healthcare provider that may help them. This would include referral to an out-of-state doctor.

Although this proposal may be controversial, but it simply gives the patient all the information. Doctors, similar to attorneys, are required to put their patient's interests above their own. This is already stated by the various medical organizations that recognize a healthcare providers duty to their patient. For example, "the Code of Ethics of the International Federation of Gynecology and Obstetrics" requires that a physician's right to preserve his or her own moral or religious values cannot result in the imposition of those values on the patient, nor can the physician's right absolve the physician from the duty to "tak[e]

Muhammad Ali. Ali was drafted to serve in the Vietnam War and refused to serve because he opposed the war).

121. See *id.*

immediate steps in an emergency to ensure that the necessary treatment is given without delay¹²². Additionally, the same statement is shared by the American Medical Association¹²³.

Therefore, if there were an abortion ban in individual states, legislatures should act to narrow the scope of conscientious exemptions to prevent patients from being left in the dark. Given that, it is obvious that at least some states should allow abortion, otherwise it could be not possible to access legal termination of pregnancy, even if perfectly informed.

5.2. Nationwide Ban

Wrongful birth was not considered a tort until after *Roe v. Wade*. Therefore, a nationwide ban may render wrongful birth claims, as we know them, obsolete. Since the parents would no longer have the option to terminate the pregnancy, they would not be able to prove they suffered any damages because of the doctor's failure to properly inform them. In fact, also if the doctor had properly informed them, they could have not taken any kind of decision to terminate the pregnancy. Further, looking at Ireland as the most recent example, it appears that wrongful birth exists because abortion is legal. Proof of this is offered by the fact that as soon as abortion was made legal in Ireland, the first wrongful birth claim was successfully brought against a healthcare provider¹²⁴.

On the other hand, it is possible to suppose how wrongful birth claims could exist without abortion. Wrongful birth claims could survive if they were approached from the already discussed "strict liability perspective". Rather than looking at damages from the loss of chance, they could be considered stemming from the diagnostic error or the misinformation that the doctor committed. The compensation that the mother would receive would accrue from the malpractice of the doctor misdiagnosing the child; rather than the compensation coming

122. Sarah M. Stephens, *Freedom from Religion: A Vulnerability Theory Approach to Restricting Conscience Exemptions in Reproductive Healthcare*, 29 *Yale Journal of Law and Feminism* 93, 97 (2017).

123. See *id.*

124. See Carolan, *Mother Gets €1.8m in First Ever 'Wrongful Birth' Case* (cited in note 42).

from the mother claiming she would have considered to terminate the pregnancy if she had known that the child would be born with a severe genetic disease. This is a possible outcome that could occur if there is a nationwide ban on abortion.

However, wrongful birth might still be a viable cause of action, just with different elements. For example, in some cases, wrongful birth was brought against a healthcare provider who failed to perform adequate sterilization procedures. With that in mind, it stands to reason that wrongful birth could survive. Parents who consult a doctor about sterilization procedures may still be able to bring a wrongful birth claim against a doctor that fails to adequately inform the parents of all their options; negligently performs the sterilization procedure which results in an unwanted pregnancy; or fails to inform the parents of the risks following a sterilization procedure that results in an unwanted pregnancy. For example, the Pennsylvania Supreme Court dealt with a case where a mother became pregnant and gave birth to a child with genetic defects after her husband underwent a vasectomy procedure¹²⁵. The doctor told the couple that no supplemental birth control was necessary to prevent the woman from becoming pregnant¹²⁶. As a result, the parents brought a cause of action seeking damages for the doctor's negligence in informing them properly about and in performance of the vasectomy procedure¹²⁷. Whilst the court refused to recognize this cause of action as wrongful birth, it still recognized the plaintiff's right to recover damages because of the negligence of the healthcare provider¹²⁸.

There is also evidence, before the *Gleitman*¹²⁹ case, that wrongful birth claims were intended to be actions brought by couples when an unintended pregnancy occurred¹³⁰. These claims were directed towards contraceptive manufacturers and doctors who administered

125. See *Speck v. Finegold*, 497 Pennsylvania 77, 82 (Pa. 1981) (in addition to that vasectomy procedure, the doctor failed to terminate the mother's pregnancy after he agreed he would).

