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The History of Wrongful Birth and the Future of Reproductive Technologies

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The History of Wrongful Birth and the Future of Reproductive Technologies

Luke Isaac Haqq *

ABSTRACT

After Dobbs v. Jackson (2022), what will be the fate of the tort claim for “wrongful birth”? First appearing in the 1960s, this action protects a right to make informed decisions about abortion, unimpeded by medical personnel. Wrongful birth liability and responses to it helped define what constitutes medical malpractice, reflecting one way in which the law shaped standards of reproductive care. The history of the first legislative bans of the action also exemplifies an instance in which the common law has been supplanted by legislative enactments, revealing how reproductive politics in particular shaped medical liability and civil litigation. How it came to be banned in Minnesota offers a valuable case study for thinking about the future of medical malpractice involving reproductive technologies. The state is one in which an abortion right continues after Dobbs, but its law on the wrongful birth claim reflects a contrary sentiment that conceptualizes abortion as contrary to public policy. Drawing on archival research to capture the political mobilization and competing interests behind it, this Article centers the legislative history of Minnesota’s wrongful birth ban, illuminating debates over the law and policy of reproductive technologies that continue into the present.

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INTRODUCTION

This Article unpacks the legislative history behind Minnesota’s law banning the “wrongful birth” action. A tort claim that first emerged in the late 1960s, plaintiffs in these cases allege that they were harmed by the existence of a child whom they otherwise would have aborted. Though none of these actions were successful prior to *Roe v. Wade* (1973), they gained traction and affirmance by courts after that case and are now permitted in half of states. While some began to argue after *Roe* that the case created a constitutional right to the wrongful birth claim,¹ others denied this conclusion.² This Article reflects how this litigation moved into legislatures and political advocacy. South Dakota and Minnesota were the first two states that were successful in passing legislation to ban this type of litigation between 1980 and 1982.³ How this history unfolded is of contemporary importance, as states reforge the terrain of reproductive policy.

1. See *infra* notes 204, 213.

2. See *infra* Part II.2; Part III.2.

3. S.D. CODIFIED LAWS §§ 21-55-1 to -3 (1981); MINN. STAT. ANN. §§ 145.424(1)–(2) (1982).

Dobbs v. Jackson (2022) changed federal abortion law and catalyzed changes at the state level as well.⁴ A minority of states criminalized abortion after *Dobbs*, others neither guarantee nor prohibit it, and some explicitly protect it.⁵ Minnesota is among those guaranteeing abortion as a matter of right, finding it protected by the state's constitution.⁶ Yet it also retains its wrongful birth ban. This Article highlights tension between Minnesota's laws affirming abortion as a fundamental right and its law banning wrongful birth.⁷ A dozen states now ban the action, but over the same course of time that this landscape developed, half of states instead came to interpret *Roe* to guarantee the wrongful birth action, as did several circuit courts.⁸ *Dobbs* opens questions as to whether people still have a right to the action in jurisdictions that took *Roe* to guarantee it. Though wrongful birth can "be seen as one of the roots of 'informed consent' in patient care,"⁹ *Roe* was a foundational root that enabled these claims to thrive.

This Article's legislative history forges new ground in the history of reproductive policy. It adds to pictures provided by historians like Daniel Williams of Minnesota's impact on national reproductive policy,¹⁰ as well as the work of historians like Leslie Reagan who have touched on the history of the

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

5. See *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Mar. 23, 2023), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html?>; *After Roe Fell: Abortion Laws by State*, Center for Reproductive Rights, <https://reproductiverights.org/maps/abortion-laws-by-state/> (last accessed Mar. 30, 2023); Elizabeth Nash & Isabel Guarnieri, *Six Months Post-Roe, 23 U.S. States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INST. (Jan. 2023), <https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup>.

6. See *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995); see also *infra* note 242.

7. See *infra* Part III.2 (discussing the Minnesota Supreme Court's upholding of Minnesota Statute Section 145.424 in *Hickman v. Group Health Plan*, 396 N.W.2d 10 (Minn. 1986)).

8. See *infra* note 235.

9. LESLIE J. REAGAN, DANGEROUS PREGNANCIES: MOTHERS, DISABILITIES, AND ABORTION IN MODERN AMERICA 137 (2010).

10. DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 156–78 (2016); see also KARISSA HAUGEBOG, WOMEN AGAINST ABORTION: INSIDE THE LARGEST MORAL REFORM MOVEMENT OF THE TWENTIETH CENTURY 11–12 (2017).

wrongful birth action.¹¹ In his *Defenders of the Unborn*, Williams highlights pro-life activism prior to *Roe*, including that of Minnesota Citizens Concerned for Life (MCCL), founded in 1968.¹² “The solutions that MCCL promoted as ‘socially progressive’ captured the attention of pro-lifers throughout the nation,” he explains, especially in the early 1970s, solutions that included providing “humane alternatives” to abortion rather than seeking to prohibit it in isolation.¹³ Williams describes MCCL’s advocacy as promoting “a comprehensive ethic of life and social justice” and “a culture that valued human life.”¹⁴ This Article’s legislative history captures one way in which MCCL can be seen promoting a facet of its visions for a broader ethic and culture of valuing life. At the same time, it decenters MCCL; while MCCL supported Minnesota’s ban, it did not take credit for initiating the effort.

This legislative history also joins scholarship on intersections of reproductive policy with medical malpractice, including work that touches on transformations to both of these facilitated by the development and routinization of prenatal technologies.¹⁵ Reagan’s *Dangerous Pregnancies* encompasses wrongful birth litigation within a broader picture of the effects of spikes in birth defects caused by German measles and thalidomide in the 1960s.¹⁶ This portion of her book and an article she published the prior year provide extensive attention to the history of wrongful birth, though others briefly canvass it in addressing prenatal technologies.¹⁷ In contrast to focusing on

11. See REAGAN, *supra* note 9; Leslie J. Reagan, *Rashes, Rights, and Wrongs in the Hospital and in the Courtroom: German Measles, Abortion, and Malpractice before Roe and Doe*, 27 L. & HIST. REV. 241 (2009).

12. WILLIAMS, *supra* note 10, at 156–57.

13. *Id.*

14. *Id.*

15. See, e.g., ILANA LÖWY, *IMPERFECT PREGNANCIES: A HISTORY OF BIRTH DEFECTS AND PRENATAL DIAGNOSIS* (2017); JOHN H. EVANS, *CONTESTED REPRODUCTION: GENETIC TECHNOLOGIES, RELIGION, AND PUBLIC DEBATE* (2010); RUTH SCHWARTZ COWAN, *HEREDITY AND HOPE: THE CASE FOR GENETIC SELECTION* (2008); RAYNA RAPP, *TESTING WOMEN, TESTING THE FETUS: THE SOCIAL IMPACT OF AMNIOCENTESIS IN AMERICA* (2004); MONICA CASPER, *THE MAKING OF THE UNBORN PATIENT: A SOCIAL ANATOMY OF FETAL SURGERY* (1998); CHARLES L. BOSK, *ALL GOD’S MISTAKES: GENETIC COUNSELING IN A PEDIATRIC HOSPITAL* (1992).

16. See generally Reagan, *supra* note 11; REAGAN, *supra* note 9, at 105–08.

17. E.g., NEIL A. HOLTZMAN, *PROCEED WITH CAUTION: PREDICTING GENETIC RISKS IN THE RECOMBINANT DNA ERA* 220–21 (1989).

the underlying cases like Reagan, this Article looks instead at the initial legislative efforts seeking to regulate this litigation. Indeed, this Article conveys a history of absence in terms of the underlying litigation, for the first states to enact wrongful birth bans did so before courts in either state had witnessed any such cases in the first place.¹⁸ Even the small subset of scholarship in law journals that specifically addresses Minnesota's ban neither provides its legislative history nor speaks to its national importance in being one of the first two bans.¹⁹

Archival research for this Article was conducted primarily at the Minnesota Historical Society but also draws on trial court records and other materials at the Cook County Circuit Court, the North Dakota State Historical Society, and the New York Public Library. The North Dakota State Historical Society has an extensive collection of MCCL materials, but few details about the ban's legislative history were available in these records. Rather, this Article draw heavily on papers at the MHS of a lobbyist for the Abortion Rights Council (ARC). Her papers are listed among its more extensive collections on abortion politics and provide many details on the formation of Minnesota's ban. They also provide a pro-choice perspective in support of wrongful birth from someone who had once been Republican, which contrasts with the perspectives of the pro-life Democrats who authored the bill to ban the action.²⁰ This Article also draws on historical newspaper databases like ProQuest to capture broader social visibility of this litigation and the rise of legislation aiming to regulate it.

After briefly covering the origins of the wrongful birth claim in Part I, Part II describes how it first came to be banned, zooming in specifically to the legislative history behind H.F. 1532 and S.F. 1461 in Minnesota. Examining fine-grained details like the demographics of the legislature that passed these bills, Part III proffers an analysis of some of the interests and compromises that produced this ban. Th3 Article concludes by

18. See Georgia Dullea, *'Wrongful Life, Birth' Lawsuits Stir Concern*, THE POST-CRESCENT, Apr. 12, 1982, at A11.

19. E.g., Shelley A. Ryan, *Wrongful Birth: False Representations of Women's Reproductive Lives*, 78 MINN. L. REV. 857 (1994); Phillip A. McAfee, *The Injury of Birth: Minnesota's Statutory Prohibition of Postconception Negligence Actions*, 14 WM. MITCHELL L. REV. 701 (1988).

20. See *infra* notes 108–111, 127 and accompanying text.

considering the status of the wrongful birth action in light of *Dobbs*.

I. EARLY WRONGFUL BIRTH LITIGATION

This Part briefly reviews the development of wrongful life, wrongful conception, and wrongful birth litigation in the 1960s and 1970s. Part I.A summarizes the emergence of these claims in the 1960s. Part I.B captures how the Supreme Court's recognition of contraception and abortion as constitutional rights impacted state law through these actions, with *Roe* lending weighty support to the wrongful birth claim in particular. Though some courts and commentators began to argue that *Roe* compelled recognition of the wrongful birth action in the 1970s, others saw no such requirement and considered the choice to recognize it or not to be best left to legislatures rather than courts.

A. WRONGFUL LIFE, CONCEPTION, AND BIRTH IN THE 1960S

The history of wrongful birth is related to two other torts that courts and legislatures came to demarcate as distinct actions: the wrongful conception and wrongful life claims. When a complaint was filed a day after the new year in 1960 alleging that the plaintiff's injury was "wrongful life," the ability to recover damages for an injury that one sustained prenatally was comparatively new. Courts had entertained such actions since the late nineteenth century,²¹ though none of these cases recognized a new action in anything more than dicta.²² This landscape changed after the first federal district court recognized a right to sue for prenatal injuries in *Bonbrest v. Katz* (1946).²³ Several states began the trend toward recognizing this

21. See especially *Dietrich v. Inhabitants of Northampton*, 52 Am. Rep. 242 (Mass. 1884).

22. See, e.g., *Gorman v. Budlong*, 49 A. 704 (R.I. 1901); *Buel v. United Railways Co.*, 154 S.W. 71 (Mo. 1913); *Nugent v. Brooklyn Heights Railroad Co.*, 139 N.Y.S. 367 (App. Div. 1916); *Lipps v. Milwaukee Electric Railway & Light Co.*, 159 N.W. 916 (Wis. 1916); *Drobner v. Peters*, 133 N.E. 567 (N.Y. 1921), *rev'd*, 102 N.E.2d 691 (N.Y. 1951); *Stanford v. St Louis-San Francisco Railway Co.*, 108 So. 566 (Ala. 1926); *Magnolia Coca Cola Bottling Co. v. Jordan*, 78 S.W.2d 944 (Tex. 1935); *Newman v. City of Detroit*, 274 N.W. 710 (Mich. 1937); *Smith v. Luckhardt*, 19 N.E.2d 446 (Ill. App. Ct. 1939); *Berlin v. J.C. Penney Co., Inc.*, 16 A.2d 28 (Pa. 1940); *Stemmer v. Kline*, 26 A.2d 489 (N.J. 1942); *Bliss v. Passanesi*, 95 N.E.2d 206 (Mass. 1950); *Drabbels v. Skelly Oil Co.*, 50 N.W.2d 229 (Neb. 1951).

23. *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946).

type of suit soon after *Bonbrest*. Less than a decade later, tort scholar William Prosser viewed the trend of recognizing the tort to be “so definite and marked as to leave no doubt that this will be the law of the future in the United States.”²⁴

In this prior case law, which involved causes of prenatal injury ranging from use of forceps during delivery to the plaintiff’s mother being involved in car accident while pregnant, the plaintiff still would have existed if the injury counterfactually had not occurred. The first wrongful life case, *Zepeda v. Zepeda* (1963), differed in that respect, for the plaintiff would not have existed without the injury he alleged. The case included several parties. The defendant, represented by Harold S. Iglow, was Louis Raul Zepeda, a thirty-three-year-old furniture salesman who lived in Chicago.²⁵ Represented by Hugh M. Matchett, the wrongful life plaintiff was Joseph Denis Zepeda, born on August 27, 1959 to Barbara Flores, with whom he lived at the time in Wichita, Kansas.²⁶ *Zepeda* was an *ad litem* claim for \$25,000 brought by the plaintiff’s aunt, Irma M. Flores.²⁷ The Circuit Court of Cook County issued a summons for the case on January 2, 1960, which the defendant was served on January 8.²⁸

The plaintiff’s claimed injury was his conception and birth outside of marriage. The harms he claimed that he suffered as a result of his parents “caus[ing] him to be born an adulterine bastard”²⁹ included “the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his father, to inherit from his paternal ancestors and . . . being stigmatized.”³⁰ The trial court granted the defendant’s motion to dismiss for failure to state a cause of action, and the plaintiff appealed. Since the plaintiff had been unsuccessful in appealing to the Supreme Court on the constitutional issues alleged,³¹ the Illinois appellate court determined that it need not address such questions. The court

24. WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 36 (2d ed. 1955).

25. *Jurists Ponder Effects of Lawsuit Noting ‘Wrongful Life’*, GALESBURG REGISTER-MAIL, Apr. 4, 1963, at 33.

