COMMENTS

Super *Suprynowicz*: Fertility Fraud and Noncognizable Wrongful Birth and Wrongful Life Claims

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Numerous states have adopted judge-made or statutory bans on tort claims for wrongful birth or wrongful life. Paradigmatically, these bans have prevented plaintiffs from recovering for allegations that a physician's negligence in diagnosing a fetus's abnormality denied the parents the opportunity to obtain an abortion, resulting in the birth of the plaintiff or the plaintiff's child. Courts are now confronting a new question: whether these bans bar recovery for a plaintiff's allegations of fertility fraud. In many of these recent cases, plaintiffs have alleged that their fertility doctor switched out the chosen sperm with his own DNA. While courts have split on whether bans on wrongful birth and wrongful life cover fertility fraud claims, the Connecticut Supreme Court in Suprynowicz v. Tohan *provided a new framework for distinguishing fertility fraud allegations from these bans. This Comment weighs in on this recent development in the law, arguing that other states could draw on* Suprynowicz*'s framework to permit recovery for fertility fraud. Furthermore, this Comment investigates whether statutory bans apply to fertility fraud allegations, an inquiry that depends on statutory interpretation. Focusing on Michigan and Maine, this analysis reveals that the texts of these bans are ambiguous in their application to fertility fraud, but their purposes—to target claims based on a missed opportunity to receive an abortion and to reduce malpractice insurance premiums, respectively—both demonstrate that fertility fraud allegations likely survive the statutes. Ultimately, the increasing use of assisted reproductive technology, the growing availability of direct-to-consumer DNA testing, and the striking lack of regulation of the fertility industry combine to ensure that more instances of fertility fraud will come to light. Whether victims are able to seek redress for these shocking wrongs will depend, in part, on courts' willingness to allow their claims to survive these bans.*

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INTRODUCTION

For years, North Carolinian Summer McKesson baffled medical professionals: Her blood relentlessly clotted, and doctors could not explain why.[1] Even a single clot could be deadly, placing her at severe risk. She underwent multiple surgeries and travelled to see renowned specialists.[2] McKesson was a medical mystery.

Finally, following an urgent open-heart surgery, a physician discovered that McKesson had Marfan syndrome (a connective tissue disorder), along with a clotting disorder.[3] Yet these diagnoses only raised more questions. Both conditions were genetic, and no one in McKesson's family had them.[4]

She reported that she discovered the truth after taking a 23andMe test. She found that she had seven half-siblings. When she reached out, one replied, "I'd ask your parents if they went to see Dr. Peete."[5] McKesson alleged that she discovered that her mother's fertility doctor used his own sperm to inseminate her without her knowledge—an act that she describes as "medical

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[1] Chelsea Bailey, *How a DNA Test Solved a Medical Mystery—and Revealed a Doctor's Decades of Deception*, CNN (Oct. 25, 2025), https://www.cnn.com/2025/10/25/us/dna-test-fertility-fraud.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

rape."[6] McKesson was not alone. Jim Harris, McKesson's half-sibling, claimed that his parents planned to use an anonymous donor, but Dr. Charles Peete used his own sperm instead.[7]

Published in October 2025, McKesson's and Harris's stories are only two instances of a broader pattern, as more and more allegations of fertility fraud come to light.[8] Following the popularity of Netflix documentary *Our Father*, this issue has gained national attention.[9] There are numerous high-profile cases of doctors allegedly swapping their own sperm for the intended father's or the anonymous donor's genetic material.[10] Unfortunately, these instances are not rare or isolated. In the United States, more than fifty doctors have faced accusations of using their own sperm in fertility treatments without the patient's consent.[11] Similar (though less shocking) practices by cryobanks[12] have also surfaced: Cryobanks have allegedly misrepresented or failed to verify the educational background, criminal history, and medical history of donors.[13] Direct-to-consumer DNA testing enables parents and children to uncover these practices, and it seems likely that more instances of fertility fraud will be uncovered as time passes. Victims—both patients and their children—often suffer gravely from this conduct, experiencing emotional distress. Moreover, the children sometimes even endure physical harm through medical conditions they otherwise would not have inherited.[14]

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6 Bailey, *supra* note 1 (quotation marks omitted); *see also* Eric Miller, *Sins of the Father: Duke Fertility Victim Fights to Change NC Laws*, WRAL NEWS (Nov. 5, 2025), https://perma.cc/4EHM-Y9T6.

7 Bailey, *supra* note 1.

8 *Id.*

9 Lindsay Lee Wallace, *Netflix's* Our Father *Tells the True Story of a Fertility Doctor Who Used His Own Sperm on Patients*, TIME (May 12, 2022), https://time.com/6176310/our-father-true-story-netflix/; *see also* OUR FATHER (Blumhouse Television 2022).

10 *See* Jody Lyneé Madeira, *Understanding Illicit Insemination and Fertility Fraud, from Patient Experience to Legal Reform*, 39 COLUM. J. GENDER & L. 110, 115 (2020).

11 Mary Whitfill Roeloffs, *Doctors Impregnating Patients: Major Cases in 2023 Allege "Fertility Fraud" Lead to "Secret Children"*, FORBES (Dec. 15, 2023), https://www.forbes.com/sites/maryroeloffs/2023/12/15/doctors-impregnating-patients-major-cases-in-2023-allege-fertility-fraud-lead-to-secret-children/.

12 For the purposes of this Comment, cryobanks refer to institutions that store and sell sperm, eggs, and embryos. *See What is a Cryobank?*, SEATTLE SPERM BANK (2023), https://perma.cc/677H-NDQV.

13 *See, e.g.*, Norman v. Xytex Corp., 848 S.E.2d 835, 837–38 (Ga. 2020).

14 *See, e.g.*, Suprynowicz v. Tohan, 328 A.3d 646, 649 (Conn. 2025) (addressing the plaintiff's allegations of mental anguish, negative impacts on familial relationships, and inheritance of mast cell activation syndrome).

For the purposes of this analysis, this Comment uses "fertility fraud" to refer to conduct sometimes termed fertility fraud or fertility negligence.[15] This analysis considers three categories of misconduct, which often result in different types of claims against the fertility services provider. First, nonconsensual insemination[16] by a provider describes cases involving allegations like McKesson's: A doctor intentionally uses their own sperm, instead of the sperm of an expected donor or parent, to produce a patient's pregnancy without the patient's knowledge or consent.[17] Victims of these practices have advanced civil claims for fraud, battery, medical malpractice, lack of informed consent, intentional or negligent infliction of emotional distress, breach of contract, and statutory consumer protection violations.[18]

The second category involves misrepresentation by cryobanks of a donor's characteristics, including their mental and physical health history, educational attainment, and criminal background.[19] These cases typically arise from allegations that a donor lied about their history to the cryobank, which then failed to vet the donor—despite assuring patients that they thoroughly did so.[20] In other cases, plaintiffs have alleged that prior to conception, the cryobank was aware of the donor's history of inheritable diseases, but it failed to inform the recipient parents and made contrary representations.[21] This category of misconduct can be intentional or simply negligent. In these cases, plaintiffs have claimed fraud, negligence, negligent misrepresentation, products liability, breach of express and implied warranty, unfair business practices, and false advertising.[22]

Third, in the final category of fertility fraud cases, cryobanks allegedly provided gametes from a different donor than the one selected by the patient (e.g., the parents chose donor #100, but

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15 *See, e.g.*, Naomi Cahn & Sonia Suter, *Sperm Donation Is Largely Unregulated, but That Could Soon Change as Lawsuits Multiply*, DETROIT LEGAL NEWS (Jan. 24, 2022), https://perma.cc/L2MK-HAZL.

16 A common treatment for infertility, "[a]rtificial insemination is a medical procedure in which sperm is introduced into a woman's reproductive system using methods other than sexual intercourse." *Artificial Insemination*, YALE MED., https://perma.cc/ZT25-YV7J.

17 *See, e.g.*, Bailey, *supra* note 1.

18 *See, e.g.*, Rowlette v. Mortimer, 352 F. Supp. 3d 1012, 1019 (D. Idaho 2018).

19 *See, e.g.*, Zelt v. Xytex Corp., 766 F. App'x 735, 737–38 (11th Cir. 2019).

20 *See, e.g.*, AnneClaire Stapleton, *Sperm Donor Lied About Criminal and Mental Health History, Lawsuit Alleges*, CNN (Apr. 20, 2016), https://www.cnn.com/2016/04/19/health/sperm-donor-criminal-mental-health-history.

21 *See, e.g.*, Johnson v. Super. Ct., 124 Cal. Rptr. 2d 650, 654 (Cal. Ct. App. 2002).

22 *See, e.g.*, *Zelt*, 766 F. App'x at 741.

the cryobank accidentally provided donor #101).[23] Plaintiffs in these cases have alleged fraud, negligent misrepresentation, breach of warranty, breach of contract, gross and ordinary negligence, and state consumer protection violations.[24]

When bringing these civil claims, victims face several barriers to recovery. For instance, significant time often transpires between the fertility fraud itself and the plaintiffs discovering the injury, which sometimes means that statutes of limitations bar the plaintiffs' claims.[25] Perhaps the largest threat to the viability of these lawsuits, though, is that some states ban claims that sound in wrongful life or wrongful birth—claims alleging that misconduct resulted in the unwanted birth of a child—which may sweep in allegations of fertility fraud. Yet, recovery may still be possible for victims. In *Suprynowicz v. Tohan*,[26] the Connecticut Supreme Court offered a novel characterization of wrongful life claims, defining them in a way that would allow plaintiffs to allege fertility fraud without implicating wrongful life.[27] The court reasoned that wrongful life claims involve damages that are impossible to calculate and a defendant who is only indirectly responsible for the harm, factors missing from fertility fraud cases.[28] If the court's reasoning proves persuasive in other jurisdictions, this framework could help victims receive compensation for the shocking wrongs of fertility fraud while requiring accountability from providers facing allegations like Dr. Peete. This Comment is the first comprehensive discussion of the intersection between fertility fraud and wrongful birth and life to examine *Suprynowicz*'s framework.

This Comment considers whether allegations of fertility fraud constitute claims for wrongful life or wrongful birth. Specifically, using legislative history to discern purpose, this Comment argues that statutory bans on wrongful birth and wrongful life suits

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[23] *See, e.g.*, Cramblett v. Midwest Sperm Bank, LLC, 230 F. Supp. 3d 865, 867 (N.D. Ill. 2017).

[24] *See, e.g.*, *id.* at 868.

[25] *See, e.g.*, Sarah Chicoine, Comment, *The Birth of Fertility Fraud: How to Protect Washingtonians*, 95 WASH. L. REV. ONLINE 168, 181–82 (2020) (describing an Idaho court's determination that its two-year statute of limitations on medical malpractice barred a plaintiff's informed consent claim).

[26] 328 A.3d 646 (Conn. 2025).

[27] *See id.* at 651–53.

[28] *See id.* (explaining that the "two distinct characteristics of a wrongful life claim" are that "the defendant is not directly responsible for the injury to the child" and "the inherent difficulty of measuring damages").

need not treat fertility fraud claims as falling into these noncognizable categories. This Comment analyzes statutes in Maine and Michigan, which were selected for the availability of legislative history and the rates of use of assisted reproductive technology in those states. This Comment sheds new light on the inapplicability of these states' statutes to fertility fraud by conducting the first thorough investigation of Michigan and Maine's legislative history in this context.

In Part I, this Comment provides background information on the growth of the fertility industry and the issue of fertility fraud. Part II discusses the diverse case law developed in state courts considering whether allegations of fertility fraud constitute wrongful birth or wrongful life claims. Part III investigates the text and legislative history of statutes barring these claims in Michigan and Maine, determining that permitting plaintiffs to allege fertility fraud would be consistent with the purposes of these statutes. Finally, Part IV summarizes additional questions that courts will face in the aftermath of *Suprynowicz* and any future cases permitting recovery.

I. BACKGROUND ON FERTILITY FRAUD

A brief history of the fertility industry and fertility fraud is necessary to understand the legal treatment of this issue and the implications of bans on wrongful birth and wrongful life claims. This Part summarizes the development of assisted reproductive technology, the prevalence of allegations of fertility fraud, and the current state of regulation.

The earliest uses of assisted reproductive technology among humans occurred in the nineteenth century. In 1866, infamous doctor J. Marion Sims—known for his nonconsensual experimental surgeries on human subjects, particularly enslaved women—attempted to artificially inseminate women with their husbands' sperm fifty-five times, but this process resulted in only one pregnancy.[29] In 1884, without informing the patient or her husband, Dr. William Pancoast inseminated a woman with the

[29] *See* Kara W. Swanson, *The Birth of the Sperm Bank*, 71 ANNALS IOWA 241, 252 (2012).

sperm of one of his medical students.[30] Incidentally, this first instance of successful donor insemination was a case that, today, would be understood as fertility fraud.

