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WRONGFUL BIRTH AND WRONGFUL LIFE ACTIONS ARISING FROM NEGLIGENT GENETIC COUNSELING: THE NEED FOR LEGISLATION SUPPORTING REPRODUCTIVE CHOICE

I. Introduction

Genetic research has made great strides in discovering the origins of genetic birth defects,¹ and has developed new tests that can accurately diagnose many birth defects in utero.² This kind of prenatal testing and diagnosis, also called genetic screening³ or genetic counseling,⁴ is being used by growing numbers of couples in family planning.⁵

Genetic counseling may take place either before the woman decides to conceive⁶ or during the early stages of pregnancy.⁷ If genetic coun-

1. See Zuskar, *The Psychological Impact of Prenatal Diagnosis of Fetal Abnormality: Strategies for Investigation and Intervention*, 12 *WOMEN & HEALTH* 91, 92 (1987) [hereinafter Zuskar]; see also *infra* notes 25-26 and accompanying text.

2. "A number of newer techniques using fetoscopy, alpha-fetoprotein, and ultrasound have recently been added to the physician's armamentarium of prenatal diagnostic procedures." *Id.*; see also *infra* notes 38-41 and accompanying text.

3. See, e.g., Steele, *Genetic Screening and the Public Well-Being*, in *MEDICAL ETHICS AND THE LAW: IMPLICATIONS FOR PUBLIC POLICY* 345 (M. Hiller ed. 1981) [hereinafter Steele].

The goals of genetic screening . . . can be divided into three parts. Genetic screening can attempt to identify newborns or older individuals who may be affected with genetic disease. . . . Genetic screening attempts to identify fetuses effected [sic] with genetic diseases prior to birth. . . . Finally, genetic screening can attempt to identify individuals who are prospectively at greater risk than the general population of having offspring with specific genetic defects.

Id. at 345-46.

4. See, e.g., Fraser, *Introduction: The Development of Genetic Counseling*, in *GENETIC COUNSELING: FACTS, VALUES, AND NORMS* 5-15 (A. Capron, M. Lappé, R. Murray, T. Powledge, S. Twiss, & D. Bergsma ed. 1979); Capron, *Tort Liability in Genetic Counseling*, 79 *COLUM. L. REV.* 618, 619 (1979) [hereinafter Capron]; Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 *YALE L.J.* 1488, 1490 (1978); see also *infra* note 47 and accompanying text.

5. See D. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 257 (1985) [hereinafter KEVLES]; see also *infra* notes 32-41 and accompanying text.

6. See Lewis, *Better Babies*, *HEALTH*, Mar. 1987, at 24 ("[i]deally, counseling begins before pregnancy occurs, as soon as a woman decides she wants to have children. The counselor may sketch a family chart (called a pedigree) to help assess the risk of a specific disorder and to suggest that certain diagnostic tests be conducted") [hereinafter Lewis].

7. See *Gallagher v. Duke Univ.*, 638 F. Supp. 979, 982 (M.D.N.C. 1986) (construing North Carolina law), *aff'd in part, vacated in part*, 852 F.2d 773 (4th Cir. 1988). In that case, Mr. and Mrs. Gallagher's first child suffered from severe multiple birth defects. 638

seling conducted before conception discloses the existence of a defective genetic trait, the couple may decide not to have children.⁸ If the woman is already pregnant and her physician diagnoses a genetic disease in the fetus, the parents may then elect to terminate the pregnancy.⁹ Family planning decisions are extremely personal and

F. Supp. at 980. Before conceiving a second child, the Gallaghers sought genetic counseling. *Id.* The court distinguished pre-conception genetic counseling from post-conception genetic counseling as follows:

The first [type] is pre-conception genetic counseling. This type of counseling provides patients with information pertaining to whether they could or should conceive. Typically, such information relates to fertility and to the relative potential for conceiving a child with genetic or congenital defects. . . . Post-conception genetic counseling usually relates to tests conducted while the child is *in utero*, to determine if the fetus suffers from genetic defects.

Id. at 981-82 (citation omitted). A chromosome analysis performed on the Gallagher's first child showed no genetic abnormality. *Id.* at 980. The Gallaghers therefore went ahead and had a second child, who suffered from the same multiple birth defects as the first child. *Id.* The district court held that wrongful birth actions exist in North Carolina where "a health care provider negligently provides counseling and information which induces a couple to conceive a defective child." *Id.* at 982. The court also held that the child had no cause of action for wrongful life because the physician provided genetic counseling before the child was conceived and thus had no duty to her. *Id.* at 982-83.