26. *Id.*

27. *Id.*

28. Summons, No. 187 (Cook County Ct. 1960).

29. *Id.*

30. *Id.*

31. *Zepeda v. Zepeda*, 41 Ill. App. 2d. 240, 246 (Ill. App. Ct. 1963).

also determined that the “complaint sounds in tort,” not contract, and concentrated on this aspect.³² The court was willing to view the facts underlying the plaintiff’s claim to have involved a tortious act in part because the defendant’s actions were criminal. The plaintiff’s father and mother were living together at the time of the plaintiff’s conception, though the former was married to someone else, a criminal offense for both of them under Illinois law.³³ Having determined that ample facts would support a finding that the defendant father had committed “a legal wrong, a tortious act,” the court turned to “[t]he second question to confront us[:] can a tort be inflicted upon a being simultaneously with its conception?”³⁴

The appellate court was concerned that recognizing the type of injury alleged in the case raised questions about values and policy that it determined were better left to legislators rather than judges. More specifically, the court believed that awarding wrongful life damages would endorse a policy reflecting a lack of “[l]ove of life”—what it explained was a “natural instinct to preserve life”—that would impel the plaintiff “to cherish his existence.”³⁵ This core aspect was why the court concluded that there were “overriding legal, social, judicial or other considerations which should preclude recognition of a cause of action.”³⁶ The appellate court thus affirmed the trial court’s dismissal of the complaint. The appellate court did not fully reject the new tort but concluded that “[i]f we are to have a legal action for such a radical concept as wrongful life, it should come after thorough study of the consequences.”³⁷ The appellate court viewed this task to be best suited for the state’s general assembly, reflecting the court’s “belief that lawmaking, while inherent in the judicial process, should not be indulged in where the result could be as sweeping as here.”³⁸

Wrongful life was the first of the three related actions to emerge as a tort in the 1960s, with *Zepeda* in 1960 and another wrongful life claim reaching a New York appellate court in

32. *Id.* at 247.

33. *Id.*

34. *Id.* at 247–48.

35. *Id.* at 258.

36. *Id.* at 258.

37. *Id.* at 262.

38. *Id.*

1966.³⁹ At the same time, courts had entertained breach-of-contract cases since at least the 1930s involving the birth of a child despite parents relying on contraceptive options.⁴⁰ This fact pattern raised many of the issues found in the torts that later came to be labeled as “wrongful conception,” “wrongful birth,” or “wrongful pregnancy” claims. While the earlier breach-of-contract cases arose in an era of Comstock laws, *Griswold v. Connecticut* (1965) contributed to a move away from this era.⁴¹ The Comstock era also waned with growing social acceptance of voluntary sterilization and with technological developments that began to offer less invasive sterilization options.

Custodio v. Bauer (1967) was the first time that wrongful conception appeared as a tort. This shift into tort law brought more general notions of right and wrong into these cases, in contrast to only the specific terms of a contract. In addition, patient’s rights, consumer rights, and women’s health movements as well as a bioethical turn were all creating a greater role for informed consent, with wrongful birth, wrongful conception, and wrongful life cases serving as early sites for defining and applying informed consent in the context of reproductive care. In *Custodio*, the plaintiffs brought suit because “Mrs. Custodio [had felt] ‘that she had more than sufficient children’” and decided to pursue a tubal ligation.⁴² The case included seven causes of action, including an allegation of malpractice based on negligence. Among other damages, the plaintiffs sought \$1,500 in medical expenses for labor, delivery, and prenatal and postnatal care, \$250,000 for Mrs. Custodio’s emotional distress, and \$500,000 in punitive damages.⁴³

39. See generally *Williams v. State*, 223 N.E.2d 343 (N.Y. 1963).

40. See especially *Christensen v. Thornby*, 255 N.W. 620 (Minn. 1934).

41. While *Griswold* declared Comstock laws to be unconstitutional infringements on a marital right to privacy, other legal changes in the early twentieth century opened access to contraceptives and articulated nascent recognition of procreation as a fundamental right. See *United States v. One Package Japanese Pessaries*, 86 F.2d 737 (2d. Cir. 1936); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Soc’y Sisters*, 268 U.S. 510, 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). But see *Buck v. Bell*, 274 U.S. 200 (1927).

42. *Custodio v. Bauer*, 251 Cal. App. 2d 303, 307 (Cal. Ct. App. 1967). Tubal ligations were starting to become more common as the procedure was becoming less invasive. See, e.g., REBECCA M. KLUCHIN, FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950–1980, at 69 (2009).

43. *Custodio*, 251 Cal. App. 2d at 308–09.

They further sought to be compensated on the grounds that they were injured by the existence of their additional, healthy child. With respect to Mrs. Custodio, her request for damages alleged “[t]hat the birth of plaintiff’s child will require of the plaintiff additional costs and expenses to properly care for and raise the said child to the age of maturity; that said cost is estimated to be in the sum of \$50,000.”⁴⁴ Mr. Custodio sought separate special damages of “\$50,000 to care for and raise” their child, and general damages on the grounds that his “emotional and nervous system will be affected by said pregnancy and subsequent birth of said child.”⁴⁵ In these respects, the plaintiffs conceptualized their complaint “in terms of a child being unwanted and a burden to the parents.”⁴⁶ Wrongful conception claims soon added that the children at issue could potentially be a burden to siblings as well.⁴⁷

The appellate court in *Custodio* reversed the trial court’s dismissal. It found that whether a duty of care had been breached and the scope of damages still had to be ascertained.⁴⁸ If the plaintiffs provided facts that established liability on remand, the trial court was directed to apply the California Civil Code on tortious conduct, which stated that “[f]or the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.”⁴⁹

The first claim in which parents alleged they were injured by being denied an opportunity to abort, rather than never conceive, their child reached a state appellate court in the same year as *Custodio*. *Gleitman v. Cosgrove* (1967) involved a plaintiff whose physicians “told her [on April 20, 1959] that the German measles” that she contracted earlier in the year “would have no effect at all on her child” in utero.⁵⁰ The lawsuit included a wrongful life claim that parents brought on behalf of their child

44. *Id.* at 309.

45. *Id.*

46. *Id.* at 324.

47. *See, e.g.,* *Coleman v. Garrison*, 327 A.2d 757, 760 (Del. Super. Ct. 1974) (four children seeking damages to compensate them for “the amount of care and support which they would have received had the last child not been born”).

48. *Custodio*, 251 Cal. App. 2d at 325.

49. *Id.* at 326 (citing to CAL. CIV. CODE § 3333 (1872)).

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

who was born with congenital rubella syndrome (CRS), another claim from his mother for her emotional injury caused by his condition, and a third by his father for the costs of caring for him.⁵¹ These claims by his parents were not given distinct labels; neither *Custodio* nor *Gleitman* used the phrases “wrongful conception” or “wrongful birth.” The next Part indicates ways in which these terms remained in flux into the 1970s and early 1980s.

The *Gleitman* court dismissed the claims of all three plaintiffs.⁵² With respect to the wrongful life plaintiff, the court drew on the same rationale articulated in *Zepeda*: “This Court cannot weigh the value of life with impairments against the nonexistence of life itself.”⁵³ The “plaintiff makes it logically impossible for a court to measure his alleged damages,” the court went on, “because of the impossibility of making the comparison required by compensatory remedies.”⁵⁴ The court found that the parents similarly required the court to make an impossible comparison by evaluating “the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh[ing] these against the alleged emotional and money injuries” caused by their child’s existence.⁵⁵ The court consequently found that the parental action too ultimately sought damages that were “impossible for a court to measure.”⁵⁶ When these three torts emerged in the 1960s, therefore, wrongful conception fared the best, while courts remained unwilling to recognize wrongful life and wrongful birth.

B. WRONGFUL BIRTH AFTER *ROE*

When the first wrongful birth claim arose in the 1960s, abortion remained criminalized in most states, though over a dozen had reformed their laws, and access to it often required navigating the process of gaining approval from therapeutic abortion review committees.⁵⁷ Borrowing Rayna Rapp’s use of

51. *Id.*

52. *Id.*

53. *Id.* at 692.

54. *Id.*

55. *Id.* at 693.

56. *Id.* at 692.

57. See, e.g., LESLIE REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND THE LAW IN THE UNITED STATES, 1867–1973, 5 (1996); RICKI

“moral pioneers” to describe women early in the adoption of amniocentesis, ultrasounds, and abortion as tools for avoiding birth defects, Reagan describes women like the mother in *Gleitman* as “legal pioneers” for seeking to forge new ground by bringing the earliest wrongful birth claims within this landscape at a time when most states criminalized abortion.⁵⁸

By the early 1970s, however, the horizons became more promising for the wrongful birth claim. The bioethical turn as well as attacks on medical conservatism and medical paternalism were in full swing, a surge in medical malpractice litigation was becoming apparent, especially against specialties providing reproductive care, and landmark cases like *Roe* provided state courts with a new outlook through which to examine wrongful birth. Genetic and prenatal technologies were also expanding into new frontiers, aided by developments in genetic engineering like recombinant DNA technologies.

Reproductive technologies had pervaded the earliest wrongful life, wrongful birth, and wrongful conception torts. The *Zepeda* court cited to Rachel Carson’s *Silent Spring*, for example, published while the case was moving from trial to appellate courts, as noting a possible future “time when it will be possible to alter the human germ plasma by design.”⁵⁹ *Custodio* foregrounded one type of reproductive technology—contraception—but not others because the child in the case was born healthy. Cases like *Gleitman* raised possibilities that a wider array of technologies beyond amniocentesis and ultrasounds, as well as personnel other than physicians or only those specializing in reproductive care, could raise wrongful birth liability.

The Wisconsin Supreme Court was the first state supreme court to address the constitutionality of the wrongful birth claim in light of *Roe*. The court had dismissed what it explained was “a cause of action which can be referred to as ‘wrongful birth’ or ‘wrongful life’” in 1974, referring to the claim of a plaintiff who, like the plaintiff in *Zepeda*, had sued for being born outside of marriage but was otherwise born healthy.⁶⁰ The following year,

SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE *ROE* V. *WADE* 4 (2000).

58. See REAGAN, *supra* note 9, at 105.

59. *Zepeda v. Zepeda*, 41 Ill. App. 2d 246, 261 (Ill. App. Ct. 1963) (citing RACHEL CARSON, *SILENT SPRING* 8 (1962)).

60. *Slawek v. Stroh*, 215 N.W.2d 9, 21 (Wis. 1974).

however, the court recognized a wrongful birth action in *Dumer v. St. Michael's Hospital* (1975).⁶¹ Like *Gleitman*, the case involved a child born with CRS, and *Dumer* similarly included an action on behalf of the child as well actions by parents for their own harms because of the child's existence.⁶²

The Wisconsin Supreme Court continued its own precedent and that of other courts that had declined to recognize wrongful life. It reasoned that "[t]he infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence."⁶³ While the court did not believe it was able to recognize that the wrongful life plaintiff had suffered a legal injury by being born with CRS, it did find itself able to recognize that she imposed a compensable injury on her parents by existing rather than having been aborted.⁶⁴ The child in *Dumer* was born on November 20, 1972, two months before *Roe* was decided.⁶⁵ The court therefore emphasized that the negligence at issue was not the defendant doctor's failure to convey information about available abortion options but rather the defendant's failure to diagnose rubella.⁶⁶ If the plaintiff could persuade the lower court on remand that she would have obtained an abortion, the Wisconsin Supreme Court found that she could be entitled to damages for her "suffer[ing] in the future by reason of the additional medical, hospital and supportive expense occasioned by the deformities of the child as contrasted to a normal, healthy child."⁶⁷

Other state courts were more direct in speaking to *Roe's* impact, in wrongful birth cases that co-constituted and made this impact themselves. In *Berman v. Allen* (1979), for example, the New Jersey Supreme Court reaffirmed its refusal to recognize wrongful life in *Gleitman* but reversed its former refusal to recognize wrongful birth.⁶⁸ "In light of changes in the law which have occurred in the 12 years since *Gleitman* was decided," the *Berman* court explained, the prior case's holding with respect to wrongful birth "can no longer stand in the way of

61. *Dumer v. St. Michael's Hospital*, 233 N.W.2d 372, 379 (Wis. 1975).

62. *Id.*

63. *Id.* at 379.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 382.