Throughout the twentieth century, techniques in artificial insemination advanced,[31] and sperm banks grew into a commercial industry.[32] Today, the fertility industry looms large. In 2023, medical providers performed 432,641 cycles of in vitro fertilization (IVF), and 95,860 babies were born from IVF in the United States.[33] The global fertility market has been valued at over $30 billion.[34]

As the fertility industry grew, so too did claims of fertility fraud. Numerous high-profile cases of alleged fertility fraud arose in the later decades of the twentieth century. For instance, Dr. Donald Cline became notorious following a Netflix documentary about his alleged acts of fertility fraud.[35] Victims claimed that throughout the 1970s and 1980s, Dr. Cline told patients that he would use the intended father's or donor's sperm but instead supplied his own.[36] The public discovered these claims in 2015, after one of the children conceived took a 23andMe test.[37] More than three dozen of Cline's unwitting offspring have been allegedly identified this way, and more are still likely undetected.[38] Indeed, the advent and popularity of direct-to-consumer DNA testing has allowed individuals to discover otherwise hidden acts of fertility fraud, creating previously nonexistent opportunities

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30 Madeira, *supra* note 10, at 128; Peter G. McGovern & William D. Schlaff, *Sperm Donor Anonymity: A Concept Rendered Obsolete by Modern Technology*, 109 FERTILITY & STERILITY 230, 230 (2018).

31 W. Ombelet & J. Van Robays, *Artificial Insemination History: Hurdles and Milestones*, 7 FACTS, VIEWS & VISION OBGYN 137, 140 (2015).

32 *See id.*

33 *US IVF Usage Increases in 2023, Leads to over 95,000 Babies Born*, AM. SOC'Y FOR REPROD. MED. (Apr. 23, 2025), https://perma.cc/G5TX-7L3Z.

34 Editorial, *The Fertility Industry: Profiting from Vulnerability*, 404 LANCET 215, 215 (2024).

35 *See* Wallace, *supra* note 9.

36 Madeira, *supra* note 10, at 120.

37 *Id.*

38 Mihir Zaveri, *A Fertility Doctor Used His Sperm on Unwitting Women. Their Children Want Answers.*, N.Y. TIMES (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/us/fertility-doctor-pregnant-women.html.

for accountability. For example, in 2023, a Washington doctor voluntarily surrendered his medical license following allegations that he used his own sperm to impregnate a patient in 2009.[39]

The rise of cryobanks has also presented new problems in this area. Plaintiffs have filed lawsuits against cryobanks, alleging misrepresentation of their donor's characteristics.[40] Other plaintiffs have alleged accidental conduct by sperm banks. For instance, mother Jennifer Cramblett claimed that her cryobank mistakenly provided her with gametes from the wrong donor, resulting in the birth of her child.[41] In particular, Cramblett intended to use a white donor, but she claimed that the donor that the cryobank provided was Black.[42] An investigation into the practices of the fertility industry has found that "mix-ups of reproductive tissue by fertility clinics" are "shockingly common."[43]

Despite these issues, the fertility industry remains highly unregulated. Few federal regulations apply to cryobanks. The FDA requires cryobanks to screen genetic material for *infectious* diseases, which could pass to the recipient parent through bodily contact, but not for genetic diseases.[44] The Fertility Clinic Success Rate and Certification Act of 1992[45] forbids the Centers for Disease Control and Prevention (CDC) from regulating "the practice of medicine in assisted reproductive technology programs."[46] Instead,

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39 Ashley Hiruko & Diana Opong, *"Such a Violation": Patients of Former UW Doctor Accused of Fertility Fraud Grapple with Uncertainty, Tough Choices*, KUOW (Jan. 5, 2024), https://perma.cc/E28J-8FTP.

40 *See* Norman v. Xytex Corp., 848 S.E.2d 835, 837–38 (Ga. 2020).

41 *Judge Throws Out Lawsuit Against Sperm Bank*, CBS NEWS (Sept. 4, 2015), https://perma.cc/6P5X-CY3M.

42 *Id.* For a more detailed discussion about the sensationalization of the news of similar lawsuits and racial disparities in the use and availability of assisted reproductive technology, see DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 258–72 (1997). Professor Dorothy Roberts has described the relationships between the rise in assisted reproductive technology, eugenics, and fears about declining white population levels. *See id.* at 276–79. While Roberts provided an overview of this issue in 1997, racial disparities remain prevalent today. Approximately 3% of sperm donors in the United States' largest cryobanks are Black. Bek Shackelford, *The Lack of Black Sperm Donors Is a Nationwide Problem*, NPR (June 13, 2024), https://perma.cc/9ZAS-S59V.

43 *See* Yaniv Heled, Hillel Y. Levin, Timothy D. Lytton & Liza Vertinsky, *Righting a Reproductive Wrong: A Statutory Tort Solution to Misrepresentation by Reproductive Tissue Providers*, 60 HOUSTON L. REV. 1, 10 (2022) (quotation marks omitted) (quoting Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 151–52 (2017)).

44 *Id.* at 18–19.

45 Pub. L. No. 102-493, 106 Stat. 3146 (1992) (codified as amended at 42 U.S.C. §§ 263a-1 to -7).

46 *Id.* § 3(i)(1), 106 Stat. at 3149.

the Act allows the CDC to develop voluntary accreditation guidelines to be implemented by the states, but no state has joined.[47] Overall, these laws fail to require cryobanks to even screen or verify a donor's medical history.[48]

A small number of states have imposed additional regulations on the broader fertility industry. For example, Colorado recently became the first state to ban anonymity in donor conception: All donor-conceived people will be able to access identifying information about their donors at the age of eighteen.[49] Colorado also created a new civil cause of action and criminal liability for fertility fraud.[50] Other states, including California and Texas, criminalize fertility fraud too.[51] These reforms have arisen in part due to advocacy by donor-conceived people, who have campaigned for the criminalization of fertility fraud and an end to anonymous donation.[52] Despite these advances, most states do not impose

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47 Heled et al., *supra* note 43, at 18.

48 *Id.* at 17–19.

49 *See* Donor-Conceived Persons and Families of Donor-Conceived Persons Protection Act § 1, ch. 279, 2022 Colo. Sess. Laws 2003 (codified at COLO. REV. STAT. § 25-57-106(1)); *see also* Madeline Ash, Note, *The Rights of Donor-Conceived Persons in Colorado: America's First Foray into Abolishing Anonymous Gamete Donation*, 99 IND. L.J. 1016, 1020–22 (2024) (citing COLO. REV. STAT. § 25-57-102(1)(a)). Colorado enacted this law against the background of criticisms of anonymous sperm donation, especially by donor-conceived advocates. *See id.* at 1020–21. Many condemn anonymous donation because it leaves donor-conceived people with inaccurate or incomplete medical histories, masks fertility fraud, hampers identity formation by some donor-conceived people, and enables cryobanks to create sibling pods of one-hundred-plus siblings, increasing the risk of accidental incest. *See, e.g.*, *id.* at 1020; *Can Donors Really Be Anonymous?*, U.S. DONOR CONCEIVED COUNCIL (Aug. 7, 2022), https://perma.cc/C6U5-83UY; Barry Stevens, *Finding Out I Had 600 Half-Siblings Sent Me on a Quest to End Sperm Donor Anonymity*, CBC (Sept. 15, 2020), https://perma.cc/5DRD-5QKY; Leigh Kiniry, *Serial Sperm Donors and Lack of Regulation Create Risks and Leave Children Seeking Answers*, CBS NEWS (Nov. 1, 2024), https://perma.cc/HAK5-642M ("One of the dangers is that donor offspring can end up in incestuous relationships without knowing.").

50 An Act Concerning Unconsented Use of Donor Gametes in Fertility Treatment §§ 1, 3, ch. 238, 2020 Colo. Sess. Laws 1153, 1153–55 (codified at COLO. REV. STAT. §§ 13-21-132 and 18-13-131).

51 *See* Rani Amani, Note, *Daddy Doctor: Why the Rights of Intended Parents Are Not Adequately Protected in Indiana*, 18 IND. HEALTH L. REV. 123, 139–41 (2021).

52 *See* Emily Bazelon, *Why Anonymous Sperm Donation Is Over, and Why That Matters*, N.Y. TIMES MAG. (Dec. 8, 2023), https://www.nytimes.com/2023/12/03/magazine/anonymous-sperm-donation-genetic-testing.html (explaining that donor-conceived advocates "succeeded in making Colorado the first state to mandate that sperm and egg banks disclose donors' identities to children . . . once they turn 18"); Sarah Beth Guevara, *Woman Battling Tumor Fights for Medical Records from Sperm Donors*, GOOD MORNING AM. (July 28, 2022), https://perma.cc/ZBL3-5GFN (discussing donor-conceived activist Laura High's advocacy for a bill criminalizing fertility fraud).

criminal or civil penalties for fertility fraud.[53] Outside of the legal sphere, private regulatory mechanisms, like accreditation and professional standards, also lack teeth.[54]

Fertility fraud harms the children produced. It robs individuals of information about their origins. It leaves them with fabricated medical histories, hampering efforts to obtain effective medical care.[55] It can disrupt family relationships and cause victimized patients to feel as if they lost agency.[56] Finally, when a locally practicing doctor illicitly inseminates patients, the risk of accidental incest between unwitting genetic half-siblings increases.[57] Consequently, many victims of fertility fraud feel wronged, raising the chance of suit. These harms further demonstrate the importance of providing accountability, deterrence, and redress in cases of fertility fraud.

As the use of assisted reproductive technology increases and direct-to-consumer DNA testing enables a child's origins to more readily come to light, further allegations of fertility fraud will almost certainly surface. It is therefore important to identify and describe the avenues victims might pursue to receive legal recourse. This Comment next considers the body of civil law impacting opportunities for recovery on the basis of fertility fraud allegations.

II. ANALYSIS OF CURRENT LAW

This Part summarizes various state courts' approaches to wrongful life and wrongful birth claims, as well as the relationship between fertility fraud and these claims. This Part first provides a definition of wrongful birth and wrongful life. Second, it provides an overview of state statutory bans on these claims. Third, it discusses state courts' early attempts to grapple with

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53 Megan R. Garofalo, *Fertility Fraud in the Land of Lincoln: Why Illinois Must Pass Comprehensive Legislation to Address Donor Fraud in Artificial Insemination*, 73 DEPAUL L. REV. 91, 108 (2023); *see also id.* at 102 (explaining that forty states "lack[ed] specific legislation addressing fertility fraud").

54 *See* Heled et al., *supra* note 43, at 15 (explaining that there is no requirement to follow or enforce guidelines set by the American Society for Reproductive Medicine).

55 McKesson's experiences exemplify this issue. *See* Bailey, *supra* note 1.

56 Sabrina Zeghiche, Isabel Côté & Kévin Lavoie, *"Once You Open That Pandora's Box, You Cannot Close It": A Qualitative Study on Family Relationships Following Insemination Fraud*, 47 REPROD. BIOMEDICINE ONLINE, no. 2, 2023, at 1, 5.

57 *See, e.g.*, Jennifer Joas, *"I Was Intimate with a Sibling": Half-Sisters Call Attention to Fertility Fraud by CT Doctor*, NBC CONN. (Mar. 11, 2024), https://www.nbcconnecticut.com/news/local/half-sisters-fertility-fraud-connecticut-doctor/3239436/.

whether fertility fraud allegations fall into these categories, revealing that courts have reached diverging conclusions. Finally, it discusses the innovative definition that the Connecticut Supreme Court introduced in *Suprynowicz*.

A. Wrongful Birth and Wrongful Life Claims at Common Law

Since the 1960s, a body of tort law has developed around claims for wrongful birth, wrongful life, and wrongful conception.[58] In general, a claim sounds in wrongful birth when parents allege that a person's misconduct led to the birth of their child, causing damages.[59] Conversely, emerging from the same facts, a child brings a wrongful life claim, alleging that a person's misconduct led to their own birth, causing damages.[60] Plaintiffs in these cases commonly allege that a doctor negligently failed to diagnose a fetus's genetic anomaly, causing the birth of a disabled child when the parents otherwise would have aborted.[61] In short, the key difference between wrongful birth and wrongful life cases is the identity of the plaintiff—the parent or the child. Given the strong interrelatedness of these doctrines, the same analysis applies to whether fertility fraud falls into either of these categories. Finally, wrongful conception claims involve the birth of an unwanted, healthy child, often due to negligent sterilization procedures.[62] This Comment is primarily concerned with wrongful

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[58] *See* Hubert W. Williams, *Wrongful Life and Wrongful Birth*, 15 INT'L SOC'Y BARRISTERS Q. 408, 410 (1980) (explaining that *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967), *overruled by* Berman v. Allan, 404 A.2d 8 (N.J. 1979), first addressed the cognizability of a wrongful life claim).

[59] *See, e.g.*, Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 398–99 (Iowa 2017) (describing each type of action); Williams, *supra* note 58, at 410 (same).

[60] *See* Williams, *supra* note 58, at 410.

[61] *See id.* Examples of these cases abound. For instance, in *Willis v. Wu*, 607 S.E.2d 63 (S.C. 2004), the South Carolina Supreme Court declined to recognize the existence of a wrongful birth or life cause of action and held that "being born with a naturally occurring defect or impairment does not constitute a legally cognizable injury in such an action." *Id.* at 71. There, the mother brought a wrongful life action on behalf of her minor son against her doctor because she claimed that he failed to diagnose the son's congenital defect during prenatal testing, denying the mother the ability to informedly decide whether to terminate the pregnancy. *Id.* at 64. In *Vanvooren v. Astin*, 111 P.3d 125 (Idaho 2005), the plaintiffs alleged that the defendants, medical providers, had not properly diagnosed their child's severe birth defects, denying the parents the opportunity to have an abortion. *Id.* at 127. Interpreting Idaho's statutory ban on wrongful life claims, the court held that this ban barred the plaintiffs' claims. *Id.* at 128.