Most of the litigation concerning negligent genetic counseling and the subsequent birth of an infant with genetic birth defects involves procedures performed, or omitted, during the early stages of pregnancy. *See, e.g.,* Siemieniec v. Lutheran Gen. Hosp., 117 Ill. 2d 230, 231, 512 N.E.2d 691, 693 (1987) (woman with family history of hemophilia sought genetic counseling during first trimester of pregnancy, parents recovered extraordinary medical and educational expenses associated with the disease); *Alquijay v. St. Luke's-Roosevelt Hosp. Center*, 63 N.Y.2d 978, 473 N.E.2d 244, 483 N.Y.S.2d 994 (1984) (erroneous amniocentesis result indicated mother would give birth to healthy child; child was born with Down's syndrome. Infant's cause of action for wrongful life not legally cognizable in N.Y.; parents' cause of action barred by statute of limitations); *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (despite parents' ancestry which put them in high-risk group for child born with Tay-Sachs disease, defendant doctor did not administer available blood tests or take a genealogical history; infant was subsequently born with Tay-Sachs disease. Parents sought damages only for emotional distress; recovery denied); *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (1985) (parents of child afflicted with Down's syndrome claimed they were not properly advised of availability of amniocentesis and genetic counseling; court held neither parents nor infant had valid cause of action), *cert. denied*, 479 U.S. 835 (1986). The principles, however, are equally applicable to pre-conception negligence.

8. *See Steele, supra* note 3, at 350. "After genetic counseling, about 33 percent of the couples at relatively high risk (*i.e.*, greater than 10 percent) of having a genetically defective child elect to continue to reproduce; about 25 percent of the couples at relatively low risk (*i.e.*, less than 5 percent) elect not to reproduce." *Id.*

9. *Id.* at 346; *see also* *Berman v. Allan*, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979) ("[p]ublic policy now supports, rather than militates against, the proposition that [a woman] not be impermissibly denied a meaningful opportunity to make that decision"). This decision is an element of the parents' claim in a wrongful birth action. *See infra* notes 14, 52-53, 148-56 and accompanying text.

Wrongful birth and wrongful life actions would not be possible if a woman's right to have an abortion were not constitutionally protected, as established in *Roe v. Wade*, 410

depend in large part upon an individual's religious and moral beliefs, as well as social and emotional reactions.¹⁰ The ramifications of an erroneous diagnosis, or the failure to diagnose a defect altogether, can be devastating for a family.¹¹ The result—*i.e.*, the birth of a child with genetic birth defects—may have enormous financial, emotional and social implications for the child, parents and siblings.¹²

U.S. 113 (1973). *Roe*, however, was recently reconsidered in *Webster v. Reproductive Health Services*, 57 U.S.L.W. 5023 (1989). Although *Webster* rejects *Roe*'s trimester analysis, it does not overrule the constitutional right to have an abortion.

The Court, however, has decided to hear three more abortion cases in its next term. *Turnock v. Ragsdale*, 841 F.2d 1358 (7th Cir. 1988), *juris. postponed*, [Current Transfer Binder] S. Ct. Bull. (CCH) B4467 (July 3, 1989); *Ohio v. Akron Center for Reproductive Health*, 854 F.2d 852 (6th Cir. 1988), *prob. juris. noted*, [Current Transfer Binder] S. Ct. Bull. (CCH) B4467 (July 3, 1989); *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988), *cert. granted*, [Current Transfer Binder] S. Ct. Bull. (CCH) B4468 (July 3, 1989). Even if the Court ultimately overrules *Roe*, abortion will not be automatically criminalized; rather, the decision to prohibit abortions will be left to each state. See *Webster*, 530 U.S.L.W. at 5030-31. Furthermore, because many countries besides the United States guarantee the right to have an abortion, the Supreme Court's future decisions will not affect the vitality of this Note.

10. See *Berman*, 80 N.J. at 440, 404 A.2d at 18 (Handler, J., concurring in part, dissenting in part) (“[p]ersons, confronted with the awesome decision of whether or not to allow the birth of a defective child, face a moral dilemma of enormous consequence”); see also *infra* notes 156-59, 163, 181 and accompanying text.