68. *Berman v. Allen*, 404 A.2d 8 (N.J. 1979).

judicial recognition of a cause of action founded upon wrongful birth. The Supreme Court's ruling in *Roe v. Wade* clearly establishes that a woman possesses a constitutional right to decide.⁶⁹ Consequently, the court determined that "[p]ublic policy now supports, rather than militates against, the proposition that she not be impermissibly denied a meaningful opportunity to make that decision."⁷⁰

II. WRONGFUL BIRTH ACTIVISM TAKES SHAPE

None of this early wrongful conception, wrongful birth, and wrongful life litigation in the 1960s and 1970s appears to have catalyzed a legislative response. Rather, this only seems to have begun in the 1980s. This Part begins with the first of these three torts to reach the Minnesota Supreme Court in Part II.A. Beyond reflecting how and why many jurisdictions impose limitations on allowable damages where these actions are permitted, this case was mentioned as a key motivation for the legislators who introduced bills to ban wrongful birth and wrongful life in the state.⁷¹ Part II.B traces these bills, H.F. 1532 and S.F. 1461, from their introduction into the seventy-second Minnesota Legislature in 1981, through their passage in 1982. Part II.C places Minnesota's legislation within a broader picture of political mobilization over wrongful birth and wrongful life litigation in other states, including bills in Oregon, Pennsylvania, and California.

A. DELIMITING DAMAGES: THE BENEFIT RULE IN *SHERLOCK V. STILLWATER*

A decade after the first wrongful birth claim in 1967, Minnesota had no case law on wrongful birth or wrongful life. But the Minnesota Supreme Court had lent credibility to the wrongful conception claim since 1934, at least in the context of contract law.⁷² In *Sherlock v. Stillwater* (1977), the court recognized wrongful conception as a tort as well. At the same time, the court indicated that an amount must be deducted from

69. *Id.* at 14.

70. *Id.*

71. See *infra* note 125 and accompanying text.

72. *Christensen v. Thornby*, 255 N.W. 620 (Minn. 1934).

any recovery to denote the value that future children confer on parents even when unexpected.⁷³

In *Sherlock*, a couple consulted with a physician at the Stillwater Clinic about “the various medical alternatives available to them to ensure that their family would grow no larger” after their seventh child.⁷⁴ The parties disputed whether the physician had informed Mr. Sherlock that his vasectomy had been successful, but the jury returned a verdict of \$19,500.⁷⁵ In responding to the defendant’s appeal challenging the sufficiency of the verdict, the Minnesota Supreme Court believed that “the jury could justifiably have concluded that Dr. Stratte negligently informed Mr. Sherlock,” with the “subsequent birth of the Sherlocks’ eighth child [as] a direct result of this negligence.”⁷⁶

In clarifying the issues before it, the court sought to differentiate wrongful birth, wrongful conception, and wrongful life claims from one another. The court explained that “[t]he first of what were later to become known as the ‘wrongful birth’ cases was decided by this court in *Christensen v. Thornby*,” its decision from 1934 involving a contract to perform a vasectomy.⁷⁷ The court in *Sherlock* believed that the parental action “for ‘wrongful birth’ is frequently confused with an action for ‘wrongful life,’ which is brought by a child to recover damages for being wrongfully born.”⁷⁸ Later in the opinion, the court confirmed that the case before it was “an action for ‘wrongful conception,’ for it is as the point of conception that the injury claimed by the parents originates.”⁷⁹

The majority in *Sherlock* described the court’s 1934 decision as one in which “we expressly held that sterilizations were not contrary to public policy and that an action, if properly pleaded, could be maintained against a physician.”⁸⁰ At the same time, it recognized that “[t]he more troublesome question of damages once liability on the part of a physician is established was neither raised nor considered” in the earlier decision.⁸¹ Indeed,

73. *Sherlock v. Stillwater*, 260 N.W.2d 169, 171 (Minn. 1977).

74. *Id.*

75. *Id.*

76. *Id.* at 172.

77. *Id.*

78. *Id.* at 172 n.3.

79. *Id.* at 175.

80. *Id.* at 172.

81. *Id.* at 172–73.

the majority noted that “the *Christensen* opinion was later relied on by other courts to preclude parents from recovering damages for the economic costs of raising a child.”⁸² This is because the *Christensen* court had emphasized that “the plaintiff has been blessed with the fatherhood of another child,” dismissing the idea that damages were warranted with a sarcastic comment, “As well might the plaintiff charge defendant with the cost of nurture and education of the child during its minority.”⁸³

The Minnesota Supreme Court in *Sherlock* recognized that more recent courts, referring to *Custodio*, have “observed that modern attitudes with respect to the family establishment and the use of contraceptives [have] changed,” such that “the birth of an unplanned child may now be viewed by some as something less than a ‘blessed event.’”⁸⁴ It identified that, over the decade since *Custodio*, a minority of courts had “denied wrongful conception recovery altogether,” some permitted compensation for “all damages directly related to pregnancy and birth” but not for childrearing expenses, and a “growing majority of courts have allowed recovery for all damages proximately caused by the physician’s negligence, including the cost of rearing the child,” as long as this is “reduced by any benefits conferred by the child.”⁸⁵ A Michigan court in 1971 had been the first to apply this offsetting rule.⁸⁶

The *Sherlock* court was persuaded to permit recovery for childrearing expenses, subject to an offsetting benefit:

Most troublesome is the matter of allowing recovery for the costs of rearing a normal, healthy child. . . . [S]uch costs are a direct financial injury to the parent . . . [but] it would seem myopic to declare today that those benefits exceed the costs as a matter of law. . . . [T]oday it must be acknowledged that the time-honored command to ‘be fruitful and multiply’ has not only lost contemporary significance to a growing number of potential parents but is contrary to public policies embodied in the statutes encouraging family planning. Recent decisions of the United States Supreme Court, moreover, seem to

82. *Id.*

83. *Id.* at 173 (citing *Christensen v. Thornby*, 255 N.W. 620, 622 (Minn. 1934)).

84. *Id.*

85. *Id.* at 174.

86. *Troppe v. Scarf*, 187 N.W.2d 511, 518 (Mich. Ct. App. 1971) (citing RESTATEMENT (SECOND) OF TORTS § 920 (AM. L. INST. 1979) (reducing monetary awards for equitable reasons of preventing unjust enrichment when tortious conduct simultaneously confers a benefit)).

suggest that the right to limit procreation is of a constitutional dimension. See, *Roe v. Wade* (1973); *Griswold v. Connecticut* (1965).⁸⁷

The court therefore permitted recovery inclusive of childrearing costs but “subject to an offset for the value of the benefits conferred to [parents] by the child.”⁸⁸ Moreover, to prevent unjust enrichment, the court emphasized that childrearing costs presumably last only until the child reaches the age of majority, while the offsetting benefit seemed to “benefit the parents for the duration of their lives.”⁸⁹ In addition to a special verdict form and explanatory instructions, the court therefore required that courts in subsequent wrongful conception claims must apply “strict judicial scrutiny of verdicts to prevent excessive awards.”⁹⁰ Since the jury had neither been given a special verdict form nor instructions to offset the award, the court remanded for a new trial solely on the issue of damages.⁹¹

The dissent suggested that the majority’s cost-benefit analysis would always preclude an award to parents.⁹² “I dissent upon the ground that the worth of a healthy child to his parents,” explained the judge who authored the dissent, “will always exceed [the] costs” that the child imposes on parents.⁹³ While the majority drew on *Christensen* as evidence that the court had already permitted wrongful conception, the dissent underscored that the *Christensen* court had clearly “considered it preposterous” to award childrearing expenses.⁹⁴ Thus the dissent concluded, “[i]n so far as the majority decision permits parents to recover damages by proving their healthy child a net burden to them, it is contrary to public policy. . . . We should not permit the courts to be used for this purpose.”⁹⁵

87. *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175 (Minn. 1977) (internal citations omitted).

88. *Id.* at 176.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 177 (Sheran, J., dissenting).

93. *Id.*

94. *Id.*

95. *Id.*

B. THE PATHS OF H.F. 1532 AND S.F. 1461

This section focuses on Minnesota's legislation that banned wrongful birth and wrongful life between 1981 and 1982, motivated in large part by the *Sherlock* decision. South Dakota had become the first state to enact such a ban between 1980 and 1981,⁹⁶ though the sources referenced below that contemporaneously documented the paths of Minnesota's bills did not mention South Dakota's law. Local actors supporting the passage of South Dakota's ban included the South Dakota Right to Life Corporation and the South Dakota Pro-Life Political Action Committee.⁹⁷ The Colorado-based organization Americans United for Life (AUL) was also involved.⁹⁸

In Minnesota, however, rather than AUL, MCCL was the primary pro-life organization that sent representatives to the meetings and hearings that shaped H.F. 1532 and S.F. 1461. Representatives of the Human Life Alliance also testified in support,⁹⁹ but there is no indication of testimony or representatives from AUL. MCCL was the largest pro-life actor in Minnesota and had become one of the most influential in the country as well by the early 1970s.¹⁰⁰ Among other reasons why it favored banning wrongful life and wrongful birth, MCCL explained that both actions "devalue human life," and that "[t]he rationale for forcing someone to pay for a children's [sic] imperfection is a very cynical one."¹⁰¹

96. S.D. CODIFIED LAWS § 21-55-1 (1981).

97. Rob Swenson, *Doctor Raps Wrongful Life Bill*, ARGUS LEADER, Feb. 4, 1981, at 4D.

98. See Dullea, *supra* note 18, at A-11.

99. Tape Message: Legislative Session 1982 (Feb. 1, 1982), 28.H.9.6F, Box 5, Folder "Legislative Session, 1982," Katherine Wood Taylor Papers, Minnesota Historical Society, Saint Paul, MN [hereinafter KWT].

100. *Wrongful Life Bill Approved*, WINONA DAILY NEWS, Mar. 16, 1982, at 18.

101. *Id.*



Figure 1. Mar. 1982 MCCL newsletter encouraging mobilization for wrongful birth ban¹⁰²

MCCL eventually encouraged activism like the above, but this appears to have been new to its agenda; from reviewing its newsletters, wrongful birth and wrongful life first garnered headlines in 1982, with Minnesota’s ban.¹⁰³ Even though MCCL sponsored the bill and lists it among what it considers “legislative successes,”¹⁰⁴ however, there does not appear to be evidence of MCCL publicly taking credit for the original initiative behind the ban.

The bill’s authors, Senator Wayne Olhoft and Representative Richard O’Connor, were both members of the Democrat-Farmer-Labor (DFL) Party.¹⁰⁵ Olhoft began serving in the Senate in 1975.¹⁰⁶ By the time he introduced the wrongful birth and wrongful life legislation, some saw his legislative actions as revealing an agenda against state family planning programs.¹⁰⁷ A Lutheran, Olhoft attributed his motivations to

102. “Wrongful birth” bill moving in Legislature, MCCL NEWSLETTER, Mar. 1982, at 3, Box 2, Folder “Minn. Citizens Concerned for Life Newsletters 3: Jan. 1981–May 1982,” KWT.

103. See generally *id.* The three headlines it captured are, “Court upholds another ‘wrongful birth’ claim” (Jan. 1982) at 2; “Wrongful birth’ bill moving in Legislature” (Mar. 1982) at 3; “Wrongful birth bill approved as session ends” (Apr. 1982) at 3.

104. *Legislative Successes*, MINN. CITIZENS CONCERNED FOR LIFE, <https://www.mccl.org/legislative-successes> (last visited Dec. 1, 2022).

105. *Democratic-Farmer-Labor Party: An Inventory of Its State Central Committee Records at the Minnesota Historical Society*, MINN. HIST. SOC’Y, <http://www2.mnhs.org/library/findaids/00586.xml> (last visited Feb. 17, 2023).

106. *Olhoft, Wayne*, MINN. LEGIS. REFERENCE LIBR., <https://www.lrl.mn.gov/legdb/fulldetail?id=10478> (last visited Feb. 17, 2023).

107. *E.g.*, Perpich Remarks to Rules Committee (May 14, 1979), 28.H.9.6F, Box 5, Folder “Legislative Files: Constitutional Convention and Abortion,” KWT (“You—me—the press—the lobbyists for the MCCL—and the feminists here—all know what is really at stake today One would have to be totally blind and deaf not to yet realize that Senator Olhoft and his friends have been frantically working to kill—either blatantly or surreptitiously—the 1978 family planning grants program.”); *cf.* Remarks Made by Kay Taylor, Lobbyist for the

ban wrongful birth and wrongful life neither to MCCL nor to AUL, but rather to an introduction to wrongful life that he read in a Christian Legal Society pamphlet.¹⁰⁸ “All we want to do is take out of the courtroom the whole issue that life is wrong,” he explained, adding that “[d]amages shouldn’t be awarded on the basis of comparing life versus nonexistence.”¹⁰⁹ He emphasized that the bill “could not be explained on strict pro-life versus pro-choice lines.”¹¹⁰

The initiative of these legislators began at the end of the legislature’s regular session in 1981. O’Connor as well as Representatives Robert McEachern, Robert Reif, Terrence Dempsey, and George Dahlvang introduced H.F. 1532 into the House on May 18, 1981, the last day of this legislature’s first regular session.¹¹¹ By the last week of January of 1982, Olhoft and Senators Ronald Sieloff, Eugene Merriam, Bob Lessard, and Carl Kroening prepared to discuss the senate version of the bill, S.F. 1461, before the Senate Judiciary Subcommittee for Law Revision, which had plans to convene at 8:30 a.m. on February 1, in Room 112 of the state capitol building.¹¹²

During this February 1 meeting, testimony included actors from the Abortion Rights Council (ARC) (an affiliate of the

Abortion Rights Council at the House Health Care Subcommittee (Feb. 2, 1978), 28.H.9.6F, Box 5, Folder “Legislative Files: Constitutional Convention and Abortion,” KWT (“[T]he MEDDLERS IN YOUR LIFE are trying to stop birth control and trying to dictate to doctors and to hospitals the choices which should be up to you.”). *But see* Wayne Olhoft, OLHOFT NEWSLETTER (Feb. 16, 1979), 28.H.9.6F, Box 5, Folder “Legislative Files: Constitutional Convention and Abortion,” KWT (Olhoft’s newsletter at the time nowhere mentioning contraception).