[62] *See* Williams, *supra* note 58, at 410.

birth and wrongful life claims, as bans on recovery for failed sterilization do not present the same obstacle as wrongful birth and life for plaintiffs alleging fertility fraud.[63]

Many jurisdictions bar recovery for claims that sound in wrongful life or wrongful birth, either through judge-made common law or statute. As a matter of judge-made common law, some courts have determined that these claims are not cognizable.[64]

A 1967 New Jersey Supreme Court case, *Gleitman v. Cosgrove*,[65] typifies the early common law reasoning rejecting wrongful life and wrongful birth claims. *Gleitman* involved allegations that doctors failed to inform parents of the risk of their fetus's birth defects, denying them the opportunity to receive an abortion.[66] The parents sought to recover for the costs of caring for their disabled child and the mother's emotional distress.[67] The court first noted that the doctors could not have provided treatment to reduce the likelihood of the birth defects and did not cause them.[68] The court then rejected the plaintiffs' claims because calculating compensatory damages would be "logically impossible."[69] Calculating damages requires comparing the plaintiff's position if the defendant had not been negligent to the plaintiff's position postnegligence. In this case, such a comparison would have required the court to "measure the difference between [the child's] life with defects against the utter void of nonexistence."[70] Thus, the court could not recognize claims for damages on behalf of the child.[71] Similarly, the parents could not recover because their claims required the court to weigh the benefits of

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63 Bans on wrongful conception are less common. *See* Luke Isaac Haqq, *The History of Wrongful Birth and the Future of Reproductive Technologies*, 24 MINN. J.L. SCI. & TECH. 293, 303 (2023) (explaining that, when these torts emerged in the 1960s, wrongful conception claims "fared the best").

64 *See, e.g.*, Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978) (dismissing "plaintiffs' complaints insofar as they seek damages on behalf of their infants for wrongful life"); Azzolino v. Dingfelder, 337 S.E.2d 528, 531 (N.C. 1985) (holding that "neither wrongful birth nor wrongful life claims are cognizable under the law of this jurisdiction").

65 227 A.2d 689 (N.J. 1967), *overruled by* Berman v. Allan, 404 A.2d 8 (N.J. 1979).

66 *Id.* at 690–91.

67 *Id.* at 690.

68 *Id.* at 691–92.

69 *Id.* at 692.

70 *Gleitman*, 227 A.2d at 692.

71 *Id.*

motherhood and fatherhood against the alleged injuries, an impossible task.[72] Furthermore, the state's policy objections to abortion weighed against permitting the plaintiff's claims.[73] As a result, *Gleitman* affirmed the trial court's judgment dismissing the complaint.[74] This posture is typical of wrongful birth and life cases. Courts frequently resolve these cases pretrial.[75]

Importantly, jurisdictions that ban wrongful birth and wrongful life do not just prevent plaintiffs from bringing those specifically identified tort claims; this doctrine can bar any claim that sounds in wrongful birth or life—even when artfully pleaded as other tort or contract claims.[76] For instance, in *D.D. v. Idant Laboratories*,[77] the Third Circuit applied New York state law and dismissed the plaintiff's breach of contract claim because it sounded in wrongful life; the injury alleged was the child's disabled existence, which was not cognizable.[78] In *Vanvooren v. Astin*,[79] the Idaho Supreme Court rejected the plaintiffs' negligent infliction of emotional distress claims because they ultimately relied on wrongful birth allegations.[80] Consequently, when courts determine that allegations of fertility fraud constitute wrongful birth or life, they often preclude recovery by the plaintiff, limiting accountability for the fertility industry and preventing these plaintiffs from being made whole.

B. Statutes Banning Wrongful Life and Birth Claims

In addition to common law bars on wrongful life and birth suits, some states have passed statutes that forbid or limit recovery for these claims. In these states, statutory interpretation determines whether a plaintiff's fertility fraud allegations constitute

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72 *Id.* at 693.

73 *Id.*

74 *Id.* at 694.

75 *See, e.g.*, *Vanvooren*, 111 P.3d at 127 (disposing of a wrongful birth suit via summary judgment); Rowlette v. Mortimer, 352 F. Supp. 3d 1012, 1019 (D. Idaho 2018) (explaining that the decision arose on the defendants' motion to dismiss for failure to state a claim upon which relief could be granted).

76 *See, e.g.*, Doolan v. IVF Am. (MA), Inc., 2000 WL 33170944, at *5 (Super. Ct. Mass. Nov. 20, 2000) (holding that the plaintiff's negligence claims, styled as prenatal torts, actually constituted noncognizable wrongful life claims, meriting summary judgment for the defendants).

77 374 F. App'x 319 (3d Cir. 2010).

78 *Id.* at 324.

79 111 P.3d 125 (Idaho 2005).

80 *Id.* at 127–28.

wrongful birth or life. To structure its analysis of the interaction between fertility fraud and state statutory bans on wrongful life and birth claims, this Comment classifies the statutory bans into three categories based on the features that are salient to this context. The three categories are (1) those specifically prohibiting allegations of a missed opportunity to receive an abortion, (2) those making exceptions for grossly negligent or intentional conduct, and (3) those imposing more broadly applicable bans. These categories were formed after analyzing the text of each state statute and identifying their common themes and scope. Explicit language related to abortions or exceptions for grossly negligent or intentional conduct led a statute to fall into the first or second category, respectively. Statutes banning wrongful birth or wrongful life without either of these particular limiting features fell into the third category. Note that these categories are grounded in the statutory text alone. As Part III.B discusses, the purpose and legislative history of these statutes may justify applying more narrowly statutes that appear broader on their face. The table below lists the states comprising these categories.[81]

TABLE 1: SURVEY OF STATUTES
BANNING WRONGFUL BIRTH AND WRONGFUL LIFE

Statutes Prohibiting Claims Based on a Missed Opportunity to Receive an Abortion	Idaho[82] Indiana[83] Kansas[84] Minnesota[85] Missouri[86] North Dakota[87] Oklahoma[88] Utah[89]

[81] Table 1 omits California, which bans wrongful life claims brought by the child against their parents. CAL. CIV. CODE § 43.6 (Deering 2025). Moreover, Colorado also has a statute that bars claims based on "injury arising from genetic counseling and screening," but it lacks explicit reference to wrongful birth and wrongful life or the broad language associated with other bans. COLO. REV. STAT. § 13-64-502 (2026).

[82] IDAHO CODE § 5-334 (2025).

[83] IND. CODE § 34-12-1-1 (2025).

[84] KAN. STAT. ANN. § 60-1906 (2025).

[85] MINN. STAT. § 145.424 (2025).

[86] MO. REV. STAT. § 188.130 (2025).

[87] N.D. CENT. CODE § 32-03-43 (2025).

[88] OKLA. STAT. tit. 63, § 1-741.12 (2024).

[89] UTAH CODE ANN. § 78B-3-109 (LexisNexis 2025).

Statutes with Exceptions for Grossly Negligent or Intentional Conduct	Arizona[90] Arkansas[91] Iowa[92] Michigan[93]
Broadly Applicable Bans	Maine[94] Pennsylvania[95] South Dakota[96] Tennessee[97]

First, a number of states expressly prohibit wrongful birth or wrongful life claims that involve allegations of a missed opportunity to receive an abortion.[98] For instance, Oklahoma defines wrongful life and wrongful birth actions as "based on a claim that a person's act or omission contributed to the mother's not having obtained an abortion."[99] In these actions, "no damages may be recovered for any condition that existed at the time of a child's birth if the claim is that the defendant's act or omission contributed to the mother's not having obtained an abortion."[100] Minnesota adopted similar, though distinct, language. For instance, Minnesota's statute prohibiting wrongful life actions states: "No person shall maintain a cause of action or receive an award of damages on behalf of that person based on the claim that but for the negligent conduct of another, the person would have been aborted."[101] Under these statutes, the salient feature of noncognizable wrongful life and birth claims is that the plaintiff claims injury because they or their fetus should have been aborted. In a typical wrongful birth case barred by these statutes, a plaintiff alleges that a provider negligently failed to inform

90 ARIZ. REV. STAT. ANN. § 12-719 (2025).

91 ARK. CODE ANN. § 16-120-902 (2025).

92 IOWA CODE § 613.15B (2025).

93 MICH. COMP. LAWS § 600.2971 (2025).

94 ME. STAT. tit. 24, § 2931 (2025).

95 42 PA. CONS. STAT. § 8305 (2025). *But see* Sernovitz v. Dershaw, 127 A.3d 783, 794 (Pa. 2015) (addressing arguments that Pennsylvania's statute is constitutionally invalid due to its potential failure to comply with Pennsylvania's legislative process).

96 S.D. CODIFIED LAWS §§ 21-55-1 to -4 (2025).

97 TENN. CODE ANN. § 29-34-212 (2025).

98 *See* OKLA. STAT. tit. 63, § 1-741.12; MINN. STAT. § 145.424; IDAHO CODE § 5-334; IND. CODE § 34-12-1-1; KAN. STAT. ANN. § 60-1906; MO. REV. STAT. § 188.130; N.D. CENT. CODE § 32-03-43; UTAH CODE ANN. § 78B-3-109.

99 OKLA. STAT. tit. 63, § 1-741.12.

100 *Id.* § 1-741.12(3)(C).

101 MINN. STAT. § 145.424.

them of their fetus's birth defects. The plaintiff claims that if they had known about the anomalies, they would have received an abortion; because the provider deprived them of the opportunity to do so, the plaintiff demands damages for the expenses associated with birthing and raising the child. Prior to *Dobbs v. Jackson Women's Health Organization*,[102] commentators raised constitutional objections to these statutes as impermissibly intruding on reproductive autonomy.[103] As Part III.A discusses, these statutory bars should not be implicated in fertility fraud suits, as these plaintiffs do not claim an inability to get an abortion as the injury that they suffered.

Second, other states have adopted bans on wrongful birth and wrongful life claims that lack explicit reference to abortion but instead impose exceptions for grossly negligent or intentional conduct.[104] For instance, Michigan mandates: "A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born."[105] The statute uses almost exactly the same language to prohibit wrongful life claims.[106] However, the statute contains an exception. The ban "does not apply to a civil action for damages for an intentional or grossly negligent act or omission, including, but not limited to, an act or omission that violates the Michigan penal code."[107] Iowa, Arkansas, and Arizona all have statutes with similar language.[108] Iowa and Arkansas also provide additional avenues to trigger their exceptions.[109] Overall, bans in this category provide broader definitions of

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[102] 142 S. Ct. 2228 (2022).

[103] *See* Christine Intromasso, Note, *Reproductive Self-Determination in the Third Circuit: The Statutory Proscription of Wrongful Birth and Wrongful Life Claims as an Unconstitutional Violation of* Planned Parenthood v. Casey*'s Undue Burden Standard*, 24 WOMEN'S RTS. L. REP. 101, 118 (2003). In states where plaintiffs can bring wrongful birth, wrongful life, or wrongful conception claims, post-*Dobbs* abortion bans have made alleging these torts more difficult. *See* Aviva K. Diamond, Note, *The Impact of Post*-Dobbs *Abortion Bans on Prenatal Tort Claims*, 122 MICH. L. REV. 377, 404–05 (2023).

[104] *See* MICH. COMP. LAWS § 600.2971; IOWA CODE § 613.15B; ARIZ. REV. STAT. ANN. § 12-719; ARK. CODE ANN. § 16-120-902.

[105] MICH. COMP. LAWS § 600.2971(1).

[106] *Id.* § 600.2971(2).

[107] *Id.* § 600.2971(4)

[108] *See* IOWA CODE § 613.15B; ARIZ. REV. STAT. ANN. § 12-719; ARK. CODE ANN. § 16-120-902.

[109] *See* IOWA CODE § 613.15B(3)(b) (exempting failures to comply with informational requirements imposed by licensure regulations from the statutory bar); ARK. CODE ANN. § 16-120-902(c)(3) (exempting injuries to the child "before, during, or after birth" from the statutory bar).

wrongful birth and wrongful life than those in the first category, since they do not require an allegation of a missed opportunity to receive an abortion. However, they also exempt—and therefore do not bar—claims that would trigger other states' bans: allegations of grossly negligent or intentional conduct.