11. See, e.g., *Procanik v. Cillo*, 97 N.J. 339, 359-63, 478 A.2d 755, 766-68 (1984) (Handler, J., concurring in part, dissenting in part) (discussing the likelihood of parents' shock, stress and emotional trauma at birth of handicapped child after genetic counselor had negligently advised that fetus was normal); Asch, *Reproductive Technology and Disability*, in *REPRODUCTIVE LAWS FOR THE 1990S: A BRIEFING HANDBOOK* 59, 68 (N. Taub & S. Cohen 1988) (“[f]or most nondisabled people, giving birth to a child with an impairment is rarely welcomed. . . . [T]he immediate question raised is how much the child with a disability will burden the woman, her mate if she has one, siblings, relatives and society as a whole. . . . The lack of a natural communal or familial structure can be psychologically and socially devastating”); see also *infra* notes 156-59, 163, 181 and accompanying text.

12. The case of *Naccash v. Burger*, 223 Va. 406, 290 S.E.2d 825 (1982), illustrates the potential harm that may result from negligent genetic counseling. The plaintiffs, Mr. and Mrs. Burger, being of eastern European ancestry, sought testing for Tay-Sachs disease when Mrs. Burger was three and one-half months pregnant with her first child. *Id.* at 410, 290 S.E.2d at 827. Tay-Sachs is an invariably fatal disease of the brain and spinal cord that occurs in Jewish infants of eastern European ancestry. *Id.* At four to six months of age the infant's central nervous system begins to degenerate, resulting in blindness, deafness, paralysis, seizures and mental retardation, and a life expectancy of no more than four years. *Id.* Because both parents must carry the Tay-Sachs genetic trait in order to afflict the child, Mr. Burger underwent a blood test; because it revealed he was not a Tay-Sachs carrier, Mrs. Burger continued her pregnancy and gave birth to a daughter. *Id.* When the child was four months old, their physician informed the Burgers that the child had Tay-Sachs disease. *Id.* At trial an expert witness testified that Mr. Burger's blood had been incorrectly labeled by the defendant hospital. *Id.* at 411, 290 S.E.2d at 827. Tay-Sachs disease is more debilitating than many other types of birth defects, as attested to by a reporter's interview of another couple with a Tay-Sachs child:

‘We were just devastated,’ David Astor said. ‘You think you have a healthy

Negligent genetic counseling has led to the emergence of "wrongful birth" and "wrongful life" suits.¹³ Wrongful birth is the parents' cause of action against a medical practitioner alleging that his negligence deprived them of making an informed decision regarding their constitutionally-protected procreative rights, ultimately resulting in the birth of a child with birth defects.¹⁴ Wrongful life is the infant's cause of action which is based on the premise that but for the medical practitioner's negligent act or omission, the infant would never have been born.¹⁵ The terms "wrongful birth" and "wrongful life" are con-

baby one day and the next you are told your baby has a 100[%] chance of dying. There is no hope.' . . . Helplessly, they watch Abigail's decline. 'She progressively lost her sight,' David Astor said. 'She's 95 percent paralyzed. She has lost the ability to swallow, so we feed her by tube now. She can't roll over. She can't cry.' . . . The experience is a drain on their emotions. . . . The couple are undergoing therapy to hold their marriage together and to help them cope with 'the grief, the anguish and the fact that we're going to have to lose our daughter, that this could have been prevented,' Kathy Astor said. It has also affected their finances and Kathy Astor's career. The Astors have had to provide nurses full-time to care for Abigail. And because of the strain, Kathy Astor had to take less stressful work.

Faulty Genetic Test Leaves Couple With a Dying Baby, N.Y. Newsday, Jan. 11, 1988, at 25, cols. 2-3.

13. The two terms, as they have been developed in the common law, are not interchangeable. See *infra* notes 14-15 and accompanying text. The two causes of action are, however, interdependent. See *infra* notes 76-83 and accompanying text.

14. See, e.g., *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 696 (E.D. Pa. 1978) (first federal case to recognize a cause of action for wrongful birth, applying Pennsylvania law). See generally Comment, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions for a Consistent Analysis*, 63 MARQUETTE L. REV. 611, 621-23 (1980) (providing further discussion of the term).

15. See, e.g., *Procanik v. Cillo*, 97 N.J. 339, 364, 478 A.2d 755, 769 (1984) (Handler, J., concurring in part, dissenting in part) ("[the infant's] injury consists of the consequences of the deprivation of his parents' right to determine on his behalf whether he should have been born"); see also Note, *Wrongful Life: Exploring the Development of a New Tort*, 21 NEW ENG. L. REV. 635, 636 (1986).