108. Jacqui Banaszynski, *Bill Says Children Can’t Sue Parents for Being Born*, STAR TRIB., Mar. 15, 1982, at 1A.

109. *Id.* at 4A.

110. *Id.*

111. A bill for an act relating to tort actions; prohibiting the causes of action for wrongful life and wrongful birth; prohibiting a defense, an award of damages, or a penalty based on the failure or refusal to prevent a live birth; proposing new law coded in Minnesota Statutes, Chapter 145 (May 18, 1981), 28.H.9.6F, Box 5, Folder “Legislative Session, 1982,” KWT; MINN. CONST. art. IV, § 12 (the Minnesota Constitution prohibiting the legislature from meeting “after the first Monday following the third Saturday in May of any year,” thus its regular sessions take place in the first five months of the year).

112. Tape Message (Mar. 2, 1982), 28.H.9.6F, Box 5, Folder “Legislative Session, 1982,” KWT; Tape Message: Legislation: Minn. Hearing Notes (Jan. 29, 1982), 149.F.4.4(F), Box 1, Folder “Legislation: Minn: Hearing Notes, 1981–1982,” KWT.

National Abortion Rights Action League (NARAL)), Planned Parenthood, and MCCL.¹¹³ The House Judicial Administration subcommittee heard the House version the following week, on February 9 and 11, a subcommittee chaired by Representative Bob Ellingson and including Representatives Ben Gustafson, Thaddeus Jude, Marsha Luknic, Fred Norton, Myron Nysether, Randolph Peterson, Michael Sieben, and Al Wieser.¹¹⁴ Testimony against the bill at these House meetings included ARC (Kay Taylor), Planned Parenthood (Jeri Rasmussen), the DFL Feminist Caucus (Jude Gartland), the American Association of University Women (Gloria Gebbard), the Minnesota Women's Political Caucus (Cory Howard), the YWCA (Patricia Tidmarsh), and others.¹¹⁵ The sole organization testifying in favor of the bill was MCCL, through its legislative director, Marice Rosenberg.¹¹⁶



Figure 2. MCCL's legislative director, Marice Rosenberg, 1980 (on right)¹¹⁷

O'Connor had brought the bill before the subcommittee and responded to questions about it. Other legislators were present

113. The Senate Saga of Wrongful Life and Wrongful Birth, 28.H.9.6F, Box 5, Folder "Legislative Files: Wrongful Birth Legislation, 1981-1982," KWT.

114. House File 1532 "Wrongful life or wrongful birth," 149.F.4.4(F), Box 1, Folder "Legislation: Minn: Hearing Notes, 1981-1982," KWT.

115. The Senate Saga, *supra* note 113.

116. *Id.*

117. *Legal Abortions Up 85% Since 1973*, MCCL NEWSLETTER, Mar. 1980, Box 2, Folder "Minn. Citizens Concerned for Life, Inc. 1968-1983," KWT.

beyond the committee members, including Representatives Peggy Byrne, Shirley Hokanson, and Kathleen Vellenga.¹¹⁸

- BYRNE: Can you limit [the] judiciary[?]
 O'CONNOR: Yes
 VELLENGA: How about pills during pregnancy[?] alcohol?
 HOKANSON: Questions by others about bill?
 O'CONNOR: I've had no problems with it[.]
 ELLINGSON: We went overtime to hear people against the bill . . . A lot of people don't like language[, there is] disagreement over bill
 HOKANSON: Is this bill [a] compromise?
 O'CONNOR: No. problem with subdivision 3. With Sieben—no other actions precluded.
 SWICKI (ATLA): problems with bill—amniocentesis—sub 2 would preclude from malpractice[,] no definition of aborted? IUD, AM pill.
 NYSEETHER: can't sue for not recommending abortion
 SWICKI: more than recommending
 ELLINGSON: Doctor didn't discover defect & didn't inform—baby is born—does baby have cause of action?
 HOKANSON: Some issues need more time—this is litmus test on abortion[.] I want to know what this bill is about.
 O'CONNOR: [It's] not [a] litmus test[.]¹¹⁹

Notes from the ARC lobbyist present at these meetings indicated that they were pervaded with confusion: "Direct quotations from the debate. 'I don't understand.' 'Can we clarify?' 'I stand confused,' I've never seen anything as confusing as this bill."¹²⁰

By the time of these subcommittee meetings, opposing sides were marshaling the common law in defense of arguments to

118. Judiciary, 149.F.4.4(F), Box 1, Folder "Legislation: Minn: Hearing Notes, 1981–1982," KWT.

119. *Id.*

120. Tape Message (Feb. 26, 1982), 28.H.9.6F, Box 5, Folder "Legislative Session, 1982," KWT.

permit or ban the actions. For example, Rosenberg had explained MCCL's position in a January 25 letter to legislators.¹²¹ The bill was not "meant to change the common law," Rosenberg explained.¹²² "Rather, this bill is an effort to codify what most jurisdictions have said the common law is."¹²³ Over half of her letter consisted of direct quotations from *Zepeda* and *Gleitman*,¹²⁴ suggesting that her comment makes the most sense if it refers only to jurisdictions that had entertained one of the three types of actions.

Contrasting with Rosenberg's use of the common law, the ARC lobbyist who had been closely following these bills emphasized that the proposed ban involved the legislature unduly interjecting itself into what otherwise would be a natural common law development:

My name is Kay Taylor. I am the lobbyist for the Abortion Rights Council. The Abortion Rights Council does not look upon S.F. 1461 as an abortion bill, but we do feel that this bill is an attack on health care for both women and men. I am speaking for those women and men. There is a premise in this country that any person who willfully or negligently injures another person is liable for damages. This bill exempts one area of medicine. . . . The trial on which this bill is based was *Sherlock v. the Stillwater Clinic*. The results of that trial may have been right or wrong—but the facts were presented in court for adjudication. Other trials may be based on other facts and each case should be judged on the merits . . . [n]ot on a legislative fiat that no cases can be presented on this subject. If this bill passes . . . [t]hose involved in a thalidomide type horror would have no recourse. . . . One way this bill could be related to abortion is the possibility that a doctor may not tell a patient that the embryo she is carrying has defects that might lead the patient to abortion. I think that we want full disclosure from doctors about our medical conditions, whatever they may be. This bill permits them to deliberately, even with malice, to withhold such information. Any law that allows lying and cheating of pregnant women is bad. I urge you to defeat this bill as contrary to general public policy.¹²⁵

The ARC lobbyist, Kay Taylor, had once been involved in Republican causes, from joining Wisconsin's Republican

121. Letter from Marice Rosenberg, Legislative Director, to Minnesota State Legislature (Jan. 25, 1982), 28.H.9.6F, Box 5, Folder "Legislative Session, 1982," KWT.

122. *Id.*

123. *Id.*

124. *Id.*

125. Testimony before Law Revision Subcommittee of Senate Judiciary (Feb. 1, 1982), 28.H.9.6F, Box 5, "Legislative Files: Wrongful Birth Legislation, 1981–1982," KWT.

Women's Club to chairing a Goldwater campaign in Minnesota's District 4.¹²⁶ She later became involved in abortion reform. Beyond lobbying for ARC, she was president of the Minnesota Council for the Legal Termination of Pregnancy.¹²⁷

Taylor attended a consortium the week after the Senate Judiciary Subcommittee meeting, which she found "[v]ery helpful in recruiting speakers against 'wrongful birth.'"¹²⁸ Taylor encouraged those at the consortium interested "in medicine from a consumer's view" to contact their legislators in opposition to wrongful birth.¹²⁹ Her initial descriptions of the bill saw it as "grant[ing] immunity from malpractice suits in one small area of medicine,"¹³⁰ but Taylor's views soon became more critical. She came to identify that the wrongful birth ban "may have severe implications for pregnant women,"¹³¹ eventually describing it as a "viciously anti-women bill" (she opposed the bill's ban of wrongful birth but did not indicate any objections to the wrongful life ban).¹³² Taylor shared the opinion of others who believed that the bill was "a litmus test of loyalty by the MCCL."¹³³

She also sought to engage legislators on the ban. "I spoke to Phyllis Kahn (a Ph.D. in genetics and a feminist legislator) about leading the fight on the floor" against the wrongful birth ban, she summarized in a mid-February memo, and Representative Kahn agreed to do so.¹³⁴ Kahn, a representative for Minneapolis, turned to politics as "a more useful way to create change" after encountering difficulties advancing in her academic career

126. *Katherine Wood Taylor: An Inventory of Her Papers at the Minnesota Historical Society*, MINN. HIST. SOC'Y, <http://www2.mnhs.org/library/findaids/00512.xml> (last visited Dec. 1, 2022).

127. *Id.*

128. Review of Activities February 8 Through February 13, 1982 (Feb. 13, 1982), 28.H.9.6F, Box 5, Folder "Legislative Session, 1982," KWT.

129. Tape Message (Feb. 8, 1982), 28.H.9.6F, Box 5, Folder "Legislative Session, 1982," KWT.

130. Tape Message (Jan. 29, 1982), 149.F.4.4(F), Box 1, Folder "Legislation: Minn: Hearing Notes, 1981-1982," KWT.

131. 1982, 149.F.4.4(F), Box 1, Folder "Legislation: Minn: Hearing Notes, 1981-1982," KWT.

132. Tape Message (Mar. 29, 1982), 28.H.9.6F, Box 5, Folder "Legislative Session, 1982," KWT.

133. 1982, *supra* note 131.

134. Report on Activities February 15 thru February 19 (1982), 28.H.9.6F, Box 5, Folder "Legislative Session, 1982," KWT.

despite equivalent credentials to her male colleagues.¹³⁵ When she and five other women were elected in 1972, there was only one other woman in the legislature.¹³⁶ In speaking with the press about H.F. 1532, Kahn described the bill “as ‘stupid.’”¹³⁷ Much like Taylor, Kahn believed that people supported the law only because “the MCCL told people to vote for it and they did.”¹³⁸

H.F. 1532 was heard twice on the House floor on Thursday, February 25. The bill at this stage included four subdivisions: one providing definitions of conception and fertilization, a second prohibiting wrongful life, a third prohibiting wrongful birth, and a final one “prohibiting a defense, an award of damages, or a penalty based on the failure or refusal to prevent a live birth.” Taylor’s notes include an abbreviated transcription of a tape recording, which captured the start of the first hearing:

O’CONNOR: rec’d to pass. reads intro[, this] keeps children from suing parents [for] not [being] aborted[,] parents [from] suing doctors [for] not doing ab[ortion].

LONG: question—market drug + did not inform about fetus danger? [i.e., does the bill preclude liability in these circumstances?]

O’CONNOR: no it doesn’t—that’s product liability

LONG: Subd. 1 woman takes drug—carrying limbless—language would preclude suit.

O’CONNOR: true, [but] liability exists—product liability[,] 2 types of action precluded

KAHN: If it said that ok. Subdivision 3—tests or treatments—40’s or 30’s pregnant dr. amniocentesis—if dr. does not tell her about tests she would have no recourse—no malpractice

O’CONNOR: rt now is not illegal to not inform women of any health hazard of pregnancy. drs must comply.

135. Trailblazing Jewish Lawmaker, *The American Jewish World: Voices of Minnesota’s Jewish Community* (May 23, 2020), <https://www.ajwnews.com/trailblazing-jewish-lawmaker/>.

136. *Id.*

137. Banaszynski, *supra* note 108, at 4A.

138. *Id.*

- KAHN: explain lines 22 to p. 2¹³⁹—Tay Sach’s disease—no way could sue if dr. didn’t suggest tests
- O’CONNOR: can malpractice suit now be maintained?
- KAHN: yes
- O’CONNOR: language in Sub 3 wording will allow any action
- KAHN: Explain, please—Tay Sachs—no cure
- O’CONNOR: the language is hard to discuss—hypotheticals and that I don’t know if it can sue now
- KAHN: Tay Sach’s. Dr. does not have to do test [if this bill is passed?]
- O’CONNOR: If that is malpractice, then it is allowed.
- KAHN: provided there is cure etc. Tay Sach’s—abort or not abort—Dr. does not tell about test? Cause for malpractice now NOT if this bill passes.
- O’CONNOR: This has nothing to do with it. Nothing to do with abortion.
- KAHN: It is specifically included—”treatable[.]” you are encouraging malpractice. strike language of Sub 3. No problem. Protect incompetent physicians
- SIEBEN: amendment—moves adoption— . . . O’Connor has no objection. Clarifies dr. improperly doing sterilization. this bill preserves right for dr. to do sterilization.¹⁴⁰
- VOICE VOTE: everyone
- VANASEK: Sub. 3. really confusing[.] tell us what you are trying to accomplish?
- SHERWOOD: (on amendment) I’m getting nervous. If I follow the amendment, the bill is tossed out.