126. See *id.*

127. See *id.*

128. See *id.* at 100.

129. See *Gleitman* at 689 (cited in note 7).

130. See Frati, et al., *Preimplantation and Prenatal Diagnosis, Wrongful Birth and Wrongful Life* (cited in note 6).

ineffective drugs or failed to perform proper sterilization procedures¹³¹. There is a 1967 case that further highlights an example of this type of wrongful birth claim. This case started in 1963, when a woman, Custodio, became pregnant after a doctor performed an operation to remove a portion of the woman's fallopian tubes in order to prevent her from becoming pregnant¹³². However, approximately one year after the operation, Custodio discovered that she was an expectant mother¹³³. Custodio brought a suit against the doctor's alleging negligent treatment in the performance of the operation¹³⁴. The cause of action focuses more on the negligent performance of the sterilization procedure, rather than the healthcare providers' duty to inform their patients of potential genetic defects¹³⁵. The court held in favor of the plaintiff, awarding her the damages for medical expenses and supporting the child¹³⁶. So, in case of a nationwide abortion ban there would be the possibility that wrongful birth claims would survive but the plaintiff would have to prove different elements.

On the other hand, if there is nationwide abortion restriction, but not a definitive abortion altogether, wrongful birth claims would be likely not be necessary affected in any case. Suppose that a so called partial-birth abortion ban, that means abortions after the 20th week of pregnancy¹³⁷, were enacted nationwide. In this case, considering that the prenatal testing that often gives rise to a wrongful birth claim are generally conduct before the 20th week of pregnancy, the woman would have ample time between the cause of action accrues and when abortion would be not allowed. So, if the healthcare provider acted with negligence not allowing the woman to take her informed

131. See *id.*

132. See *Custodio v. Bauer*, 251 Cal.App.2d 303 (1967).

133. See *id.*

134. See *id.*

135. See *id.* (in addition to a medical malpractice claim, the plaintiff alleges misrepresentation and breach of contract).

136. See *Custodio*, 251 Cal.App.2d at 303.

137. See Julie Rovner, *Partial-Birth Abortion: Separating Fact from Spin*, National Public Radio, available at <https://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin> (last visited April 26, 2020) (partial-birth abortion is an abortion that occurs farther along in the pregnancy. It is an extremely controversial procedure that involves dilating the woman's cervix and pulling the fetus out of the womb through the birth canal).

decision before the 20th week, when she would have been still able to legally terminate her pregnancy, it should be considered as responsible for wrongful birth claim. In fact, she could have benefit of her abortion right if she were immediately correctly informed about the result of the test.

In light of the foregoing, wrongful birth claims, potentially, would survive if the Supreme Court decided to restrict abortion nationwide. Despite this, it is likely that, even without a decision from the Court, wrongful birth claims will not survive. In fact, because states tend to be willing to protect physicians from medical malpractice claims, rather than subject doctors to more of them, states would probably enact legislation outlawing wrongful birth claims altogether.

6. *Conclusion*

Wrongful birth claims are nowadays still a central matter of discussion in the USA and some new trends, that could renew the actual legal framework, are assuming even more importance. On this way, it was thought to assume some possible scenarios of abortion restrictions in a state-by-state and in a national wide perspective.

In the former case, some possible solution to grant at least a minimum persisting right of being compensated in case of wrongful birth cases could be: oblige healthcare provider to inform women about abortion practices, offered in other states if not available in their country, too; impose a "strict liability" on informational duties of healthcare institutions in order to arose their diligence standards; discipline a more transparent "conscience exemption status" that would impose more clear disclosure about their position on abortion. In this scenario, wrongful birth claims could be limited, but they would probably survive, despite new jurisdictional and procedural issues.

Finally, wrongful birth claims are unlikely to exist if abortion is illegal nationwide. So, assuming that a definitive abortion ban was adopted in the USA, it would be probably the end of the wrongful birth claims, as we know them nowadays. On the other hand, they could assume new forms. For example, they could be restricted to cases where healthcare providers failed informing about or performing sterilization or other contraceptive practices. Although, there are some

evidences that could ensure that these relatively recent claims would continue to exist upon an occurrence as a partial abortion restriction. In fact, an incomplete information set or negligent behaviors could still be relevant, in the case these would in any way prevent the mother to take the free and legal decision to abort.