Finally, four states have adopted statutes that bar wrongful life and wrongful birth claims even without an allegation of a missed opportunity to receive an abortion and without exceptions for intentional or negligent conduct. Both South Dakota and Tennessee have adopted broad bans on wrongful life claims. The bans expressly apply to individuals who allege that they would not have been conceived—or once conceived, would not have been born—but for the defendant's wrongful acts.[110] To fall within the statute's terms, a plaintiff need not necessarily allege that their parents should have aborted them, and there are no explicit exceptions for intentional conduct. Interestingly, these references to preconception are not present in the states' otherwise broad bans on wrongful birth claims.[111]

Maine's statute is more limited but broadly forbids damages for certain classes of wrongful birth and life claims. For healthy children, "[a] person may not maintain a claim for relief or receive an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to that person."[112] However, some damages are permitted for failed sterilization procedures.[113] Similarly, some damages are permitted for the birth of an unhealthy child: "Damages for the birth of an unhealthy child born as the result of professional negligence are limited to damages associated with the disease, defect or disability suffered by the child."[114] For instance, if a doctor negligently failed to diagnose a fetus with an anomaly, causing the parents to forgo terminating the pregnancy, a plaintiff could recover damages associated with the child's disability. In contrast, the statute's text implies that if

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110 S.D. CODIFIED LAWS § 21-55-1; TENN. CODE ANN. § 29-34-212(b).

111 *See* S.D. CODIFIED LAWS § 21-55-2; TENN. CODE ANN. § 29-34-212(a).

112 ME. STAT. tit. 24, § 2931(2).

113 *Id.*:

> A person may maintain a claim for relief based on a failed sterilization procedure resulting in the birth of a healthy child and receive an award of damages for the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy.

114 *Id.* § 2931(3).

a provider's negligence in communicating the results of a positive pregnancy test stopped a plaintiff from being able to terminate their pregnancy, and the child was born healthy, the statute would not permit the parents to recover. Therefore, while some claims are possible for the birth of an unhealthy child, the Maine statute imposes a stronger bar on recovery for conduct—including intentional conduct—that produces the wrongful birth of a healthy child.

Finally, Pennsylvania's wrongful birth bar includes narrow exceptions, allowing claims for injuries resulting from an attempted abortion or intentional misrepresentation by health care practitioners under particular state statutes. Nonetheless, although these exceptions permit some wrongful birth claims, the Pennsylvania statute appears more restrictive than statutes in states with intentional conduct or gross negligence exceptions and is therefore best situated in the third category.[115]

C. Fertility Fraud and Wrongful Birth and Life Claims Leading Up to *Suprynowicz*

Most commonly, wrongful birth and life claims center around prenatal genetic testing. The paradigmatic case involves allegations that a medical provider failed to diagnose a fetal anomaly, causing the birth of a child when the parents otherwise would have terminated the pregnancy.[116] But the invention of assisted reproductive technology and the rise of the fertility industry present novel factual patterns involving fertility fraud. As a result, courts confront a new question: When a plaintiff alleges fertility fraud, do their claims constitute wrongful birth or wrongful life, denying them the opportunity to recover in states with judicial or statutory bars like those discussed in Part I.A and I.B? State courts have reached diverging conclusions on this issue, but the Connecticut Supreme Court's 2025 decision in *Suprynowicz v. Tohan* may offer a broadly applicable resolution. This Section considers two competing approaches to fertility fraud suits.

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[115] 42 PA. CONS. STAT. § 8305. *But see Sernovitz*, 127 A.3d at 794 (addressing a potential legislative process violation).

[116] *See* Williams, *supra* note 58, at 410.

1. Decisions concluding that fertility fraud allegations constitute wrongful birth or wrongful life.

Many courts have determined that claims framed as fertility fraud constituted wrongful birth or wrongful life and that the plaintiffs therefore were not entitled to recovery. For instance, in *Idant Laboratories*, decided in 2010, the plaintiff purchased sperm from defendant Idant Laboratories and claimed that the defendant failed to identify the sperm donor as a "Fragile X" carrier.[117] The plaintiff's daughter was eventually diagnosed with developmental delays.[118] The plaintiff advanced claims for strict products liability, breach of express warranty, and breach of contract.[119] Applying New York law, the Third Circuit held that the plaintiff's claims lacked a cognizable injury because they sounded in wrongful life.[120] By the court's telling, the plaintiff essentially alleged that her child's "genetic makeup is [the child's] injury," and New York law did not recognize a child's right to be born without genetic defects.[121] The plaintiff thus could not recover.

Similarly, in 2018 in *Rowlette v. Mortimer*,[122] a federal district court interpreting Idaho law rejected a family's claims against their doctor. Despite planning to use an anonymous sperm donor during a fertility procedure, the parents and child alleged that Dr. Gerald Mortimer had instead used his own sperm.[123] The plaintiffs brought claims for "medical malpractice, lack of informed consent, fraud, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract, and violation of Idaho's consumer protection act."[124] The court determined that the child's claims against Mortimer were claims for wrongful life, which Idaho statutory and case law did not permit.[125] The court also dismissed all of the parents' claims,

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117 *Idant Lab'ys*, 374 F. App'x at 320–21.

118 *Id.* at 320.

119 *Id.* at 321.

120 *Id.* at 324.

121 *Id.*

122 352 F. Supp. 3d 1012 (D. Idaho 2018).

123 *Id.* at 1018.

124 *Id.* at 1019.

125 *Id.* at 1021. Yet this finding was not dispositive, as the court ultimately dismissed the child's claims for deficiencies in her allegations under traditional tort principles: The state's medical malpractice statute and statute of limitations barred them. *See id.* at 1023. The court also failed to grapple with whether the exception in Idaho's statute for "claims that, but for a wrongful act or omission, fertilization would not have occurred" applied to fertility fraud. IDAHO CODE § 5-334(2).

albeit on other grounds;[126] it inexplicably failed to consider whether the parents' allegations constituted wrongful birth.[127]

A few years later, in a series of cases involving a single anonymous sperm donor allegedly used by Xytex Corp., Georgia's position limiting recovery for fertility fraud became clear. Xytex allegedly represented to clients that donor #9623 was working on his Ph.D. and had an IQ of 160, a nearly perfect medical and mental health history, and no criminal background.[128] However, the plaintiffs claimed that, in actuality, donor #9623 had been "diagnosed with psychotic schizophrenia, narcissistic personality disorder, and significant grandiose delusions."[129] The plaintiffs further alleged that while selling his sperm, donor #9623 was arrested for multiple crimes, pled guilty to burglary, and had not obtained any advanced degrees.[130]

The first case arose in federal court after parents who had used donor #9623's sperm sued, claiming that their children were impaired.[131] In 2019, the Eleventh Circuit interpreted Georgia law to preclude claims for wrongful birth and found that the plaintiffs' suit implicated that bar.[132] Ultimately, the court dismissed parents Rene and Trayce Zelt's fraud, negligent misrepresentation, products liability, breach of express and implied warranty, negligence, unfair business practices, and false advertising claims because they "allege[d] as the injury their children's inheritance from [the donor] of objectionable characteristics that the children would not have inherited from a different donor."[133] Although the Zelts did not ask the court to compare their children's impaired existence to nonexistence, the court took issue with comparing the children's current lives to their lives if the parents had used a different donor.[134] According to the court, a legal injury could not exist based on allegations that a child did not have the characteristics their parents desired at conception.[135]

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126 *Rowlette*, 352 F. Supp. 3d at 1033.

127 *See id.*

128 Norman v. Xytex Corp., 848 S.E.2d 835, 837 (Ga. 2020).

129 *Id.* at 838.

130 *Id.* at 837.

131 Zelt v. Xytex Corp., 766 F. App'x 735, 736 (11th Cir. 2019).

132 *Id.* at 739.

133 *Id.* at 741.

134 *Id.* at 740.

135 *Id.* ("[W]e would be extending Georgia law beyond what state law authorizes were we to recognize that the Zelts have suffered a legally compensable injury because their children may be different from what the Zelts envisioned . . . .").

In 2020, Georgia clarified its position in *Norman v. Xytex Corp.*[136] The plaintiffs claimed that they had used donor #9623 to conceive their son, who had severe mental health and behavioral problems and was ultimately diagnosed with an inheritable blood disorder and Attention Deficit Hyperactivity Disorder.[137] The plaintiffs brought numerous claims against Xytex, including fraud, negligent misrepresentation, products liability, and unfair business practices.[138] While recognizing that the plaintiffs' allegations were unlike Georgia's leading precedent on wrongful birth,[139] the Georgia Supreme Court nevertheless dismissed most of the Normans' claims because they sounded in wrongful birth.[140] In characterizing wrongful birth and life claims, the court adopted a key principle: "[L]ife can never amount to a legal injury."[141] The plaintiffs' claims that they would not have purchased sperm from the donor had they known about his background required the court to consider a counterfactual world in which the child did not exist.[142] As a result, these claims constituted wrongful birth.

However, while the prohibition on wrongful birth suits barred the plaintiffs from recovering the expenses of raising their child and damages for associated emotional distress, the court admitted that a remedy could be available for some potential claims. The plaintiffs could recover some damages if they introduced evidence that Xytex failed to communicate updated information that it possessed about the donor, causing delayed treatment for the child.[143] Moreover, the plaintiffs could recover for the difference in the price of the sperm as advertised and the quality that they received.[144] Finally, the plaintiffs could allege a consumer protection claim, enabling them to seek punitive damages and an injunction against similar practices.[145] The difference between these claims and those forbidden is that these claims do not allege damages to compensate for the child's impaired existence.

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136 848 S.E.2d 835 (Ga. 2020).
137 *Id.* at 838.
138 *Id.*
139 *Id.* at 840.
140 *Id.* at 841–42.
141 *Norman*, 848 S.E.2d at 840.
142 *See id.* at 842.
143 *Id.* at 843.
144 *Id.*
145 *Id.*

Still, notwithstanding these narrow paths to recovery, *Zelt* and *Norman* limited the ability of plaintiffs alleging fertility fraud to recover under Georgia law by characterizing these cases as wrongful birth—much like *Idant Laboratories* in New York and *Rowlette* in Idaho.

2. Decisions concluding that fertility fraud allegations are not wrongful birth or wrongful life.

Conversely, some courts have held that fertility fraud allegations do not constitute wrongful birth or life claims or have otherwise permitted recovery in the face of a ban. In *Grinnell v. Kaiser Foundation Hospitals*,[146] in an unpublished 2022 order in California state court, a mother and daughter sued the mother's fertility doctor, alleging that he used his own sperm after promising to inseminate her with an anonymous donor.[147] The court held that the mother was not seeking damages for wrongful birth but instead for extreme emotional distress arising from the circumstances, making recovery for emotional distress possible.[148]

In another unpublished opinion issued by the Kentucky Court of Appeals in 2024, *White v. Baptist Healthcare Systems, Inc.*,[149] the plaintiff brought claims for breach of contract, fraud, battery, violation of consumer protection statutes, and practice of medicine without a license after her doctor allegedly used his own sperm to inseminate her, producing a healthy child.[150] While Kentucky's failure to recognize wrongful birth claims precluded the plaintiff from recovering the cost of raising her child,[151] her claims for breach of contract, fraud, battery, and statutory violations survived.[152] According to the court, these constituted claims for "injuries resulting from [the provider's] intentional act of providing her with his own sperm after promising to obtain sperm from an agreed upon donor. Her claims exist[ed] independent of her pregnancy and the birth of her child."[153] The court expressed concern that an alternative holding would greenlight intentional

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146 Minute Order, 2022 Cal. Super. LEXIS 42939 (June 1, 2022).
147 *Id.* at *3–4.
148 *Id.* at *13.
149 2024 WL 1813237 (Ky. Ct. App. Apr. 26, 2024).
150 *Id.* at *1–3.
151 *Id.* at *3.
152 *Id.*
153 *Id.*

conduct and fraud, allowing defendants to escape accountability as long as a healthy child resulted.[154]

For plaintiffs alleging fertility fraud in jurisdictions that bar wrongful life and wrongful birth claims, *Grinnell* and *White* would have provided little persuasive power: Neither opinion has been published, and neither opinion engages in a detailed discussion of the issue. However, a pair of Connecticut Supreme Court opinions changed this landscape beginning in 2024.

D. *Suprynowicz*'s Innovation

In a pair of recent cases, the Connecticut Supreme Court offered a novel—and more restrictive—characterization of wrongful life and wrongful birth suits, defining these claims as requiring indirect defendant responsibility and incalculable damages. In *Suprynowicz*, this innovation permitted recovery for children produced via a medical provider's alleged fertility fraud.[155] If its logic were applied in other jurisdictions, *Suprynowicz* could expand the opportunities to recover for victims of fertility fraud, increasing accountability for the fertility industry.

Suprynowicz featured an archetypal allegation of fertility fraud. The parents of plaintiffs Kayla Suprynowicz and Reilly Flaherty received fertility treatment from the defendant, Dr. Narendra Tohan, their reproductive endocrinologist.[156] The parents did not seek to use a sperm donor.[157] However, Suprynowicz and Flaherty alleged that Tohan used his own sperm instead of the intended fathers' sperm.[158] After discovering this alleged deception using a direct-to-consumer DNA test, Suprynowicz and Flaherty sued Tohan, advancing claims for negligence, lack of informed consent, and statutory consumer protection violations.[159] The court determined that these claims did not allege wrongful life.[160]

Suprynowicz drew heavily on precedent that the Connecticut Supreme Court had recently established in *Lynch v. State*.[161] In

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154 *White*, 2024 WL 1813237, at *3.

155 *Suprynowicz*, 328 A.3d at 648.

156 *Id.*

157 *See id.*

158 *Id.* After she became pregnant, Suprynowicz's mother was informed that "mixed sperm" was used. *Id.* at 649.