139. This line and page reference covers Subdivision 3 (“Wrongful Birth Action Prohibited”) and Subdivision 4 (“Failure or Refusal to Prevent a Live Birth”).

140. For the language of this amendment, see *infra* note 153 and accompanying text.

- O'CONNOR: controversy is over last lines [i.e., prohibiting a failure or refusal to abort from being raised as a defense]—the people who support this bill support the amendment
- SHERWOOD: tossing out language tosses out section 1+2 [i.e., see Peterson's next comment]
- O'CONNOR: sub 1+2 have nothing to do with malpractice
- PETERSON: I'm troubled. In an action of this sort, you should have had an abortion would be defense. Consider retention of language you are trying to accommodate
- O'CONNOR: Peterson, are you moving an amendment[?]¹⁴¹

An ARC update on its activism explained that, at this point, the bill remained “so confusing that the press has not even covered it.”¹⁴² Much like the concerns raised by Sherwood and Peterson, ARC described the bill's subdivision on “the failure or refusal to perform an abortion shall not be a defense” as “the most confusing part, since it must be intended to be something other than what it states.”¹⁴³

Taylor's notes for the second hearing indicate that she arrived late, at 3:50 p.m. Confusion remained in the second hearing, and some House members suggested laying the bill over.

O'CONNOR: debate has been long enough

141. Minnesota House Hearing on H.F. 1532 (Feb. 25, 1982), 149.F.4.4(F), Box 1, Folder “Legislation: Minn: Hearing Notes, 1981–1982,” KWT. Taylor mentions that some of her transcriptions are “from tape.” *Id.* The MHS and other archives, however, did not have any recordings of meetings or hearings related to H.F. 1532 and S.F. 1461.

142. *Activist Update*, Abortion Rights Council of Minnesota (Feb. 18, 1982), 149.F.4.4(F), Box 1, Folder “Abortion Rights Council of Minn. 1982,” KWT. That is, if the wrongful birth ban precludes doctors from being liable for a child's existence rather than the child counterfactually having been aborted, why then prohibit doctors from raising a defense that they would have refused to perform an abortion? The reason seems to have been to prevent doctors from raising this defense to escape wrongful *conception* liability, since this subdivision codified the right to that type of medical malpractice claim.

143. *Id.*

- CLAWSON: nothing has been clarified[.] I now hope we pass the bill. 87 word sentence—grateful for amendment.
- SHERWOOD: I don't know what we have here now.. We probably have nothing
- O'CONNOR: Strike Sub. 3 altogether. Amend [to] strike subd. 3.
- SIEBEN: O'Connor—shall we lay over? While we clarify.
- O'CONNOR: sub 3 is what we wanted to do. I withdraw my motion/amendment (to strike sub. 3) [. . .]
- SHERWOOD: I stand confused and I would appreciate laying the bill over [versus?] strike sub. 3
- O'CONNOR: we are doing the same thing here that we did in sub committee + full committee. Laying over won't do any good
- SHERWOOD: amend [to] strike all sub. 3 [or at least] balance of it. roll call vote.
- VANASEK: my signals are crossed. what difference to the bill [does it make to] strike or add?
- SHERWOOD: I want to preserve sub div 1 + 2. I would prefer laying over
- AYE: 32
- NAY: 80
- SHERWOOD: strike O'Connor amend[.] amend [to] add all subdiv. 3. reinstate all sub. 3 to original language. Roll call
- AYE: 65
- NAY: 59
- LONG: amendment—I've never seen as confusing a bill in 4 years. Introduced OUR/ARC amendment [i.e. Taylor's amendment on behalf of ARC]
- MCDONALD (chair): I speak against. This sounds simple. It should then go back to Judiciary to see if it meets requirements as to what we want to do.
- O'CONNOR: we worked on language—vote no
- MCCARRON: I'm in Sherwood's position—I'm confused. this bill was designed—here is an

amendment in English. this is clear concise American English.

O'CONNOR: we have no problem with subd. 1 and 2. we have problem with subd 3. vote down + get on.

MCCARRON: I thought Long's clear English is—what's wrong with it? wrong with it as a whole bill?

O'CONNOR: we got no problem—you're wasting our time.

MCCARRON: no waste of time

LONG: sure—amendment: our language himself . . . “or on behalf of another person” . . . and no court[.] roll call!

VANASEK: incorporate and then we can vote on one amendment

LONG: Ok—in interest of clarity 1. “himself or another person” because that person was born[.] roll call

JENNINGS: (next to Sherwood toward wall) bill language is clear

WEISER: ask[s] O'Connor—Sherwood [Sherlock] vs. Stillwater, can't sue if born?

O'CONNOR: [This bill] is more strict [i.e., banning wrongful life is more strict than what *Sherlock* required]

ROLL CALL: Long amend not adopted

HOKANSON: Sieben's language?

CHAIR: yes only amendment on bill

AYE: 99

NAY: 22¹⁴⁴

The language of Representative Sieben's amendment can be inferred. The language of Subdivision 4 at this point (which became Subdivision 3 with the elimination of the first subsection) was: “The failure or refusal of any person to prevent a live birth of a person shall not be a defense in any action, nor shall be considered in awarding damages or in imposing a

144. Minnesota House Hearing on H.F. 1532, *supra* note 141.

penalty in any action.”¹⁴⁵ This suggests that the Sieben amendment inserted the following italicized language:

*Nothing in this section shall be construed to preclude a cause of action for intentional or negligent malpractice or any other action arising in tort based on the failure of a contraceptive method or sterilization procedure or on a claim that, but for the negligent conduct of another, tests or treatment would have been provided properly which would have made possible the prevention, cure, or amelioration of any disease, defect, deficiency, or handicap; provided, however, that abortion shall not have been deemed to prevent, cure, or ameliorate any disease, defect, deficiency, or handicap. The failure or refusal of any person to perform or have an abortion shall not be a defense in any action, nor shall that failure or refusal be considered in awarding damages or in imposing a penalty in any action.*¹⁴⁶

The final draft of the bill with this language passed in the House on February 25, with 112 in favor and 22 opposed.¹⁴⁷

When H.F. 1532 passed in the House, S.F. 1461 was still in the Senate Judiciary Subcommittee for Law Revision. The following day, the chairman of the subcommittee, Senator Jack Davies, called Taylor at her home, asking her “to bring interested parties to his office to review new language that he had written for the bill.”¹⁴⁸ Taylor invited Chuck Weigher and Kathleen Meyerl of the Minnesota Medical Association (MMA) as well as Walk Swicki from the local chapter of the American Trial Lawyers Association (ATLA).¹⁴⁹ Taylor described that the “new language was acceptable to all of us although we did not believe that Olhoft would stay with the language on the floor.”¹⁵⁰

Thus some parties, including MCCL and Olhoft, wanted the Senate to retain the House language in H.F. 1532, which others like Davies opposed. The full Senate Judiciary committee heard H.F. 1532 on March 3, the last day for committee action.¹⁵¹ As Taylor summarizes,

Olhoft [then] presented the “strike everything” amendment. The new language passed with no debate or discussion. Olhoft stated that he would not amend the bill on the floor. Now it gets complicated. Davies[] plan was to delay getting the bill to the floor so it would pass with Senate language, then go to the House for concurrence [sic]

145. *Id.*

146. MINN. STAT. ANN. § 145.424, Subd. 3 (West 1982).

147. *Wrongful Birth Bill Approved*, *supra* note 100.

148. The Senate Saga, *supra* note 113.

149. *Id.*

150. *Id.*

151. *Id.*

rather than go to a Conference committee (where the House language would certainly be substituted.) Wayne Olhoft refused to “progress” (pull) the bill if others amended it on the floor. Davies “continued to hold his feet to the fire” by not releasing the bill from the Judiciary committee. “Behind in their paper work” was the excuse. On March 9, Davies asked Linda Berglin draw the bill from committee . . . The bill went to the Bill Referral subcommittee of the Rules committee . . . [which] decided that the bill was an abortion bill and had not belonged in the Judiciary committee at all. They reassigned it to Health, Welfare and Corrections. This reassignment must be passed by the full Rules committee. The Rules committee has no plans (March 11) to meet again. The Rules committee met at 9 a.m. March 12. They did not discuss H.F. 1532.¹⁵²

Taylor’s notes suggest little action was taken on S.F. 1461 over the next week and also indicate that she and others had turned their attention to national reproductive politics and a version of a Human Life Amendment in Congress.¹⁵³

Though there may have been little action or change to the bills over the following week, March appears to be the first time that this legislation was covered by the press. This included two interviews that Taylor gave on March 3, one with Jim Ragsdale from the *Minneapolis Tribune* (which merged with the *Minneapolis Star* a month later), and another with Jan Falstad of WCCO-Radio that aired the following day.¹⁵⁴ Taylor also developed “a sheet of facts on the bill for our pro choice friends in the Senate and for the press,” which she hand-delivered to twenty Senators.¹⁵⁵

The earliest newspaper article in ProQuest that covered the bills is from a week and a half later. Perhaps the author had access to Taylor’s fact sheet, and the article also relied on data from ATLA on verdicts and settlements. At the time, ATLA reported that the highest wrongful conception award was \$450,000 for a child born with an impairment after an unsuccessful tubal ligation.¹⁵⁶ ATLA explained that larger sums had been obtained in out-of-court settlements, including a California hospital’s agreement to pay \$900,000 to settle a case

152. *Id.*

153. Taylor called Senator Biden, for example, as a potential sway vote on such an amendment at 8:55 a.m. on March 10. *See* Tape Message (Mar. 10, 1982), 28.H.9.6F, Box 5, Folder “Legislative Session, 1982,” KWT.

154. *See* Memorandum from Katherine Wood Taylor to Merri (1982), 28.H.9.6F, Box 5, Folder “Legislative Session, 1982,” KWT.

155. *Id.*

156. Dullea, *supra* note 18, at A-11.

involving Down's syndrome.¹⁵⁷ It also found that the largest settlement for a child born healthy was \$110,000, awarded to a St. Louis woman who already had three children and gave birth to twins despite having obtained a tubal ligation.¹⁵⁸

MCCL also updated its supporters on the bill's status in March and April. Its newsletter explained that "in order to insure a hearing in the Senate Judiciary Committee chaired by Sen. Jack Davies, the bill's chief Senate author Wayne Olhoft had to agree not to oppose any amendments attached by the committee."¹⁵⁹ "[W]hen the legislation emerged," MCCL continued, "it had been gutted to the point that the Abortion Rights Council was telling its supporters that there was nothing objectionable in it."¹⁶⁰ Since Olhoft agreed not to oppose any amendments, Senator Kroening adopted the role of returning to the original House language.¹⁶¹

The final bill passed in the Senate on March 14, by a vote of 46 to 15, which incorporated the following revisions to the original language, plus the Sieben amendment above:

157. *Id.*

158. *Id.*

159. MCCL Newsletter, Apr. 1982, at 3, Box 2, Folder "Minn. Citizens Concerned for Life Newsletters 3: Jan. 1981–May 1982," KWT.

160. *Id.*

161. *Id.*

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

10 Section 1. [145.424] [PROHIBITION OF TORT ACTIONS.] *Olhoff delete*

11 Subdivision 1. [DEFINITION.] For the purpose of this

12 section, "to conceive" means to fertilize a human ovum by a

13 human sperm. Fertilization is deemed to have occurred when the

14 sperm penetrates the cell membrane of the ovum.

15 Subd. 2. [WRONGFUL LIFE ACTION PROHIBITED.] No person

16 shall maintain a cause of action *on behalf of himself* or receive an award of damages

17 on behalf of himself based on the claim that *but for the*

18 *due to* negligent conduct of another, he would not have been *conceived*

19 or, once conceived, would not have been *permitted* to be born

20 alive.

21 Subd. 3. [WRONGFUL BIRTH ACTION PROHIBITED.] No *person (Olhoff)*

22 shall maintain a cause of action or receive an award of damages

23 on the claim that but for the conduct of another, *a* ~~his~~ child

24 would ~~not~~ have been ~~permitted to be born alive.~~ *aborted*

25 Subd. 4. [FAILURE OR REFUSAL TO PREVENT A LIVE BIRTH.] The

26 failure or refusal of any person to *perform or have abortion* ~~prevent~~ a live birth of a

Figure 3. Taylor's markups indicating revisions to the original language

Newspaper coverage after its passage suggested how the final law still reflected a clash of viewpoints.



Figure 4. Local coverage after ban passes the House and Senate

On the one hand, Kahn argued in the article that the law enabled “anti-abortion physicians” not to recommend options that would make abortion more likely.¹⁶² Because of the ban, “doctors don’t have to do anything—they can just pat the woman’s stomach and say she is getting along fine,” Kahn said.¹⁶³ On the other, Olhoft insisted that parents “still could sue a doctor for malpractice if they believed the doctor neglected to suggest prenatal examinations.”¹⁶⁴ In this coverage of the bills, wrongful life carried the headline and led the story as well, which begins, “Children won’t be allowed to sue their parents for bringing them into the world.” Wrongful birth only comes in at the third paragraph.¹⁶⁵

The paths of H.F. 1532 and S.F. 1461 resulted in Minnesota Statute Section 145.424, approved on March 22:

Subd. 1. Wrongful life action prohibited. No person shall maintain a cause of action or receive an award of damages on behalf himself based on the claim that but for the negligent conduct of another, he would have been aborted.