Wrongful birth and wrongful life must be further distinguished from "wrongful conception," also known as "wrongful pregnancy." These actions involve negligently performed sterilization procedures, usually resulting in the birth of a normal, healthy child. See, e.g., *Hartke v. McKelway*, 707 F.2d 1544 (D.C. Cir.), cert. denied, 464 U.S. 983 (1983) (birth of healthy child occurred after failed tubal cauterization); *O'Toole v. Greenberg*, 64 N.Y.2d 427, 477 N.E.2d 445, 488 N.Y.S.2d 143 (1985) (birth of healthy child occurred after failed tubal ligation); *Speck v. Finegold*, 497 Pa. 77, 439 A.2d 110 (1981) (birth of genetically defective child occurred after negligent vasectomy and abortion procedures). These types of cases are outside the scope of this Note because they involve different policy considerations.

Another situation arising from negligent genetic counseling which will not be explored in this Note is one in which a physician informs a woman that her fetus has birth defects, when in fact it does not. See, e.g., *Lynch v. Bay Ridge Obstetrical & Gynecological Assoc., P.C.*, 72 N.Y.2d 632, 532 N.E.2d 1239, 536 N.Y.S.2d 11 (1988) (woman who chose to have abortion because of erroneous medical advice given to her was held to have valid cause of action for negligent infliction of emotional distress); *Martinez v. Long Is-*

fusing because they seem to indicate a unique or novel claim for relief, when they are merely tort claims sounding in traditional negligence or medical malpractice.¹⁶ “Wrongful birth” is a misnomer that does not

land Jewish Hillside Medical Center, 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987) (after physician diagnosed severe fetal congenital birth defects, plaintiff terminated her pregnancy although she felt it was morally wrong; plaintiff later recovered for emotional distress after learning fetus had been healthy).

Due to the wide variety of factual circumstances that may arise in connection with prenatal diagnoses, there has been widespread confusion among the courts attempting to define and distinguish wrongful birth and wrongful life. “[T]he difficulties presented by this categorization process have been compounded by haphazard use of the available terminology, both in the cases and the commentary, that fails adequately to distinguish factually and legally dissimilar claims.” Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713, 715 (1982) [hereinafter Rogers].

A prime example of the confusion in terminology is New York’s leading case, *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). Mrs. Becker was 37 years old when she became pregnant and subsequently gave birth to a Down’s syndrome child. *Id.* at 405-06, 386 N.E.2d at 808, 413 N.Y.S.2d at 896. The Beckers alleged they were never advised that women over 35 are at a higher risk of having a Down’s syndrome child and were also not advised as to the availability of amniocentesis. *Id.* at 406, 386 N.E.2d at 810, 413 N.Y.S.2d at 898. The court held that the infant had no cause of action for wrongful life. *Id.* at 413, 386 N.E.2d at 814, 413 N.Y.S.2d at 902. The parents did establish a valid cause of action, although the court did not call it wrongful birth. *Id.* at 412, 386 N.E.2d at 813, 413 N.Y.S.2d at 901. The court also concluded that wrongful birth applied only to illegitimate children. *Id.* at 409-10, 386 N.E.2d at 811, 413 N.Y.S.2d at 899. While these interpretations are not generally accepted today, *Becker v. Schwartz* is still precedent in New York and is often cited by sister states addressing these issues for the first time. See *infra* notes 113-15 and accompanying text; cf. *Lininger v. Eisenbaum*, 764 P.2d 1202, 1204 n.2 (Colo. 1988) (en banc) (“[t]he use of the terms ‘wrongful life’ and ‘wrongful birth’ more often serves to obscure the issues than to elucidate them; unfortunately the labels are so entrenched in normal usage that it is difficult to entirely abstain from their use”).