159 *Suprynowicz*, 328 A.3d at 648–49.

160 *Id.* at 648.

161 308 A.3d 1 (Conn. 2024).

Lynch, plaintiff Jean-Marie Lynch alleged that as a result of insemination with sperm infected by cytomegalovirus (CMV),[162] she became pregnant with children Shay and Joshua Monroe-Lynch.[163] Jean-Marie alleged that Shay died in utero as a result of CMV infection and Joshua was born with severe complications, resulting in lifelong medical needs.[164] Jean-Marie was CMV-negative.[165] Guidelines from the American Society for Reproductive Medicine recommend only using CMV-positive donor sperm for CMV-positive recipients.[166] However, the trial court found that the standard of care among medical professionals permits the use of CMV-positive donor sperm by CMV-negative patients with informed consent.[167] Jean-Marie claimed that her physician did not check the CMV status of the donor, thereby denying her the opportunity to give informed consent.[168] Jean-Marie and her husband sued "individually and in their representative capacities as parents" of Joshua, and as administrators of Shay's estate.[169]

The *Lynch* court determined that Joshua's claims did not constitute claims for wrongful life.[170] The court reasoned that wrongful life claims tend to involve a medical professional with "no direct responsibility for the child's condition."[171] Similarly, "in most wrongful life cases, but for the defendants' negligence, there never could have been a healthy child."[172] These features made the defendant's alleged negligence in the context of assisted reproductive technology fundamentally distinct from the "paradigmatic wrongful life

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[162] Spread through bodily fluids, including semen, CMV is a common virus that stays in the body for life after infection. *Cytomegalovirus (CMV) Infection*, MAYO CLINIC (June 17, 2025), https://perma.cc/S3TJ-69Z4. Over 50% of adults get CMV by the age of 40. *About Cytomegalovirus*, CDC (Jan. 17, 2025), https://perma.cc/3JX7-D6NL. If a pregnant person becomes actively infected with CMV, the infection can pass to the fetus. *Id.* Congenital CMV can lead to long-term complications, including developmental delay. Emily Santos, Andrea Ciaranello, Irene Dimitriadis, Jill Attaman & Lisa M. Bebell, *Possible CMV Transmission via Intrauterine Insemination: Case Report*, 25 BMC INFECTIOUS DISEASES, Feb. 19, 2025, at 1, 2. While data is limited, there is "sufficient concern" that a CMV-positive sperm donor can infect a CMV-negative recipient parent with CMV during intrauterine insemination, posing a risk to the health of the child conceived. *Id.* at 3.

[163] *Lynch*, 308 A.3d at 6.

[164] *Id.* at 8.

[165] *Id.* at 7.

[166] *Id.*

[167] *Id.* at 8.

[168] *Lynch*, 308 A.3d at 7–8.

[169] *Id.* at 6.

[170] *Id.* at 19.

[171] *Id.*

[172] *Id.* at 20.

cases," which involve allegations that a physician's negligence denied parents timely notice of their fetus's congenital abnormality.[173] Consequently, *Lynch* opened the courts to plaintiffs alleging harms against fertility providers.[174] Unlike the Georgia Supreme Court in *Norman*, the Connecticut Supreme Court in *Lynch* did not broadly limit a plaintiff's opportunity to recover by determining that the claims sounded in wrongful birth.[175] In *Suprynowicz*, when the Connecticut Supreme Court faced its first case alleging intentional fertility fraud, *Lynch* controlled, and the court drew heavily upon its reasoning.[176]

Suprynowicz took an additional step and innovatively defined wrongful life claims as involving two key characteristics. First, in a wrongful life claim, "the defendant is not directly responsible for the injury to the child."[177] This factor led the court to conclude that the plaintiffs' fertility fraud claims did not constitute wrongful life: By allegedly using his own sperm, Tohan directly caused the plaintiffs' physical and mental injuries.[178] This factor reflects a longstanding critique of wrongful birth and life claims—namely, that these claims lack proximate causation.[179] The typical wrongful birth claim involves a parent's allegations that a doctor's failure to diagnose their fetus's congenital defect led them to forgo abortion. Multiple intervening decisions would need to occur for the parents to avoid the child's birth and therefore the alleged injury. By contrast, in cases of fertility fraud, the

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[173] *Lynch*, 308 A.3d at 19 (citing Turpin v. Sortini, 643 P.2d 954, 955 (Cal. 1982)).

[174] The plaintiff's allegations in *Lynch* that her physician used sperm that infected her with an illness, disabling her child, differ from allegations that providers misrepresented the donor's identity. *Contrast id.* at 7–8 (discussing Lynch's allegations that the use of a CMV-positive donor caused her infection with CMV and therefore the in utero CMV infection of her fetuses), *with, e.g.*, *Norman*, 848 S.E.2d at 837–38 (discussing the plaintiffs' allegations that their child genetically inherited impairments from their sperm donor).

[175] *Norman*, 848 S.E.2d at 841.

[176] *Suprynowicz*, 328 A.3d at 648, 651–52.

[177] *Id.* at 651.

[178] *Id.* at 653.

[179] *See, e.g.*, Becker v. Schwartz, 386 N.E.2d 807, 816 (N.Y. 1978) (Wachtler, J., dissenting in part):

> Even if we assume . . . that the parents would have made all the difficult decisions leading to an abortion—a conclusion which could be certain, if ever, only in retrospect—we must still go to great lengths to find that the doctor's failure to detect the defect was the cause, indeed, the proximate cause, of the child's handicapped life.

defendant produces the pregnancy itself by providing the fertility treatment and gametes.

Suprynowicz's second factor—difficulty quantifying damages—similarly distinguishes fertility fraud cases from the class of wrongful birth or life claims. According to the *Suprynowicz* court, wrongful birth or life claims must involve an "inherent difficulty of measuring damages" by asking courts to compare impaired existence with nonexistence.[180] The *Suprynowicz* plaintiffs' claims did not present this issue because they did not argue that their parents should have had abortions, nor did they ask to be made whole by never being born.[181] Instead, the plaintiffs sought damages for injuries that could have been avoided or mitigated if the defendant acted with due care.[182]

In essence, *Lynch*'s and *Suprynowicz*'s reasoning establishing the second factor suggests that a claim does not constitute wrongful life if it was at all possible for the child to be born *and* for the defendant to have mitigated the damage caused. *Lynch* first recognized that "in most wrongful life cases, but for the defendants' negligence, there never could have been a healthy child."[183] Medical professionals testified for the plaintiffs that antiviral medications could have been used, at least experimentally, to prevent or treat the disease in utero.[184] While the trial court did not make findings about whether this treatment would have been helpful for the children in *Lynch*, the potential availability of treatment "illustrate[d] that key considerations that ha[d] led other courts to foreclose wrongful life actions [we]re not present in th[at] case."[185] This reasoning suggests that if it is merely possible for the defendant to mitigate the negative effects of their misconduct without preventing the birth of the child, the claim does not allege wrongful life at all.

In regard to the second factor, *Suprynowicz* reached a similar conclusion. There, the court could "imagine a scenario in which the plaintiffs were born and avoided the emotional harm of which they complain."[186] For instance, the doctor could have informed the parents that he intended to use his own sperm, allowing them

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[180] *Suprynowicz*, 328 A.3d at 652.
[181] *Id.* at 653.
[182] *Id.*
[183] *Lynch*, 308 A.3d at 20.
[184] *Id.*
[185] *Id.*
[186] *Suprynowicz*, 328 A.3d at 653 n.9.

to communicate this fact to their children and thereby avoid their agonizing late discovery.[187] Given this possibility for mitigation, and in response to arguments that the plaintiffs alleged harm that could only have been avoided if they were never born,[188] *Suprynowicz* sweepingly concluded that the "case bears none of the hallmarks of a wrongful life claim."[189] Thus, under the *Suprynowicz* court's logic, allegations do not constitute wrongful life as long as it is possible for the plaintiffs to be born while avoiding or mitigating the harm alleged. In these cases, there is no inherent difficulty in measuring damages because courts do not have to compare existence to nonexistence.

Unlike typical wrongful life cases, fertility fraud cases survive this damages-calculation factor. In a typical wrongful life case—in which a plaintiff alleges that they would have been aborted but for a physician's negligent prenatal testing—the plaintiff could only have avoided the injury if they were not born. The missed opportunity for the mother to have an abortion is an integral component of the claim. The opposite is true when a plaintiff claims that a doctor swapped their intended father's sperm for the doctor's own. The plaintiff could have been born, but by informing the parents of his intentions or actions, the doctor could have mitigated the plaintiff's physical and emotional suffering by providing an accurate medical history that facilitates treatment of inherited conditions and prevents traumatizing discovery of parentage via direct-to-consumer DNA testing.[190]

Suprynowicz's reasoning substantially differs from the reasoning in *Grinnell* and *White*. Neither earlier case offered a framework for dividing fertility fraud from wrongful birth or wrongful life cases. Without further explanation, *Grinnell* simply asserted that seeking emotional distress damages for fertility fraud did not constitute wrongful birth.[191] *White* emphasized the intentional nature of the defendant's conduct but did not develop a transportable framework for distinguishing fertility fraud cases from noncognizable claims.[192] *Suprynowicz* therefore represents the most comprehensive opinion determining that fertility fraud allegations do not constitute wrongful life claims.

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187 *Id.*
188 *Id.*
189 *Id.* at 653.
190 *See, e.g.*, *id.* at 653 n.9.
191 *See Grinnell*, 2022 Cal. Super. LEXIS 42939, at *13–14.
192 *See White*, 2024 WL 1813237, at *3.

Yet, *Suprynowicz*'s reasoning is not immune to critique. In determining that the plaintiffs' claims did not impermissibly allege wrongful life, the *Suprynowicz* court characterized them as ordinary negligence instead.[193] But the defendant's alleged conduct appears intentional. Therefore, actions for breach of contract or an intentional tort may better fit these facts. For fertility fraud cases, Professor Frederick Vars has suggested that battery, fraud, and intentional infliction of emotional distress are the most applicable tort doctrines.[194] Furthermore, many of the emotional harms surrounding fertility fraud center on the family relationship. Discovering fertility fraud can be traumatizing because it changes how an individual sees themselves, their place in their family, and their family relationships. Therefore, where available, alienation of affection may also encompass these claims.[195] Negligence may better fit claims like those alleged in *Norman* and *Zelt*—but even if negligence by fertility providers had been at issue, those claims could be equally vulnerable to the wrongful life and wrongful birth bars. Such claims are therefore equally saved by the clarifying definition that the *Suprynowicz* court introduced.

Despite its unexpected approach, *Suprynowicz* reaches the right result. Victims of fertility fraud often face an uphill battle to vindicate their rights.[196] Given the growth of the fertility industry and the numerous instances of fertility fraud,[197] providing opportunities for accountability and redress is important. If victims cannot sue providers that engage in this fraud, deterrence will be more difficult to achieve. Furthermore, determining that fertility fraud allegations constitute wrongful birth or wrongful life raises philosophical questions that courts are not equipped to handle. For such a ban to apply to fertility fraud cases, a court must determine that a pregnancy produced using a different donor or the intended father would have resulted in the birth of a different child, instead of the

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193 The court provided little reasoning on this point. *See Suprynowicz*, 328 A.3d at 653 (concluding that "the present case bears none of the hallmarks of a wrongful life claim and is properly understood and can be properly adjudicated within the context of ordinary negligence claims").

194 Frederick E. Vars, *Fertility Fraud: The Child's Claims*, 63 B.C. L. REV. E. SUPP. 29, 30–31 (2022).

195 *See* Ames v. Ames, 2016 WL 7015642, at *5 (E.D. Wash. Nov. 30, 2016).

196 *See supra* Introduction, Part II.C.1.

197 *See supra* Part I.

same child with different DNA.[198] Philosophers disagree on this issue;[199] judges cannot know which answer to this question is correct.

Moreover, *Suprynowicz*'s result avoids the concerns that originally led courts to bar recovery in wrongful birth and wrongful life suits. Much of courts' original hostility to these claims stemmed from these claims' vindication of abortion rights.[200] But fertility fraud cases are not contingent on abortion. Similarly, for wrongful birth claims brought by parents, early cases sought to avoid comparing the cost of raising a disabled child to the immeasurable benefits of parenting—a comparison that the compensatory damages calculation would require.[201] For plaintiffs alleging fertility fraud, they would likely still be parents and experience those benefits in the counterfactual world in which no fertility fraud occurred. Thus, these cases do not require this immeasurable or controversial comparison.

For plaintiffs seeking to hold fertility providers and cryobanks accountable for fertility fraud and negligence, *Suprynowicz*'s logic may offer a persuasive argument against holding that their cause of action alleges noncognizable claims for wrongful birth and life. However, *Suprynowicz* dealt with the common law of Connecticut. Other states have codified statutory bans on wrongful birth and life claims. Whether plaintiffs alleging fertility fraud in these states can successfully circumvent the wrongful birth and wrongful life labels may depend in part on whether the logic of *Suprynowicz*

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198 *See, e.g.*, MICH. COMP. LAWS § 600.2971(1) ("A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born."); *Norman*, 848 S.E.2d at 841 (finding that fertility fraud claims were not cognizable because they "would require recognizing [the child]'s life as an injury").