Subd. 2. Wrongful birth action prohibited. No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted.

Subd. 3. Failure or refusal to prevent a live birth. Nothing in this section shall be construed to preclude a cause of action for intentional or negligent malpractice or any other action arising in tort based on the failure of a contraceptive method or sterilization procedure or on a claim that, but for the negligent conduct of another, tests or treatment would have been provided properly which would have made possible the prevention, cure, or amelioration of any disease, defect, deficiency, or handicap; provided, however, that abortion shall not have been deemed to prevent, cure, or ameliorate any disease, defect, deficiency, or handicap. The failure or refusal of any person to perform or have an abortion shall not be a defense in any action, nor shall that

162. David Shaffer, ‘Wrongful Life’ Bill with Quie, ST. PAUL PIONEER PRESS, Mar. 15 1982.

163. *Id.*

164. *Id.*

165. *Id.*

failure or refusal be considered in awarding damages or in imposing a penalty in any action.¹⁶⁶

C. LEGISLATION IN OTHER STATES

This Article's legislative history examined a single state and legislative session, but this examination also suggested a lack of enough mobilization over these actions to produce laws in other places and times. Taylor's papers do not mention any previous bills to ban wrongful birth introduced into the Minnesota Legislature, for example, and they suggest that legislators as well as organizations like ARC and MCCL were not aware of any attempts to ban these actions elsewhere over the 1970s.

Though only South Dakota and Minnesota had been successful in passing bans of wrongful life and wrongful birth by the early 1980s, Taylor's papers did indicate some legislation in other states that was never passed into law. At the earliest stages of Minnesota's bills, for example, Taylor obtained information from leaders in Oregon NARAL.¹⁶⁷ The executive director, Phyllis Oster, noted that a bill to ban wrongful birth had been introduced into the Oregon Legislature in 1981, motivating NARAL to take specific advocacy positions over the action.¹⁶⁸ NARAL encouraged supporters to press the following points with their legislators:

2. The types of court actions that this bill would negate are traditionally covered under malpractice and negligence law. Cases of this type are note easily comparable. They should not be lumped together, but each one considered on its own merits by a court of law. Additionally, since the area of negligence and malpractice have traditionally been dealt with in the courts, the legislature is trying to redefine those theories in a very small area. Is this really necessary?

3. If the bill is passed, the legislature would be providing protection for doctors or labs who are negligent or who are intentionally withholding information from a patient. Why? There is no social benefit from this legislation at all except to remove the doctor's obligation to the patient of rendering

166. MINN. STAT. ANN. § 145.424, Subd. 3 (1982).

167. Letter from Phyllis Oster, Director, Oregon NARAL, to Oregon NARAL Members, April 1, 1981, 28.H.9.6F, Box 5, Folder "Legislative Files: Wrongful Birth Legislation," KWT.

168. *Id.*

medically sound advice. Are they encouraging negligence by passing this bill?

4.a. A woman has the constitutional right to choose abortion if she knows that her fetus may be born deformed or with some untreatable disease. If this legislation is passed and a doctor did not believe in abortion and did not inform the woman that she may have a high risk pregnancy, the doctor would not be liable.

b. In the event that a woman would choose to continue a high risk pregnancy, it is imperative that the woman and her family be informed of the possibility of a high risk pregnancy so that pregnancy could be well monitored and the family prepared for the extra care that might be needed.¹⁶⁹

Summarizing Oregon's bill, H.B. 2070, NARAL noted that its sponsors introduced it "at the request of Right to Life, Oregon."¹⁷⁰

Oregon is the only other state with similar legislation mentioned in Taylor's papers, but there are others. In Wisconsin, for example, where the wrongful birth claim had been permitted since 1975, a bill to override this precedent and ban the action was introduced on June 24, 1981.¹⁷¹ This bill too never became law. Another bill to ban wrongful birth and wrongful life was debated the same year in Pennsylvania.¹⁷² Legislators attempted to ban wrongful life and wrongful birth after the state's supreme court recognized wrongful birth in 1981, though they were only successful in doing so after a series of attempts over several years.¹⁷³

Finally, California joined South Dakota and Minnesota in passing legislation into law that regulated these actions in the early 1980s. In two decisions between 1980 and 1982, California's appellate and supreme courts recognized a right to wrongful birth and also made the state the world's first jurisdiction to permit the wrongful life claim.¹⁷⁴ In response to this latter precedent, the California Legislature passed a law that prohibits plaintiffs from bringing wrongful life claims

169. *Id.*

170. *Id.*

171. Assemb. J., 85th Regular Session, at 667 (Wis. 1981).

172. Legis. J., 172nd Gen. Assemb., 1988 Sess., at 1965 (Pa. 1988).

173. *Id.*

174. *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982); *Curlender v. Bio-Science Laboratories*, 165 Ca. Rptr. 477 (Cal. App. Ct. 1980).

against their parents.¹⁷⁵ Despite these notable cases, it was *Sherlock* rather than this Californian precedent that recurred in conversations about Minnesota's legislation. At the same time, it seems likely that California becoming the first jurisdiction to recognize wrongful life would have been a contributing factor, given that one of the bill's authors, Olhoft, explained his original motivations as stemming from a pamphlet he had read that discussed wrongful life.¹⁷⁶

III. MIDWESTERN BANS IN BROADER PERSPECTIVE

Zoomed in to the legislative history behind one state's ban, the prior Part revealed how Minnesota's ban was a product of disagreement and clashing interests, but also bipartisan convergence. In addition, far from being animated only with cabined concern over two types of torts that had never been brought in the state, these debates were directly and indirectly about reproductive politics, reflected in the conclusion of several people that the bill was a "litmus test" from MCCL.¹⁷⁷

This final Part places Minnesota's ban in a broader perspective. Part III.A unpacks demographic information about the legislature that enacted this ban and draws on this information to analyze its passage. Part III.B turns to the ban's aftermath, as plaintiffs sought to have it declared unconstitutional under *Roe* and Minnesotan precedent. Finally, while the prior Parts have provided the views of judges, legislators, and litigants, Part III.C captures how doctors responded to Minnesota's bans.

A. ANALYZING THE PASSAGE OF MINNESOTA'S BAN

Minnesota's seventy-second legislature that heard H.F. 1532 and S.F. 1461 was controlled by the DFL.¹⁷⁸ This reflected control that Democrats had held for much of the 1970s. From 1973 to 1978, the DFL controlled the House, Senate, and governorship.¹⁷⁹ With Walter Mondale serving as Vice

175. CAL. CIV. CODE § 43.6 (Deering 1982).

176. See Banaszynski, *supra* note 108.

177. See Judiciary, *supra* note 118.

178. See *Legislative Party Control: A Chart, 1901–Present*, MINN. LEGIS. REFERENCE LIBR., https://www.lrl.mn.gov/history/caucus_table (last visited Dec. 1, 2022) (showing the parties which controlled each house and when).

179. *Id.*

President, Wendell Anderson resigned as governor to fill his seat in the U.S. Senate in 1976, and Rudy Perpich assumed the governorship.

This streak of control by Democrats ended with the election of Republican Al Quie as governor, as well as an equal division of the House between the DFL and Republicans in 1979, the only time that Minnesota's House has been evenly divided.¹⁸⁰ The even split developed after surprising gains for Republican candidates in the 1978 general election, though it initially left the House "effectively paralyzed" because of impasses over the speakership.¹⁸¹ After "[i]ntense around-the-clock negotiations" in the first week of the new year, House members agreed that, among other things, Republicans would get the speakership while the DFL would chair "the three most powerful House committees: rules, taxes and appropriations."¹⁸² Over the session, the DFL gained a majority through unseating Representative Robert Pavlak.¹⁸³

Thus when Minnesota's wrongful birth legislation arose, the DFL had held power for years, it retained control of the Senate, but its influence in the House was more precarious than it had been for much of the 1970s.¹⁸⁴ The DFL held 103 seats in the House to 31 Republicans at the start of the seventieth legislature (1977–1978), the seventy-first (1979–1980) was split 66 to 66 and eventually DFLers led 67 to 66, and the DFL won 70 seats to 64 by Republicans in the seventy-second (1981–1982).¹⁸⁵

Taylor's tallying of votes in combination with biographies of legislators available through the Minnesota Legislative Reference Library permits a breakdown of the party, sex, race, and religion of legislators. The demographics in the following tables and paragraphs come from finding the webpage that the library created for each of the 201 legislators in the seventy-

180. *Id.*

181. Tim Walker, *The Year the House Was Tied, and How the Two Parties Made Peace . . . Until They Didn't*, MINN. HOUSE OF REPRESENTATIVES (May 11, 2020), <https://www.house.leg.state.mn.us/sessiondaily/Story/15307> (describing an attempt at cooperation between political parties in Minnesota).

182. *Id.*

183. *Id.*

184. See *Legislative Party Control*, *supra* note 178.

185. *Id.*

second legislature and recording the information provided on those pages.¹⁸⁶ For H.F. 1532, votes broke down as follows:

Table 1. House votes on H.F. 1532, February 25, 1982

H.F. 1532				
Yes	Party	Republican: 59		DFL: 53
	Sex	Men: 101		Women: 12
	Race	White: 111		Other: 1
	Religion	Cath.: 36	Luth.: 27	None: 26
No	Party	DFL: 19		Republican: 3
	Sex	Women: 14		Men: 8
	Race	White: 21		Other: 1
	Religion	None: 7	Luth.: 4	Cath.: 4

For S.F. 1461, votes were:

Table 2. Senate votes on S.F. 1461, March 14, 1982

S.F. 1461				
Yes	Party	DFL: 34		Republican: 18
	Sex	Men: 48		Women: 3
	Race	White: 50		Other: 1
	Religion	None: 15	Luth.: 14	Cath: 12
No	Party	DFL: 10		Republican: 5
	Sex	Women: 13		Men: 2
	Race	White: 21		Other: 0
	Religion	None: 5	Luth.: 3	Episc.: 2

Combined, votes on H.F. 1532 and S.F. 1461 were:

Table 3. Total votes between H.F. 1532 and S.F.1461

H.F. 1532 and S.F. 1461 Total				
Yes	Party	Republican: 78		DFL: 77
	Sex	Men: 149		Women: 15
	Race	White: 161		Other: 2

186. See *Minnesota Legislators Past & Present*, MINN. LEGIS. REFERENCE LIBR., <https://www.lrl.mn.gov/legdb/> (last visited Mar. 30, 2023).

	Religion	Cath.: 48	Luth.: 41	None: 41
No	Party	DFL: 29		Republican: 8
	Sex	Women: 27		Men: 10
	Race	White: 42		Other: 1
	Religion	None: 12	Luth.: 7	Cath.: 5

This demographic breakdown as well as the substance of the debates over these bills suggests gendered differences, party differences, and differences based on religious views. The authors of the bills were male and most of the votes supporting their passage were from men, in a legislature that was overwhelmingly male. In addition, most of the votes against the bans came from women. While support for the bills was almost equal between DFLers and Republicans, DFL members constituted a large majority of the opposition. And whereas most people supporting the bills identified as religious (though many did not), the most prevalent religious view among those who opposed the bills was “none indicated.”

Even though MCCL was involved, less than 2% of the legislature identified as either evangelical or Baptist. Evangelicals thus seemed to have been a small part of this lawmaking process. MCCL promoted the passage of H.F. 1532 and S.F. 1461, to be sure, but success in doing so depended on convincing legislators from many denominations. Indeed, the passage of H.F. 1532 and S.F. 1461 reflected agreement across denominations. Most of the legislators in the House and Senate identified as Catholic (26.4%), Lutheran (23.9%), Methodist (6.9%), or did not indicate any religion (26.4%). Of those who voted for H.F. 1532, Catholics constituted the largest group (32.1%), followed by Lutherans (24.1%) and those with no identified religion (23.2%). Of legislators against H.F. 1532, most were Christians (75%), but when split into denominations, those not indicating a religion made up the largest group (25%). In the Senate, of those who voted for S.F. 1461, no religion reported was the largest group (29.4%), followed by Lutherans (27.5%) and Catholics (23.5%). The largest group against S.F. 1461 was no religion reported (33.3%), then Lutherans (20%) and Episcopalians (13.3%).

In addition to indicating the minor role of evangelicals and collaboration across denominations, the breakdown of religious views also reveals the crucial importance that Catholic votes played in passing this legislation, as the largest religious group

in support of the bill was Catholics. Williams summarizes that “[t]he Minnesotan pro-life movement began in the 1960s[, a] small beleaguered, and almost exclusively Catholic effort” that fought “against a liberal Protestant push for abortion law reform.”¹⁸⁷ Most of the founding members of MCCL were Catholic too, though its first president was Protestant.¹⁸⁸ At the time of the state’s wrongful birth and wrongful life legislation, about 40% of Minnesota’s population was Catholic, which had developed especially from Irish and German immigration. Protestants constituted a larger proportion of the population but were split across a multiplicity of denominations.¹⁸⁹ The state elected its first Catholic governor with Perpich in 1982.