One commentator has recommended the substitution of the terms “wrongful impairment” and “wrongful formation.” Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a New Framework*, 22 J. FAM. L. 677, 678 (1984). “A child, who is born alive, may have a wrongful impairment cause of action if it suffers from impairments which are the result of wrongful postconception or preconception conduct of, generally, one other than its parents.” *Id.* at 678 n.3. “Parents may have a wrongful formation cause of action if their procreative rights have been denied by the wrongful conduct of another.” *Id.* at 678 n.4. Although such refinement of terms would probably be useful if only to minimize the apparent contradiction of a term such as “wrongful life,” the courts have only recently come to accept uniform meanings for wrongful birth and wrongful life. These terms currently indicate the parents’ cause of action and the infant’s cause of action, respectively. See, e.g., *Turpin v. Sortini*, 31 Cal. 3d 220, 225 n.4, 643 P.2d 954, 957 n.4, 182 Cal. Rptr. 337, 340 n.4 (1982); *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 235-36, 512 N.E.2d 691, 695 (1987); *Procanik v. Cillo*, 97 N.J. 339, 347-48, 478 A.2d 755, 760 (1984).

16. See, e.g., *Robak v. United States*, 658 F.2d 471, 476 (7th Cir. 1981) (“[s]tate courts have been quick to accept wrongful birth as a cause of action since *Roe v. Wade*, because it is not a significant departure from previous tort law); *Lininger v. Eisenbaum*,

identify the underlying tort as much as it inartfully describes the result of the tort."¹⁷ The same conclusion is true for wrongful life.

Although the first wrongful birth case was decided over fifty years ago,¹⁸ wrongful birth and wrongful life actions were relatively rare until the United States Supreme Court's decisions in *Griswold v. Connecticut*¹⁹ and *Roe v. Wade*²⁰ in 1965 and 1973, respectively. Presently, most state courts recognize wrongful birth actions,²¹ but generally refuse to recognize wrongful life actions.²² The few legislatures that have addressed the subject bar *both* types of actions.²³ Even in those jurisdictions that recognize causes of action for wrongful birth or wrongful life or both, there is confusion concerning recoverable damages.²⁴

This Note discusses wrongful birth and wrongful life actions arising from negligent genetic counseling and explains why they should be recognized statutorily. Part II details the technological advances in the field of genetics and their implications for the legal duty imposed upon the medical profession. Part III traces the judicial developments that led to the gradual recognition of wrongful birth actions and the refusal to recognize wrongful life actions. Part III also discusses the recent legislation that has barred both wrongful birth and wrongful life actions. Part IV proposes a model statute based on the

764 P.2d 1202, 1213 (Colo. 1988) (en banc) (Erickson, J., concurring in part, dissenting in part); see also *infra* note 162 and accompanying text.

17. *Liningier*, 764 P.2d at 1213 (Erickson, J., concurring in part, dissenting in part); see also *id.* at 1205. The court noted the following:

[I]t is more accurate to view these terms as describing the result of a physician's negligence. The asserted negligence may involve any number of distinguishable negligent acts including, but not limited to, the misdiagnosis of an hereditary condition, the misrepresentation of the risks associated with conception and delivery of a child, the negligent interpretation of diagnostic tests, or the negligent performance of a sterilization procedure.

Id. (footnote omitted); see also *supra* note 15.

18. The first wrongful birth case, *Christensen v. Thornby*, was what would be termed a "wrongful conception" case, see *supra* note 15, today. 192 Minn. 123, 255 N.W. 620 (1934) (negligently performed vasectomy led to birth of healthy child); accord *Shaheen v. Knight*, 6 Lycoming R. 19, 11 Pa. D.&C.2d 41 (1957) (same); *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963) (infant sued his father because of illegitimacy; recovery was denied), *cert. denied*, 379 U.S. 945 (1964), was an early wrongful life case.

19. 381 U.S. 479 (1965) (establishing married couple's right to privacy regarding reproductive choices).

20. 410 U.S. 113 (1973) (holding woman has right to choose abortion during first trimester of pregnancy free from state interference, and that state has no legitimate interest in life of fetus until point of viability). *But see supra* note 9 and accompanying text.

21. See *infra* note 110 and accompanying text.

22. See *infra* notes 111-16 and accompanying text.

23. See *infra* note 127 and accompanying text.

24. See *infra* note 146 and accompanying text.

following policy considerations: (1) procreative choice is constitutionally protected within the right of privacy; (2) individuals, and not courts, should determine for their children whether existence with genetic birth defects is preferable to nonexistence; (3) this type of medical malpractice should not go undeterred and the use of due care by genetic counselors should be encouraged; and (4) victims of negligence should be compensated in accordance with established principles of tort law.