199 Adherents of origin essentialism often maintain that the same person cannot come from a different sperm-egg pair. *See* Michael Tze-Sung Longenecker, *Conventionalism About Persons and the Nonidentity Problem*, 101 AUSTLRALASIAN J. PHIL. 954, 955–57 (2023). However, scholars have criticized this perspective. For instance, Professor Frederique Janssen-Laurent has explained that in ordinary language, people frequently express the idea that an individual could have been the same person even if they had been conceived using different DNA. Frederique Janssen-Lauret, *Anti-Essentialism, Modal Relativity, and Alternative Material-Origin Counterfactuals*, 199 SYNTHESE 8379, 8383 (2021). She argued that these statements are coherent and rebut origin-essentialist claims. *Id.* at 8389. Ancient theories of the soul could also support this thesis: Plato theorized that the soul is not fundamentally tied to a person's body and instead preexists it. *See* Hendrik Lorenz, *Ancient Theories of Soul*, STANFORD ENCYCLOPEDIA OF PHIL. (May 15, 2024), https://perma.cc/K2GW-F46M; Fran O'Rourke, *Immortality of the Soul in Plato and Acquinas*, 27 CLASSICS IR. 237, 239 (2020).

200 *See, e.g.*, *Gleitman*, 227 A.2d at 693.

201 *See, e.g.*, *id.*

is consistent with those states' statutory schemes. The next Part considers this issue.

III. INTERPRETING STATUTORY BANS

In jurisdictions with existing statutes banning wrongful birth and wrongful life claims, statutory interpretation will determine whether fertility fraud allegations are cognizable. As a result, this Part considers each of the three broad categories of statutes that states have adopted: those involving a lost opportunity to receive an abortion, those with exceptions for gross negligence and intentional conduct, and broader bars.[202] In particular, as case studies for the second and third categories, this Part investigates the text and purpose of Maine's and Michigan's ambiguous bans, concluding that most fertility fraud claims likely survive. These statutes were selected based on the availability of legislative history and the prevalence of assisted reproductive technology in those states.[203]

While considering legislative history and purpose is inevitably state specific, these analyses reach conclusions that are relevant for other states. As this Part explains, the Maine and Michigan legislatures adopted their bans for varying reasons, but none of the identified purposes implicate fertility fraud. Moreover, at first glance, the purpose behind Michigan's ban may appear deceptively unique: Despite the statute's silence on abortion, the ban's purpose was to prohibit allegations based on a missed opportunity to receive an abortion. Yet, evidence suggests that the purpose and history behind Michigan's ban also underlie bans in other states, where similar analyses could thus apply.[204] The Michigan analysis also reveals that antiabortion motivations may have prompted other bans on wrongful birth and wrongful life, even when the statutes do not explicitly reference this issue. Finally, Michigan's and Maine's statutes are compatible with *Suprynowicz*'s framework, demonstrating that this framework

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[202] *See supra* Part II.B.

[203] *See State-Specific Assisted Reproductive Technology Surveillance*, CDC (Dec. 27, 2021), https://perma.cc/T2VG-M9WD (showing that, in 2019, Maine and Michigan were among the states where 2,085 to 2,616 assisted reproductive technology procedures were performed per one million women).

[204] *See infra* notes 242–43 and accompanying text.

could provide courts and plaintiffs with additional support for interpreting statutory bans to distinguish fertility fraud from wrongful birth and wrongful life.

A. Abortion-Based Statutes Likely Do Not Preclude Fertility Fraud Claims

Based on their text, abortion-based bans on wrongful birth and wrongful life do not implicate fertility fraud allegations, making *Suprynowicz*'s framework unnecessary to permit recovery but compatible with the statutes' regimes. On their face, statutes barring abortion-based wrongful life and birth claims do not apply to fertility fraud cases. For defendants to avail themselves of these bans, these statutes require the plaintiff to allege that "the defendant's act or omission contributed to the mother's not having obtained an abortion."[205] When a plaintiff claims that a fertility provider switched out the chosen gametes for his own or that a cryobank misrepresented the characteristics of a gamete donor, they do not allege that the defendant denied them the opportunity to have an abortion. Instead, plaintiffs allege that their child should have been conceived using different gametes.

The logic of *Suprynowicz* is therefore not necessary for plaintiffs bringing fertility fraud cases in these states to overcome statutory bars. However, *Suprynowicz*'s framework dividing fertility fraud from wrongful birth and wrongful life claims is entirely compatible with these statutes and may further support plaintiffs alleging fertility fraud in these states. According to *Suprynowicz*, a wrongful life claim must involve a defendant that is not directly responsible for the birth of the child.[206] When a defendant's act causes a mother not to obtain an abortion, this lack of direct responsibility is apparent: There are multiple steps in the causal chain ending in the birth of the child, and to avoid the alleged harm, the parents would have had to intervene by having an abortion. These statutes also align with *Suprynowicz*'s second factor, immeasurable damages.[207] In a barred wrongful life action, plaintiffs must claim that their mothers should have aborted them, forcing the courts to compare their existence to nonexistence. Thus, while *Suprynowicz*'s characterization of wrongful birth and

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[205] *E.g.*, OKLA. STAT. tit. 63, § 1-741.12. Other states have similar constructions. *See supra* Part II.B.

[206] *Suprynowicz*, 328 A.3d at 651.

[207] *Id.* at 652.

wrongful life claims is broader than these statutes' abortion-focused definitions, its characterization comports with these statutes. Fertility fraud plaintiffs in these states can use *Suprynowicz*'s reasoning to distinguish their allegations from those barred by the statutes.

Given that plaintiffs alleging fertility fraud can escape the prohibitions in these statutes based on the text alone, additional analysis of legislative history is unnecessary.

B. Statutes Containing Exceptions for Gross Negligence and Intentional Conduct: Michigan Case Study

Using Michigan as a case study, this Section considers whether statutes barring wrongful birth or life claims but exempting intentional or grossly negligent conduct apply to—and therefore bar—fertility fraud allegations. Michigan courts have yet to confront this issue. Therefore, this Section offers analysis that courts and plaintiffs can adopt.[208] Based on the text alone, many fertility fraud plaintiffs will succeed in evading Michigan's prohibition. However, for the claims that fail to meet the scienter requirement, an analysis of the statute's purpose clarifies that it likely does not encompass fertility fraud.[209]

Relying first on the text, the statute's definition of wrongful birth and wrongful life is ambiguous for allegations of fertility fraud. Michigan's statute provides, "A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not

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[208] Michigan lawmakers have attempted to enact legislation penalizing fertility fraud, but at the time of writing, these efforts have not succeeded. *See* Colin Jackson, *Fertility Fraud Bills Pass Michigan House, Head to Senate*, MICH. PUB. (Feb. 18, 2026), https://perma.cc/8V3M-5NYS. If these proposals become law, Michigan courts will need to determine whether they apply retroactively to preenactment incidents of fertility fraud. If the laws are not retroactive, the state's wrongful life and birth bans will impact whether victims can achieve redress in those cases. Considering that victims often fail to discover fertility fraud for years or decades after the initial incident, interpretation of these bans could determine whether Michigan plaintiffs can recover for fertility fraud for many years to come. *See supra* text accompanying note 25.

[209] Outside of the context of statutory interpretation, one commentator has briefly outlined the legislative history of Michigan's ban and its promotion of antiabortion public policy. *See* William C. Duncan, *Statutory Responses to "Wrongful Birth" and "Wrongful Life" Actions*, *in* LIFE AND LEARNING XIV, at 3, 5–6 (Joseph W. Koterski ed., 2004). This Comment breaks new ground by more thoroughly dissecting the ban's history, concluding that abortion is integral to the definition of wrongful birth and life claims in Michigan and that this abortion-based definition therefore influences the ban's applicability to fertility fraud.

have been born."[210] It uses similar language to ban wrongful life claims.[211] Given disagreement about whether allegations of fertility fraud involve a claim that but for a defendant's actions, a child would not have been born,[212] the text's application to fertility fraud is ambiguous. This ambiguity is especially strong given that many fertility fraud allegations revolve around the use of one person's gametes instead of another's, raising philosophical questions about existence that courts cannot answer.[213]

Yet, some plaintiffs alleging fertility fraud could avoid confronting this ambiguity: Even if their claims constitute wrongful birth or wrongful life, they will likely satisfy the statute's exception. The statute does not bar "a civil action for damages for an intentional or grossly negligent act or omission, including, but not limited to, an act or omission that violates the Michigan penal code."[214] In Michigan, a plaintiff can successfully allege claims that otherwise constitute wrongful birth or life if they allege intentional or grossly negligent conduct. Especially in cases involving a medical provider that used his own sperm instead of the intended sperm, plaintiffs frequently allege intentional torts. For instance, the plaintiffs in *White* brought claims for fraud and battery.[215] Other plaintiffs alleging fertility fraud have advanced claims for intentional infliction of emotional distress.[216] On the basis of text alone, some fertility fraud lawsuits will therefore survive these bans because they allege intentional conduct, which statutes in this category permit.

Other fertility fraud lawsuits may be possible under the standard of gross negligence. In Michigan, gross negligence establishes a high bar.[217] In the context of qualified immunity, Michigan has statutorily defined gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."[218] An intermediate court has argued that "evidence that a defendant engaged in affirmative actions contrary to professionally accepted standards and then sought to cover up those actions

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[210] MICH. COMP. LAWS § 600.2971(1).

[211] *See id.* § 600.2971(2).

[212] *See supra* Part II.D.

[213] *See supra* note 199 and accompanying text.

[214] MICH. COMP. LAWS § 600.2971(4).

[215] *White*, 2024 WL 1813237, at *1.

[216] *See Rowlette*, 352 F. Supp. 3d at 1019.

[217] *See, e.g.*, Maiden v. Rozwood, 597 N.W.2d 817, 824 (Mich. 1999) (requiring conduct to be "substantially more than negligent").

[218] MICH. COMP. LAWS § 691.1407(8)(a).

does establish gross negligence."[219] When a doctor commits fertility fraud by secretly using his own sperm, plaintiffs likely meet this standard. These actions clearly transgress accepted professional expectations, and their secret, nonconsensual nature demonstrates an attempt to cover up the conduct. Plaintiffs may face greater difficulty establishing gross negligence for a cryobank's accidental use of the wrong donor's sperm or misrepresentation of the donor's characteristics. Thus, if their claims fall into the statute's definition of wrongful birth or wrongful life, plaintiffs purely alleging negligence by fertility providers or cryobanks may struggle in the face of this high bar. Resolving the statute's ambiguous definition of wrongful birth and wrongful life can therefore aid courts and plaintiffs when confronting these allegations under Michigan law.

The statute's legislative history demonstrates that legislators likely understood it to apply only to wrongful birth and life actions in which a plaintiff alleges that but for a defendant's conduct, the pregnancy would have been terminated. Via Michigan Senate Bill 1170, the state codified its ban on these claims in January 2001.[220] While the Michigan House considered the bill, the House Legislative Analysis Section, a nonpartisan group of House staff, prepared a report on the bill "for use by House members in their deliberations . . . ."[221] While prepared by staff—instead of legislators—and not intended to serve as a statement of legislative purpose,[222] this report provides evidence of the House's understanding of the scope of its ban at the time of enactment. Legislators would have referred to this report's definitions when considering the bill. In its basic summary of the problem the bill sought to address, the report defined wrongful birth and life claims as follows:

> First, "wrongful life" is a tort that is brought by or on behalf of a child who has been born with birth defects alleging that but for the negligence of the defendant, he or she would not have been born. Second, the tort of "wrongful birth" is distinguished from wrongful life claims because it is brought by the

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219 Bellinger v. Kram, 904 N.W.2d 870, 873 (Mich. Ct. App. 2017).

220 S.B. 1170, 90th Leg., 2000 Reg. Sess. (Mich. 2001).

221 H. LEGIS. ANALYSIS SECTION, 1999-HLA-1170-A, PROHIBIT WRONGFUL BIRTH/LIFE LAWSUITS: SENATE BILL 1170 WITH HOUSE COMMITTEE AMENDMENT, FIRST ANALYSIS 3 n.# (Mich. 2000).

222 *Id.*

> parents of the child rather than the child. The parents assert that but for the failure of the defendant to properly inform them of the existence or evidence of birth defects they would have chosen to abort the pregnancy.[223]

This definition of wrongful birth and life claims assumes the presence of a key feature: a claim that without the defendant's misconduct, the parents would have obtained an abortion. This formulation reflects the quintessential wrongful birth or life claim: A provider failed to diagnose a birth defect, denying the parents the opportunity to have an abortion.[224]

Further support for the definition's emphasis on abortion comes from the involvement of pro-life advocacy groups in advancing the bill. The report notes that Right to Life of Michigan supported the bill.[225] Furthermore, local newspapers nearly invariably referred to the bill as "a move sought by anti-abortion activists."[226] One pro-life candidate for State Representative even used his role advising the authors of the bill as evidence of his "proven track record on life issues."[227] The bill enjoyed strong pro-life support, suggesting that its purpose was abortion related.