Protestants and Catholics forged new connections and collaborations in reforming law, policy, and society in the 1960s and 1970s over issues like war and social justice, which also revealed and shaped new divisions as well.¹⁹⁰ Abortion became one of these issues, manifesting among other ways through attempts to pass a federal Human Life Amendment, but for much of the 1970s, abortion had not yet brought sharp divisions along party lines. Polls in 1976, for example, indicated that 48% of Democrats favored a constitutional amendment prohibiting abortion to 44% who it opposed it, versus 48% of Republicans in favor to 47% in opposition.¹⁹¹ The same year also saw a presidential candidate running as a pro-life Democrat.¹⁹² But by the end of the decade, it had become clear that Democrats needed to win over the “increasingly vocal pro-choice wing” of the party to be viable candidates.¹⁹³ Hubert Humphrey, for example, sought to navigate positions on abortion to win over pro-choice as well as Catholic votes in his presidential bid.¹⁹⁴

While the particular legislative history at the core of this Article reflected collaboration across denominations, it also suggests an absence of other legislatures that enacted laws to

187. WILLIAMS, *supra* note 10, at 156–57.

188. *Id.* at 157.

189. Doug Rossinow, *Tradition, Schism, and Continuity in Minnesota’s Communities of Faith*, MNOPEdia (Jan. 17, 2014), <https://www.mnopedia.org/tradition-schism-and-continuity-minnesota-s-communities-faith>.

190. WILLIAMS, *supra* note 10, at 160–67.

191. *Id.* at 228.

192. *Id.* at 225.

193. *Id.* at 228.

194. *Id.* at 185–86.

regulate these actions. Why had laws not appeared in more states, or at the federal level, by the early 1980s? In-depth examinations not only of states like South Dakota, Wisconsin, California, Pennsylvania, and Oregon that entertained bills on these actions, but of every state's legislature, which may have brought these actions into conversations even when they were not the direct subject matter of a particular piece of legislation, could help answer this question.

In terms of the substance of the law and policy on which legislators were able to agree, contraceptive policy was a juncture at which competing interests reached consensus or compromise. Representative Kahn returned the legislature's attention multiple times to Tay Sach's and the issue of whether the proposed bans would preclude liability.¹⁹⁵ Tay Sach's and other diseases like cystic fibrosis and sickle cell anemia had gained greater visibility over the 1960s and 1970s through efforts by religious and ethnic communities to prevent births by using "novel methods [like] mass genetic testing and reproductive counseling," tools that were not without controversy.¹⁹⁶ The 1970s brought new hopes in genetic engineering and gene therapy, but Tay Sach's remained incurable, though contraception and abortion could be used to prevent it.¹⁹⁷ After Kahn raised Tay Sach's, Sieben proposed his amendment to add language preserving the availability of wrongful conception.¹⁹⁸ It seems likely that Kahn's example motivated at least some House members in their votes to adopt the Sieben amendment.

Given that Minnesota and South Dakota both banned two actions—wrongful birth and wrongful life, it is possible that one of these carried more weight than the other in convincing legislators to support the ban. The legislative history of H.F. 1532 and S.F. 1461 does not indicate that anyone opposed the wrongful life ban at any of the hearings of these bills. Groups like MCCL strongly urged legislators to ban wrongful life, while those like ARC and Planned Parenthood defended wrongful

195. Minnesota House Hearing on H.F. 1532, *supra* note 118.

196. KEITH WAILOO & STEPHEN PEMBERTON, THE TROUBLED DREAM OF GENETIC MEDICINE: ETHNICITY AND INNOVATION IN TAY-SACH'S, CYSTIC FIBROSIS, AND SICKLE CELL DISEASE 16 (2006).

197. *Id.*

198. Minnesota House Hearing on H.F. 1532, *supra* note 118.

birth but not wrongful life.¹⁹⁹ Supporting a ban of wrongful life could therefore permit a legislator to pass litmus tests by *both* pro-life and pro-choice interest groups.

Finally, mapping out the votes over H.F. 1532 and S.F. 1461 indicates Democrats wielding greater urban influence and Republicans more rural influence. Drawing on the Minnesota Legislative Reference Library's collection of historical maps, below are districting maps from 1972. Minnesota's federal district court determined these district lines to be unconstitutional in 1981, but the legislature did not create a new map until just after S.F. 1461 passed in the Senate.²⁰⁰ The votes on the bill in the House and Senate are depicted with the districts of the legislators who voted for the ban shaded in red, and with votes in opposition indicated in white:

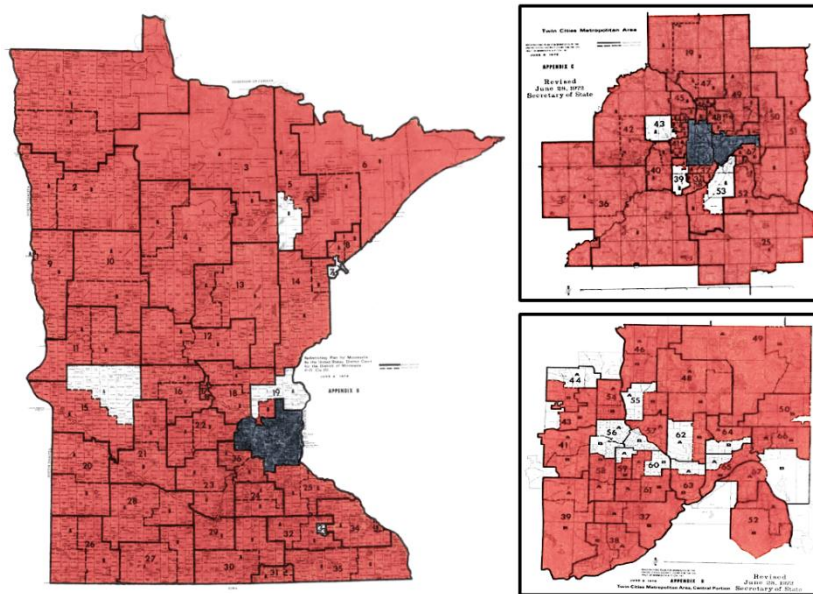


Figure 4. H.F. 1532 Votes Statewide, Twin Cities Metro, Metro Central

199. See, e.g., *supra* notes 125–137 (Taylor's activism in opposition to wrongful birth ban).

200. See *Lacomb v. Grove*, 541 F. Supp. 160, 160 (D. Minn. 1982) (“Because the Legislature has failed to fulfill its constitutional obligation to equitably reapportion the State, this Court must do so.”).

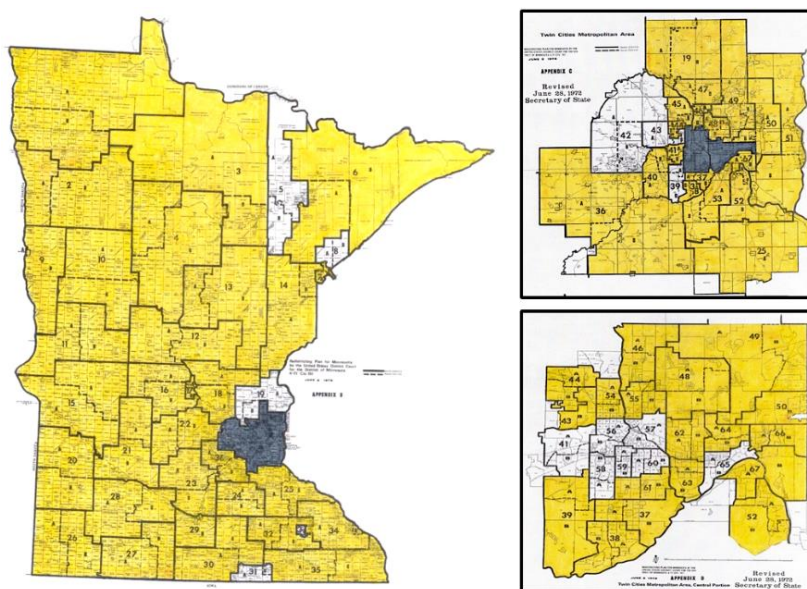


Figure 5. S.F. 1461 Votes Statewide, Twin Cities Metro, Metro Central

The above maps reflect how votes opposing the ban were almost exclusively urban, namely, in the Twin Cities, though they were also found in the Iron Range near Hibbing and Duluth. But even in these areas, opposition to the bans was not unequivocal. Rather, only in one case (District 56) did a district's senator and its representatives oppose the bans. In every other district, at least one legislator voted for the ban, and in more rural areas, support for the bans was almost universal.

B. MINN. STAT. 145.424 AND HICKMAN V. GROUP HEALTH PLAN

Plaintiffs challenged the wrongful life and wrongful birth bans in Minnesota Statute Section 145.424 soon after its enactment, asking that the law be invalidated as unconstitutional under federal and state law. *Hickman v. Group Health Plan, Inc.* (1986) involved plaintiffs who gave birth to a child with Down's syndrome.²⁰¹ The parties disputed whether

201. 396 N.W.2d 10 (Minn. 1986).

the defendant obstetrician had offered prenatal testing.²⁰² The plaintiffs requested the court to declare Section 145.424 “as unconstitutional under *Roe v. Wade*” and “under article 1, section 8 of the Minnesota Constitution, guaranteeing a remedy for every wrong.”²⁰³

The Hennepin County District Court found Section 145.424 “unconstitutional under *Roe*,” on the grounds that *Roe* “established more than just a woman’s right to an abortion; it established the broader right to decide,” and the statute “allowed a doctor to withhold information that might have helped her form a decision on abortion.”²⁰⁴ The court only found the subdivision banning wrongful birth to be unconstitutional, not the ban of wrongful life, and the plaintiffs did not appeal on this front.²⁰⁵

On appeal, the Minnesota Supreme Court was presented with certified questions on the constitutionality of Section 145.424. It concluded that the statute did not violate Article 1, Section 8 of the Minnesota Constitution, which “only assures remedies for rights that vested at common law.”²⁰⁶ In addition to recognizing that “no such action exists at common law,” the court commented that “wrongful birth presents a myriad of public policy problems, including difficulty in ascertaining damages, increased litigation, and distinguishing between legislative and judicial roles.”²⁰⁷ It therefore took the choice of whether or not to recognize a new cause of action to be a task best left to the legislature, and the legislature had already manifested its intent with Section 145.424.²⁰⁸

Not finding a right to the wrongful birth action in the Minnesota Constitution, the court also did not find it in the U.S. Constitution.²⁰⁹ Beyond the impact of *Roe*, other Supreme Court cases like *Planned Parenthood v. Danforth* (1976) and *Thornburgh v. American College of Obstetricians and Gynecologists* (1986) animated the Minnesota Supreme Court’s

202. *Id.*

203. *Id.* at 11–12 (Minn. 1986).

204. *Id.* at 12.

205. *Id.*

206. *Id.* at 14.

207. *Id.* at 13.

208. *Id.*

209. *Id.*

reasoning in *Hickman*.²¹⁰ In *Thornburgh*, for instance, the Supreme Court “invalidated laws that forced doctors to provide clients with information discouraging abortion,” while in *Danforth* it “held unconstitutional [statutes giving] third parties the arbitrary right to veto the woman’s choice.”²¹¹ The Minnesota Supreme Court found that, “[u]nlike these” cases, “section 145.424, subdivision 2 does not directly interfere with the woman’s right to choose a safe abortion. The two parties, doctor and patient, are still left free to make whatever decision they feel is appropriate.”²¹²

As in *Hickman*, plaintiffs in wrongful birth cases often alleged that their right to sue was protected by the Constitution because of *Roe*. Legal commentators also declared this connection, insisting that “all decisions since *Roe v. Wade* that deny recognition of the [wrongful birth] action [are] ignoring the Supreme Court rulings regarding the individual’s right not to have children.”²¹³ Even when *Roe* was the law of the land, many courts resisted being pressured into this conclusion, as with the Minnesota Supreme Court in *Hickman*.

C. LEGISLATING REPRODUCTIVE LIABILITY

Rather than taking *Roe* to demand that the state must recognize wrongful birth, the Minnesota Supreme Court thought that the *Hickman* “plaintiffs stretched the United States Supreme Court abortion cases to the breaking point” in claiming that these cases compelled recognition of wrongful birth.²¹⁴ The court went on:

Parents here were as cognizant of the risks of a late pregnancy as were the doctors. How can it be said that the plaintiffs’ right to an abortion, therefore, was in anyway impaired? . . . By advising the patient about amniocentesis, appellant contends that there is as high as a 1 to 100 chance that the fetus will be injured if the patient elects to have the test; by not advising about the test, there is as high as a 1 in 350 chance that the child will be born with mental or physical defects. With either alternative, the doctor would be subject to a possible suit. How could the court require the state to provide a cause of action against a doctor faced with this Hobson’s choice? . . . We are fully aware of the situation that existed a mere quarter of a century ago

210. *Id.*

211. *Id.* at 13–14.

212. *Id.* at 14.

213. Donna K. Holt, *Wrongful Pregnancy*, 33 S.C. L. REV. 759, 793 (1982).

214. *Hickman*, 396 N.W.2d at 14.

when physicians' actions were scarcely ever challenged and there was very little or any accountability to anyone for decisions that they made. Those times have changed. The pendulum has now swung to the opposite extreme. Simply put, doctors must be returned some leeway in exercising judgment affecting the treatment of their patients without the fear of legal sanction.²¹⁵

The court therefore did not think it inappropriate for the law to determine standards of medicine but denied that this was required by *Roe*.