Moreover, Michigan's statute likely passed in response to recent wrongful birth cases, revealing that its purpose was to ban traditional abortion-based claims. The House Legislative Analysis Section report states that courts had allowed recovery in some wrongful birth suits, creating a problem of "conflicting court cases."[228] Hinting at purpose, the report notes, "Legislation has been proposed to resolve this confusion."[229] While the report does not constitute an official statement of legislative intent, a spurt of cases addressing wrongful birth prior to the statute's passage

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[223] *Id.* at 1.

[224] *See* Williams, *supra* note 58, at 410.

[225] H. LEGIS. ANALYSIS SECTION, *supra* note 221, at 3.

[226] *E.g.*, *Senate Approves Ban on "Wrongful Birth" Lawsuits*, BAY CITY TIMES, May 31, 2000, at 3A. Other newspapers used largely similar language. *See, e.g.*, *Abortion Foes Hail Bill*, FLINT J., May 31, 2000, at A3; *"Wrongful Birth" Lawsuit Ban OK'd*, ANN ARBOR NEWS, May 31, 2000, at B6; *House Bill Eases Move to Virtual High School*, SAGINAW NEWS, May 31, 2000, at A4 (describing the bill as "a move sought by pro-life activists").

[227] Advertisement, *Tom George Is Pro-Life*, KALAMAZOO GAZETTE, July 30, 2000, at B4; *see also 61st State House District Question and Answer*, KALAMAZOO GAZETTE, Aug. 4, 2000, at 2 (including candidate Tom George's statement that "I believe the state has a duty to protect the life of its citizens from conception until natural death. I was an adviser to the authors of the 'wrongful birth bill,' which would prohibit parents from suing a hospital when they have an unwanted baby").

[228] H. LEGIS. ANALYSIS SECTION, *supra* note 221, at 1.

[229] *Id.*

suggests that the statute's purpose was to clarify the legislature's position in the face of conflicting rulings. Each of those cases confronted typical wrongful birth allegations, not fertility fraud. In *Blair v. Hutzel Hospital*,[230] decided in 1996, the plaintiff claimed that her doctor negligently failed to screen her child for Down Syndrome, resulting in the birth of her disabled child.[231] The court recognized wrongful birth as a valid cause of action.[232] However, in *Taylor v. Kurapati*,[233] the same intermediate court determined that it could not recognize wrongful birth claims in 1999.[234] That case similarly involved a medical professional's alleged failure to diagnose a fetal anomaly, preventing an informed decision to terminate the pregnancy.[235] The proximity of these cases to the passage of Michigan's ban suggests that the legislature sought to respond to these inconsistent rulings. As both cases confronted allegations that a provider's negligence denied a patient information that would have led them to obtain an abortion, the statute's animating purpose was likely to clarify Michigan law on these types of claims.

In the court's last word on wrongful birth prior to the statute's passage, *Kurapati* seemed to define wrongful birth and wrongful life claims to require abortion-based allegations. The court explained that wrongful birth "usually involves an allegation of a negligent failure relatively early in the pregnancy to inform the parents of the risk of birth defects."[236] In distinguishing wrongful birth from other birth-related medical negligence, *Kurapati* argued that the latter "do[es] not involve an allegation that the negligence deprived the parents of the opportunity to terminate the pregnancy."[237] This dividing line implies that wrongful birth cases inherently do involve an allegation of a missed opportunity to receive an abortion.

Blair's emphasis on abortion rights further supports this definition. While *Blair* adopted a slightly broader characterization of wrongful birth, its definition still matches typical wrongful birth allegations: A provider's negligence in diagnosing birth defects

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230 552 N.W.2d 507 (Mich. Ct. App. 1996).
231 *Id.* at 508.
232 *Id.* at 510.
233 600 N.W.2d 670 (Mich. Ct. App. 1999).
234 *Id.* at 691.
235 *Id.* at 674.
236 *Id.* at 675.
237 *Id.*

stopped parents from making an informed choice about the future of their pregnancy.[238] Moreover, protecting abortion rights formed an essential component of *Blair*'s holding recognizing this cause of action:

> As long as abortion remains an option allowed by law, the physician owes a duty to furnish patients with adequate information for them to be able to decide whether to choose that course of action. Those who would eliminate such a right of recovery must first abolish the right to have an abortion.[239]

Blair's justification for permitting wrongful birth suits demonstrates that the court understood this claim as vindicating abortion rights. This close relationship between wrongful birth claims and abortion rights supports a definition of these claims that requires parents to allege that but for a physician's negligence, they would have received an abortion.

Kurapati's and *Blair*'s approaches to wrongful birth signal that the Michigan statute solely applies to abortion-based claims. Leading up to the statute's consideration and passage, both *Kurapati* and *Blair* suggested that wrongful birth refers to cases in which a provider's negligence prevented the patient from deciding to terminate their pregnancy. Consequently, this definition likely reflects the Michigan legal community's—and therefore the legislature's—understanding of wrongful birth claims at the time of the statute's passage. The statute can be interpreted as only applying to these kinds of claims.

Under this traditional abortion-based definition, fertility fraud plaintiffs would be able to recover in Michigan. Fertility fraud does not constitute wrongful birth when that category is defined as requiring the plaintiffs to allege that but for the physician's negligence, they would have received an abortion. In *Suprynowicz*, the plaintiffs' claims did not constitute wrongful life largely because the fertility fraud allegations did not mirror this traditional form of claim.[240] Plaintiffs in fertility fraud cases do

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[238] *Blair* referred to wrongful birth as "shorthand" for actions brought against providers for failing to inform parents of the risk of fetal anomaly, "effectively precluding an informed decision as to whether the pregnancy should be avoided or terminated." *Blair*, 552 N.W.2d at 509 (quotation marks omitted) (quoting Proffitt v. Bartolo, 412 N.W.2d 232, 235 (Mich. Ct. App. 1987)).

[239] *Id.* (quotation marks omitted) (quoting *Proffitt*, 412 N.W.2d at 238).

[240] *See Suprynowicz*, 328 A.3d at 651–53.

not argue that a provider's negligence denied the parents the opportunity to have an abortion.

Moreover, *Kurapati*'s reasoning also suggests that Michigan's approach to wrongful birth at the time of enactment was compatible with *Suprynowicz*'s framework, providing additional support for plaintiffs alleging fertility fraud. *Kurapati* distinguished wrongful birth suits from other birth-related medical negligence: The former "involve the intermediate step of parental action."[241] *Suprynowicz*'s first factor mirrors this characterization: The provider is indirectly responsible for the harm. Thus, in interpreting Michigan's statute as banning the abortion-based wrongful birth claims confronted by the state's courts at the time of enactment, Michigan courts could reasonably use a *Suprynowicz*-like framework to distinguish fertility fraud allegations. After all, in fertility fraud cases, the provider is directly responsible for the pregnancy and harm.

In summary, plaintiffs may be able to recover for fertility fraud in Michigan, even when they cannot prove intentional or grossly negligent conduct. Legislative history suggests that the Michigan legislature understood its ban on wrongful birth and life claims to apply only when plaintiffs allege that a provider's negligence stopped them from obtaining an abortion. While the partial reliance on legislative history in this analysis may limit the applicability of these conclusions to other states, there is reason to believe that other states' bans were also motivated by abortion-related politics[242] or enacted in response to court cases confronting typical abortion-based wrongful birth allegations.[243] Moreover, this analysis reveals that even for wrongful birth statutes that do not explicitly refer to abortion, antiabortion politics may have motivated their adoption. Under statutes with this purpose, fertility fraud allegations should survive.

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[241] *Kurapati*, 600 N.W.2d at 675.

[242] Minnesota's ban had pro-life roots. *See* Haqq, *supra* note 63, at 310–12.

[243] An early draft of the bill banning wrongful life and birth claims in Iowa stated that the bill was in part a response to the Iowa Supreme Court's decision permitting recovery for wrongful birth in *Plowman v. Fort Madison Community Hospital*, 896 N.W.2d 393 (Iowa 2017), one year prior. *See* H. File 2165, 87th Gen. Assemb., 2d Sess. (Iowa 2018) (withdrawn). *Plowman* involved typical wrongful birth allegations that a doctor's negligence in diagnosing a birth defect denied the parents the opportunity to terminate the pregnancy. *Plowman*, 896 N.W.2d at 396–97. *Plowman* also defined wrongful birth traditionally: "In a wrongful-birth action, parents of a child born with a detectable birth defect allege that they would have avoided conception or terminated the pregnancy but for the physician's negligent failure to inform them of the likelihood of the birth defect." *Id.* at 399.

C. Statutes Broadly Prohibiting Wrongful Birth and Wrongful Life Claims: Maine Case Study

To determine whether statutes containing broader bans on wrongful birth and wrongful life claims permit fertility fraud allegations, this Section investigates Maine's statute. In 1986, Maine originally enacted its ban as a part of a law on medical and legal professional liability.[244] Maine has yet to interpret this statute in relation to fertility fraud claims, so this Section offers courts and plaintiffs a guide to parsing its ambiguity in these high-stakes cases. For some fertility fraud plaintiffs, the statute's application would likely turn on whether the child was born healthy or unhealthy. Beyond this textual analysis, the purpose of the ban demonstrates that it should not bar many fertility fraud suits.

By leveraging the text of Maine's statute restricting wrongful birth and wrongful life claims, plaintiffs may be able to successfully allege some fertility fraud claims, but its application to other claims is ambiguous and changes based on the health of the child. Maine divides the possibility of recovery on the basis of whether the child born is healthy or unhealthy.[245] Apart from an exception for failed sterilization procedures, Maine prohibits damages for the birth of a healthy child: "A person may not maintain a claim for relief or receive an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to that person."[246] As exemplified by the split between *Norman* and *Suprynowicz*,[247] state courts disagree on whether fertility fraud allegations meet this definition—whether the plaintiffs' claims allege the child's birth as their injury.[248] This provision's application to fertility fraud claims is thus ambiguous. If it does apply and fertility fraud results in a healthy child—e.g., a doctor inseminates a patient using his own sperm but the child is not born with any inheritable conditions—the statute bars recovery.

In contrast, recovery is possible for unhealthy children. The statute permits recovery for the birth of "an unhealthy child born as the result of professional negligence" but limits damages to

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[244] An Act Relating to Medical and Legal Professional Liability, ch. 804, § 16, 1986 Me. Laws 4273, 4286 (codified as amended at ME. STAT. tit. 24, § 2931).

[245] ME. STAT. tit. 24, § 2931(2)–(3).

[246] *Id.* § 2931(2).

[247] *See Norman*, 848 S.E.2d at 841; *Suprynowicz*, 328 A.3d at 648.

[248] *See supra* Part II.D.

those associated with the child's disability.[249] If fertility fraud allegations trigger this statute, children born with disabilities or diseases as a result of the fraud would be able to recover. However, the limitation on damages may prevent recovery unrelated to the child's disability, potentially precluding liability for emotional harm.[250] Solely mentioning damages that result from "professional negligence," the text also leaves open whether the limitation on damages applies to intentional conduct or breaches of contract—instead of pure "negligence"—by medical providers.[251] Given these ambiguities, assessing the purpose of the statute can shed light on its application to fertility fraud claims.

Maine's statement of intent, codified in the statute, has mixed implications for plaintiffs alleging fertility fraud. The statute describes the legislature's intent as follows: "It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child."[252] At first glance, this language is similar to the principle recognized by the Georgia Supreme Court in *Norman*, that "life can never amount to a legal injury."[253] Yet, the statement is limited to healthy children.

The statement of intent is consistent with recovery for plaintiffs alleging fertility fraud who do not claim that the pregnancy would have been terminated but for the provider's actions.[254] This distinction led *Suprynowicz* to conclude that the plaintiffs' claims did not exhibit either of the characteristics of wrongful life cases.[255] Fertility fraud plaintiffs seek to have and raise a child—but with the gametes they selected. Therefore, the injury is not the birth but the deception. Moreover, plaintiffs in these cases

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[249] ME. STAT. tit. 24, § 2931(3).

[250] *See id.*

[251] *Id.*

[252] *Id.* § 2931(1).

[253] *Norman*, 848 S.E.2d at 840.

[254] *See Suprynowicz*, 328 A.3d at 653 ("The plaintiffs do not claim that the defendant's alleged negligence prevented their mothers from terminating their pregnancies, or that the plaintiffs would have been better off had they never been born.").

[255] *See id.* (identifying a lack of inherent difficulty in calculating damages in part because "[t]he plaintiffs do not claim that the defendant's alleged negligence prevented their mothers from terminating their pregnancies"); *id.* at 652–53 (describing the provider's indirect responsibility in a wrongful life suit as failing to inform parents of a fetal anomaly in time for an abortion).

frequently allege emotional distress, which focuses on the harmful emotional impacts of the defendant's deception and therefore might not allege birth as an injury.[256] Given that the statement of intent does not completely answer the statute's applicability in fertility fraud cases—in particular, by failing to address cases in which a child is born unhealthy—the legislative history can shed further light on this analysis.