One can also see how the MMA valued medicine's autonomy yet could simultaneously convey support for medicine being answerable to the law in its commentary on the passage of H.F. 1532 and S.F. 1461:

Wrongful Life/Wrongful Birth Actions Prohibited — HF 1532 (O'Connor)/SF 1461 (Olhoft) Chapter 521
 Physicians may have an improved professional liability picture as the result of a tort reform bill pushed by Minnesota Citizens Concerned for Life. The law prohibits legal actions called wrongful life or wrongful birth actions, thereby preventing a child or parents from suing the physician for allowing the child to be born defective. No action has yet been brought in Minnesota, although several cases around the country have resulted in multi-million dollar judgments against physicians. Despite arguments of the bill's proponents that the measure will result in fewer abortions because fewer physicians will feel "compelled" to discuss prenatal screening and possible abortion with the parents, the MMA feels that the legal and ethical obligation to inform a woman of all treatment alternatives remains. The physician can then counsel against abortion depending on the physician's personal beliefs. The law attempts to preserve all tort actions for negligence except for wrongful life and wrongful birth, but ambiguities in this "savings" clause will likely need clarification by the Supreme Court.

Figure 6. The MMA envisages less liability with the state's wrongful birth ban

This is the only mention of these bills in *Minnesota Medicine* between 1981 and 1982.²¹⁶ On the one hand, this comment nowhere outright rejects the ban, nor does the MMA identify any position that it took during the legislative process, even though MMA delegates helped pro-choice groups oppose the ban.²¹⁷ Rather, the MMA merely notes that this outcome lessens liability for doctors.²¹⁸ On the other, it also makes clear that "the

215. *Id.*

216. *Wrongful Life/Wrongful Birth Actions Prohibited*, 65 MINN. MED., Jan. 1982, at 320.

217. *See supra* notes 130–134 and accompanying text.

218. *See Wrongful Life/Wrongful Birth Actions Prohibited, supra* note 216, at 320.

MMA feels that the legal and ethical obligation to inform a woman of all treatment alternatives remains.”²¹⁹ The MMA could therefore show ostensible support for the law and for reproductive rights, while simultaneously benefiting from a specific statute that limited *Roe*’s impact by reducing medical liability, and that accorded greater autonomy to medicine.

However, from the perspective of doctors or even the general public, was this really just another “tort reform bill pushed” by interested parties, as the editors of *Minnesota Medicine* indicated? The country had witnessed a first wave of tort reforms in the mid-1970s, laws responding to dramatic increases in medical malpractice claims, especially against obstetricians, as well as worries about the consequent accessibility and solvency of insurance companies for physicians.²²⁰ The Department of Health, Education, and Welfare had pursued an early attempt to study this rise in lawsuits, forming its Commission on Medical Malpractice in 1973.²²¹ In addition to changes like physician-owned insurance options, damages caps were another piece of tort reform laws passed in 49 states in the 1970s.²²² But none of these changes appear to have targeted wrongful birth, wrongful conception, or wrongful life.

A second wave of tort reforms took shape in the early 1980s, marked by a spike in physician insurance premiums.²²³ Both of these waves developed during “explosive growth in certain kinds of tort liability,” including increases in the number of claims against physicians and the severity of claims in terms of the size

219. *Id.*

220. For an analysis of medical malpractice claims involving obstetric care, see COMMITTEE TO STUDY MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE, *MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE* (1989). For broader examinations of medical malpractice in the 1970s and 1980s, see, e.g., PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* (1990); AMERICAN MEDICAL ASSOCIATION, NATIONAL MEDICAL SPECIALTY SOCIETY COORDINATION PROJECT ON PROFESSIONAL LIABILITY, *A PROPOSED ALTERNATIVE TO THE CIVIL JUSTICE SYSTEM FOR RESOLVING MEDICAL LIABILITY DISPUTES: A FAULT-BASED, ADMINISTRATIVE SYSTEM* (1988); George Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L. J.* 1521 (1987); PATRICIA DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* (1985).

221. See COMMITTEE TO STUDY LIABILITY AND OBSTETRICAL CARE, *supra* note 220, at 2.

222. *Id.*

223. BERNARD S. BLACK, ET AL., *MEDICAL MALPRACTICE LITIGATION: HOW IT WORKS, WHY TORT REFORM HASN’T HELPED* 236 (2021)

of jury verdicts and settlements.²²⁴ Among other legal changes in the second wave were federal laws like the Health Care Quality Improvement Act of 1986.²²⁵ In addition, reproductive liability fueled beliefs that there was too much litigation, a topic that the National Academy of Sciences commissioned a group to examine in 1989.²²⁶ Drawing on numerous studies conducted over the decade, the group reported that “[c]laims against obstetrician-gynecologists are currently two to three times more numerous than the average for all other physicians.”²²⁷

Minnesota’s banning of wrongful birth and wrongful life therefore might seem to be just another tort reform bill, but evidence suggests otherwise. After all, the country’s first two bans arose before a single claim had been brought in either state. Tort reform also does not appear much if at all in the legislative hearings leading to these bans. Rather, reproductive politics proved to be far more front and center. What is more, the MMA *was* involved in the legislative process, but this was not to push an agenda of avoiding liability or curtailing patient rights. Rather, it was the opposite: the MMA joined organizations like ARC and Planned Parenthood in opposition to the wrongful birth ban.²²⁸

Thus another broader explanation could be that these bans were just another pro-life response to *Roe*. In many ways this is correct, for *Roe* transformed this domain of litigation, and legislative responses to these cases seemed unmistakably about reproductive politics.²²⁹ But as the Minnesota Supreme Court pointed out in *Hickman*, the target of these bans was not “directly” *Roe*.²³⁰ This is not to deny that such bans were part of

224. COMMITTEE TO STUDY LIABILITY AND OBSTETRICAL CARE, *supra* note 220, at 3.

225. 42 U.S.C. §§ 11101–11115.

226. See COMMITTEE TO STUDY LIABILITY AND OBSTETRICAL CARE, *supra* note 220.

227. *Id.* at 2.

228. See *Wrongful Life/Wrongful Birth Actions Prohibited*, *supra* note 216, at 320.

229. See *supra* Part I.B.

230. The Minnesota Supreme Court in *Hickman* denied that the wrongful birth ban “directly” impacted abortion, a requirement from *Maher v. Roe*, 432 U.S. 464 (1977):

The statute does not forbid the doctor to inform the patient of new tests and the risks they entail. It does not directly touch on the expectant mother’s right to choose an abortion . . . [S]ection 145.424 subdivision 2 does not directly interfere with the woman’s right to choose a safe

a pro-life response to *Roe* but rather to spotlight the nuances of state-level litigation and legislation that abortion politics writ large can overshadow. The cases discussed touch on numerous ethical questions and debates about the value of existence, the interests of parents in shaping their own lives, whether it can be better never to come into existence, gendered differences in childrearing, and other topics beyond debates over whether or not abortion is in the Constitution. And the actors in this Article who engaged in these debates did so not with long-established pro-life or pro-choice positions in hand, but rather as pro-life and pro-choice groups appeared to be concretizing their own positions on these actions for the first time. Tending to the nuances and details of responses to these actions is still consistent with seeing responses to them, in the end, as responses to *Roe*, in terms of flowing from precommitments with respect to abortion politics.

Finally, to the extent that wrongful birth bans were not “directly” about abortion, at the very least, they seemed directly about the public policy of reproductive technologies. The *Hickman* court agreed with the ban’s initial authors that the ban was not directly about abortion because, among other reasons, it did not ban abortions, did not restrict access to abortions, and did not interfere with the doctor-patient relationship by forcing

abortion If doctors know they can be sued for money damages, presumably they will be more likely to practice medicine carefully. Presumably, too, doctors try to be careful whether or not they can be sued. But in an imperfect world, even with lawsuits, people will still be careless. This is not to denigrate the tort remedy, but only to observe the indirect and problematic consequences of the absence of a tort deterrent does not constitute a direct impact that intrudes on a person’s constitutional right to choose whether or not to have an abortion The United States Supreme Court, in other situations, has required a “direct” impact on the woman’s abortion decisionmaking.

Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 13–14, 16–17 (Minn. 1986). The dissent, by contrast, did see a direct effect, emphasizing Supreme Court cases that struck down informational requirements:

The legislature’s removal of the negligence action safeguard, while not preventing a woman from actually obtaining an abortion, does harm the complete exercise of a woman’s rights under *Roe*. I see this as a direct infringement on the informed decisionmaking process as enunciated in *Roe* Restrictions that circumvent the rights of a woman to make an informed decision on abortion, or that directly impede upon the decisionmaking process by imposing unnecessary requirements, have been held unconstitutional.

Id. at 19 (Amdahl, C.J., dissenting) (internal citations omitted).

doctors to speak or not speak.²³¹ But the acts or omissions of defendants at issue in such cases can take many forms, such as failing to ask if a patient was pregnant or intending to become pregnant, misdiagnosing a rash, failing to recommend or order tests, or neglecting or intentionally withholding test results. Liability over an expansive array of activities and technologies such as these may change after *Dobbs*, especially in jurisdictions that took *Roe* to compel recognition of wrongful birth.

CONCLUSION

This Article captured a time and space in which pro-life Democrats worked in collaboration with Republicans to shape abortion policy, before most states had yet to work out their own responses to wrongful life, wrongful conception, and wrongful birth claims. As this body of case and statutory law took shape into the twenty-first century, bans of wrongful life became widely accepted, but wrongful birth bans became a minority view. While more than a dozen states have banned it,²³² half of states recognize it.²³³

This national landscape, however, took shape under the shadow of *Roe*. When it was the law of the land, was there a right to wrongful birth protected by the Constitution? More circuit courts than not have affirmed state decisions that found wrongful birth as a guarantee of *Roe*. The Eighth Circuit approved of wrongful conception in 1978,²³⁴ the Seventh, Ninth, and Tenth Circuit affirmed wrongful birth decisions in the 1980s and 1990s,²³⁵ and the Fourth Circuit also did so in 2016.²³⁶ The

231. Hickman, 396 N.W.2d at 12–15.

232. These include South Dakota, Minnesota, Utah, Idaho, North Carolina, Missouri, Pennsylvania, Georgia, Michigan, Kentucky, Arizona, Kansas, Oklahoma, Arkansas, and North Dakota. See Luke Isaac Haqq, *The Impact of Roe on Prenatal Tort Litigation: On the Public Policy of Unexpected Children*, 13 J. TORT L. 124, fig. 5 (2020).

233. These include Texas, Wisconsin, New York, New Jersey, California, Florida, Wyoming, South Carolina, Washington, West Virginia, New Hampshire, Illinois, Colorado, Virginia, Delaware, Maine, Massachusetts, Alabama, Maryland, Nevada, Indiana, Ohio, and Connecticut. See *id.*

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

235. Robak v. United States, 658 F.2d 471, 476 (7th Cir. 1981); Harbeson v. Parke Davis, Inc., 746 F.2d 517, 524 (9th Cir. 1984); Duplan v. Harper, 188 F.3d 1195, 1199 (10th Cir. 1999).

236. Simms v. United States, 839 F.3d 364, 368 (4th Cir. 2016).

Ninth Circuit reaffirmed its stance after *Dobbs*.²³⁷ The First Circuit and the Eleventh Circuit, however, upheld judicial and statutory bans of wrongful birth in 2018 and 2019, respectively.²³⁸

After *Dobbs*, it seems possible that case or statutory law could change in any state.²³⁹ States that do not recognize these actions might alter that precedent, perhaps in opposition to *Dobbs*, just as states that currently recognize them might revisit the issue. In Minnesota, Democrats control the Senate, House, and governorship, and the legislature passed the Protect Reproductive Options Act at the start of 2023, divided sharply along party lines. The new law uses language that effectively eviscerates, or at least is in tension with, the state's wrongful birth ban, through it does not challenge the state's ban on wrongful life.²⁴⁰ Other jurisdictions have brought Comstock era laws back into effect. Such recent events are suggestive that defining reproductive liability will continue to be a matter of deep contestation. Though once seeming to be a *fait accompli* because most states already have case or statutory law that prohibits or permits these actions or circumscribes damages, their future status could be as changeable as shifting political tides.

237. *Pacheco v. United States*, 48 F.4th 976, 978 (9th Cir. 2022).

238. *Doherty v. Merck & Co.*, 892 F.3d 493, 498 (1st Cir. 2018); *Zelt v. Xytex Corp.*, 766 Fed. App'x 735, 741 (11th Cir. 2019).

239. For others mentioning the possibility of *Dobbs* affecting the landscape of wrongful birth, see, for example, Gerard Magliocca, *Wrongful Birth Actions*, PRAWFSBLAWG (Aug. 6, 2022), <https://prawfsblawg.blogs.com/prawfsblawg/2022/08/wrongful-birth-actions.html>; E. Travis Ramey, *Wrongful Birth after Dobbs*, SSRN (Nov. 3, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4263215.

240. H.F. 1, Minn. Leg., 93rd Session (Minn. 2023). For example, this bill codified that “[e]very individual who becomes pregnant has a fundamental right [to] obtain an abortion, and to make autonomous decisions about how to exercise this fundamental right.” See MINN. STAT. § 145.409, subd. 3(b) (2023).