The legislative history also supports exempting fertility fraud allegations, as the statute's overall purpose was to reduce medical malpractice insurance premiums for providers. In a speech before the Maine House of Representatives on April 15, 1986, Representative Carol Allen provided a comprehensive summary of the medical malpractice reform bill in which the ban appeared.[257] Allen stated that the bill resulted from the efforts of a professional liability work group that "worked for over a year trying to pull together provisions that would, in fact, lower the cost of medical malpractice insurance in Maine and then doctors would be able to continue in practice and the cost to the patients would be less."[258] By limiting medical malpractice liability, insurance companies could lower their premiums, reducing the costs of practicing medicine in the state. However, the statute did not seek to reduce this liability to zero: Allen explained that "it was a carefully drawn up compromise."[259] While Allen did not discuss the values being balanced, legislators presumably sought to protect patients' interests in compensation for harm, as the statute enables compensation in suits that are not "frivolous."[260] Moreover, the statute appears to seek deterrence of negligence and malpractice by doctors, as it includes provisions like mandatory disciplinary review of certain providers.[261]

This purpose provides some support for permitting recovery in cases of fertility fraud, as medical malpractice insurance likely does not cover much of the fraudulent conduct at issue in those cases.[262] The discussion of the bill on the floor of the Maine House of Representatives did not contain explicit mentions of the issue

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256 *See supra* Part II.C.

257 2 H. LEGIS. REC., 112th Leg., 2d Reg. Sess. 1466 (Me. 1986).

258 *Id.*

259 *Id.*

260 *Id.*

261 *See id.* at 1467.

262 *See Not All Claims Covered by Med/Mal Policies*, CLINICIAN.COM (Sept. 1, 2013), https://perma.cc/NPH6-W79P.

of fertility fraud or the fertility industry. However, if a court interprets the Maine statute as broadly seeking to reduce malpractice insurance premiums while balancing competing interests, permitting recovery for fertility fraud is consistent with this goal. Medical malpractice insurance tends not to cover intentional conduct.[263] Therefore, allowing recovery in intentional fertility fraud cases would not increase premiums because the liability burden on insurance companies would not rise. This argument is weaker for unintentional negligence. However, the lack of regulation of the fertility industry provides further evidence that the statute would permit recovery here. The statute balanced its reduction of malpractice liability by adding other mechanisms to ensure that patients received adequate care from medical professionals.[264] The continued lack of regulation of assisted reproductive technology[265] demonstrates that removing liability here would not achieve the same balance sought by the professional liability statute and that the legislature likely did not intend the law to reach this issue. Otherwise, the statute would likely contain a similar compromise. Therefore, the legislative purpose suggests that under the statute, a court should reach the same result as *Suprynowicz*: Allegations of fertility fraud do not constitute claims for wrongful birth or life.

The legislative history also lends supports for an even narrower definition of wrongful birth claims than *Suprynowicz*. Allen specifically discussed the wrongful birth provision. She explained, "The second thing [the bill] does is that it will clarify our statutes with regards to wrongful birth. This is when a woman gives birth to a child after having gone through a sterilization procedure."[266] Allen's discussion of wrongful birth suggests that she and the drafters of the statute understood wrongful birth as a claim arising from the birth of a child after a failed sterilization procedure. Technically, this definition is closer to the traditional characterization of claims for wrongful conception.[267] Needless to say, fertility fraud allegations do not involve claims of a failed sterilization procedure.

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263 *Id.*

264 *See, e.g.*, 2 ME. H. LEGIS. REC. 1467.

265 *See supra* Part I.

266 2 ME. H. LEGIS. REC. 1466.

267 *See* Williams, *supra* note 58, at 410.

While statements made by one representative are a weak form of legislative history, Allen's statements persuasively describe the bill's purpose and scope. Courts are sometimes hesitant to assign significance to these kinds of statements.[268] In taking a broad approach to relevant legislative history, Maine courts are explicitly willing to rely on "the history of relevant codifications, amendments, and repeals; the legislative committee file[;] . . . reports and recommendations from legislative task forces, committees, and working groups; [and] narrative summaries and statements of fact accompanying proposed legislation and committee amendments."[269] Despite potential hesitance to rely on statements made by one representative, there may be reason to give Allen's statements weight. Her statements are not offhand remarks. Instead, Allen was a member of the committee that approved the bill, and she made her statements in response to a suggestion to amend a different provision, providing a comprehensive summary of the bill's contents and compromise.[270] A comprehensive summary provided by a member of the committee in which the bill originated and informing the legislature's understanding of the bill's scope may constitute a greater indication of a bill's purpose than another legislator's remarks.

Moreover, Allen's description of the bill's purpose and scope is supported by other sources. The ban appears in the broader context of a law addressing malpractice liability, suggesting that its purpose is indeed to confront this overarching issue.[271] Furthermore, a report prepared by Maine's Office of Policy and Legal Analysis, a nonpartisan staff office of the Maine Legislature,[272] reflects Allen's limited definition of wrongful birth: "The bill limits the damages recoverable in an action based on a failed sterilization, subsequent pregnancy, and birth of a healthy child."[273] This report similarly

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[268] *See, e.g.*, NLRB v. SW Gen., Inc., 580 U.S. 288, 307 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.").

[269] Corinth Pellets, LLC v. Arch Specialty Ins. Co., 246 A.3d 586, 595 (Me. 2021) (alterations in original) (quotation marks omitted) (quoting Wawenock, LLC v. Dep't of Transp., 187 A.3d 609, 617 (Me. 2018)).

[270] 2 ME. H. LEGIS. REC. 1466.

[271] *See generally* An Act Relating to Medical and Legal Professional Liability, 1986 Me. Laws 4273.

[272] *About Office of Policy and Legal Analysis*, ME. STATE LEGISLATURE, https://perma.cc/3K4A-J5ZC.

[273] OFF. OF POL'Y & LEGAL ANALYSIS, JOINT STANDING COMMITTEE ON JUDICIARY BILL SUMMARY 48 (1986).

suggests that the legislature intended to limit recovery only for claims based on failed sterilization.

Finally, for judges more convinced by interpretive methods centered on a statute's original public meaning, Allen's description matches contemporaneous newspaper reports, demonstrating that the Maine public likely understood the bill to operate in the same fashion. Local newspapers described the purpose of the bill as reaching a compromise to address the crisis of high medical malpractice liability,[274] which wrongful birth suits had contributed to.[275] When newspapers endeavored to define wrongful birth, they adopted Allen's limited, wrongful conception–esque description: The bill would "eliminate 'wrongful birth' suits in the event a healthy child is born to a woman who has been sterilized."[276] Thus, Allen's characterization of the statute's purpose and scope merits weight.

Given this definition, a *Suprynowicz*-like framework could also assist Maine courts in distinguishing fertility fraud claims from wrongful birth and wrongful life. Under the narrow definition of the statute's reach suggested by Allen, the cases covered would always involve a defendant who lacked direct responsibility for the harm alleged. After all, when a failed sterilization results in pregnancy, the defendant did not create the pregnancy itself, matching *Suprynowicz*'s first factor.[277] In contrast, fertility fraud cases, as *Suprynowicz* demonstrates,[278] do not meet this characteristic: The cryobank or medical provider directly participated in creating the pregnancy. Overall, where the statutory text runs out, the legislative history indicates that Maine's ban on wrongful birth and wrongful life claims likely does not cover plaintiffs alleging fertility fraud.

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Ultimately, this analysis of Michigan's and Maine's statutes produces four generalizable conclusions. First, the text of a statute need not explicitly refer to abortion for its purpose to reflect

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[274] *See* Nancy Perry, *Malpractice Reforms Clear Legislature*, KENNEBEC J., Apr. 16, 1986, at 1; Gregory T. Davis, *Malpractice Lawsuits Adding Up to Higher Medical Costs*, RUMFORD FALLS TIMES, Mar. 26, 1986, at 1; *Malpractice Measure Gets Wide Support*, LEWISTON J., Mar. 13, 1986, at 1.

[275] *See* Davis, *supra* note 274, at 1.

[276] *Maine Seen Facing Insurance Crisis*, KENNEBEC J., Nov. 25, 1985, at 20.

[277] *Suprynowicz*, 328 A.3d at 651.

[278] *Id.* at 653.

anti-choice politics. More wrongful birth and wrongful life statutes may fall into the first abortion-based category than is apparent based on text alone. Second, while some statutes purporting to restrict wrongful birth or wrongful life claims were motivated by antiabortion politics, not all were. In states other than Maine and Michigan, a concern for increasing medical malpractice liability is also a possible legislative purpose. Third, legislatures may mislabel their wrongful birth bans, which may have instead intended to address other types of claims—like wrongful conception. Finally, neither purpose identified—preventing recovery for allegations that a provider's negligence stopped an individual from receiving an abortion or reducing malpractice insurance premiums—compels banning claims for fertility fraud.

This final conclusion reveals that plaintiffs should continue to bring fertility fraud suits, even in jurisdictions with statutory bans on wrongful birth or life claims. Courts need not interpret these bans to bar fertility fraud suits. Such interpretations would extend ambiguous bans to claims that the legislature likely did not intend to reach. While interpreting these statutes, courts can similarly draw on a *Suprynowicz*-like framework to aid them in distinguishing fertility fraud from noncognizable claims.

IV. FUTURE QUESTIONS RAISED

In jurisdictions that do permit recovery for fertility fraud claims, these claims will present additional questions to courts, which may impact a plaintiff's ability to recover. This Part summarizes some of the questions that courts will face.

Courts will likely confront conflict of laws questions when plaintiffs raise fertility fraud allegations. Patients travel to receive fertility care frequently enough that some fertility providers have published information for clients travelling from afar to their facilities.[279] Thus, courts will likely encounter cases in which the location of the cryobank, location of the fertility provider, plaintiff's domicile, or child's place of birth differ, requiring the court to determine which state's law to apply. The abortion-related nature of some of the wrongful birth or wrongful life bans may impact these analyses, especially in states that adopt approaches

[279] *See, e.g.*, *Traveling for Treatment*, CNY FERTILITY, https://perma.cc/4ANB-T872 (recommending travel procedures for different types of travelers, including "[r]oad [t]rippers" and "[f]lyers").

to conflicts of laws that include exceptions or elements favoring their own public policy.[280]

Courts must also determine the types of claims and remedies available to fertility fraud plaintiffs. Under the *Suprynowicz* framework, a plaintiff's fertility fraud allegations can advance past the motion to dismiss or summary judgment stage, avoiding bars on wrongful birth and wrongful life claims. As a result, courts will need to determine which types of claims a child or their parent can bring. If the child seeks to recover under a theory of breach of contract, they must satisfactorily allege that they are a third-party beneficiary.[281] Similar considerations also impact a child's claims for lack of informed consent or negligence. These allegations raise complicated questions about whether the doctor providing fertility care to the parents also owes a duty to the child.[282] To avoid these complications, courts may choose to allow only parents to bring claims for negligence, lack of informed consent, and breach of contract, while permitting children to bring claims for undisclosed medical risks or emotional distress. Other questions that courts must answer following *Suprynowicz* include how to calculate damages in these cases.

Suprynowicz provides little guidance on these issues. *Suprynowicz* simply reversed the trial court's grant of the defendant's motion to strike the negligence claims because they sounded in wrongful life.[283] Therefore, if courts allow plaintiffs' claims to survive the initial hurdle of bans on wrongful birth and wrongful life, future fertility fraud cases will need to address these other issues, breaking new ground.

CONCLUSION

This Comment considers whether plaintiffs alleging fertility fraud can survive statutory and judge-made law banning claims for wrongful birth or wrongful life. *Suprynowicz* permitted recovery for plaintiffs alleging fertility fraud by providing a novel

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[280] *See, e.g.*, Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1046–47, 1083 (1987) (describing the Second Restatement approach, interest analysis theory, and public policy exceptions to the traditional approach).

[281] Fertility fraud plaintiffs have alleged that the children are third-party beneficiaries of the agreement between the parents and provider. *See, e.g.*, *Idant Lab'ys*, 374 F. App'x at 324.

[282] *See, e.g.*, Vars, *supra* note 194, at 30 (arguing that doctors owe a duty of care to children produced via fertility services but noting a court's disagreement).

[283] *See Suprynowicz*, 328 A.3d at 653.

definition of wrongful birth and wrongful life: These latter claims involve a defendant's lack of direct responsibility for the child's birth and impossibility of measuring damages.[284] This framework may be compatible with statutory bans on these claims in other states. Based on their text alone, bans that define wrongful birth and wrongful life as involving allegations of missed opportunities to receive an abortion likely do not apply to fertility fraud cases. Moreover, the text and legislative history of Michigan's and Maine's bans suggest that they do not bar fertility fraud allegations. Ultimately, states have varying purposes for banning wrongful birth and wrongful life claims, but across purposes, fertility fraud plaintiffs can likely still recover.

Summer McKesson's story is one of the latest reports of fertility fraud, but it will likely not be the last. The expansion of the fertility industry and the rise of direct-to-consumer DNA testing will make this issue increasingly prevalent. For victims of these practices, achieving redress and holding professionals accountable is important. Bans on wrongful life and wrongful birth claims may be an obstacle to these suits. However, if *Suprynowicz*'s framework distinguishing fertility fraud persuades courts outside of Connecticut, plaintiffs may have a path to justice after all.

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[284] *Id.* at 651–52.