II. Medical Background and Legal Implications

A discussion of wrongful birth and wrongful life actions arising from negligent genetic counseling cannot proceed without first examining the process of genetic counseling itself, along with the necessary elements of a medical malpractice action. Because research in the field of genetics has uncovered so much new information within the past few years, health care practitioners and prospective parents alike should be aware of the latest genetic technologies and their potential legal implications.

A. The Rapid Growth of Genetic Information and Technology

The number of genetic diseases²⁵ that can be detected by medical science is growing at a phenomenal rate.²⁶ The pace of genetic research accelerated in the 1970's,²⁷ particularly after *Roe v. Wade*,²⁸ in which the Supreme Court recognized a woman's constitutional right to choose an abortion during the first trimester,²⁹ and also due to Congress' enactment of the National Sickle Cell Anemia, Cooley's Anemia, Tay-Sachs and Genetic Diseases Act in 1976 (Genetic Dis-

25. Genetic diseases are "hereditary diseases, wholly or partly due to defective genes and chromosomes." M. SANTOS, GENETICS AND MAN'S FUTURE: LEGAL, SOCIAL, AND MORAL IMPLICATIONS OF GENETIC ENGINEERING 4 (1981).

According to a report provided by the National Institute of General Medical Sciences an estimated 15 million Americans today suffer the consequences of birth defects of varying severity. Not all of these disorders are genetic; 20 percent are estimated not to contain a genetic component but represent the effect of environmental factors such as infection, drugs, radiation, physical injury to the fetus, etc. Thus the remaining 80 percent, or 12 million Americans, are afflicted with [genetic] diseases

Id. at 3-4.

26. See Lappé, *The Limits of Genetic Inquiry*, HASTINGS CENTER REPORT, Aug. 1987, at 5-6 [hereinafter Lappé].

27. KEVLES, *supra* note 5, at 257.

28. 410 U.S. 113 (1973).

29. See, e.g., Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2021 (1987) [hereinafter *Wrongful Birth Actions*].

eases Act).³⁰ The Genetic Diseases Act authorized and provided federal funding for, *inter alia*, "projects for research in diagnosis, treatment, and control (including prevention) of genetic diseases, training programs for genetic counseling and related professions, education programs for health care practitioners and the public, and development of counseling and testing programs . . . for the diagnosis, prevention, control and treatment of genetic diseases."³¹ As a result of ever-increasing scientific knowledge, legalized abortion, and Congress' support of genetic research and genetic counseling,³² the demand for such genetic counseling services has increased.³³

Genetic counseling includes the use of prenatal diagnostic tests as well as discussion of the test results with the prospective parents.³⁴ The most common method of detecting birth defects used today³⁵ is the prenatal diagnostic procedure known as amniocentesis,³⁶ which was widespread by the late 1960's.³⁷ Other current techniques include sonography,³⁸ fetoscopy³⁹ and two recently developed procedures, chorionic villus sampling⁴⁰ and alpha-fetoprotein testing.⁴¹

30. Pub. L. No. 94-278, tit. IV, § 403(a), 90 Stat. 407-09 (current version at 42 U.S.C. §§ 300b-1 to 300b-4 (1976)) (amended 1981).

31. H.R. REP. No. 94-498, 94th Cong., 2d Sess. 21-22, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 709, 729-30 (codified at 42 U.S.C. § 300b-1 (1976)).

32. See P. REILLY, GENETICS, LAW & SOCIAL POLICY 104 (1977) [hereinafter REILLY] ("it is clear that one purpose of the [Genetic Diseases Act] is to encourage enlightened reproductive decisions").

33. See *id.* at 151; see also KEVLES, *supra* note 5, at 257.

34. See *supra* notes 2-9 and accompanying text; *infra* note 47 and accompanying text.

35. See KEVLES, *supra* note 5, at 294-95. "By the early eighties, amniocentesis could detect . . . about [100] chromosomal anomalies and about as many genetic disorders of a molecular type." *Id.* at 294.

36. Amniocentesis involves penetrating the uterine wall with a hypodermic needle to obtain cellular material. REILLY, *supra* note 32, at 24. The procedure is continued as follows:

The syringe is inserted to avoid the placenta and the fetus (both of which can usually be localized by a technique called ultrasonography), and a few milliliters of amniotic fluid are withdrawn. This fluid, which usually contains sloughed-off fetal cells, is then used to begin tissue cultures. After the fetal cells have multiplied enough to provide sufficient material, certain diagnostic tests can be performed. . . . The timing of amniocentesis is crucial to the success of the diagnostic effort. The tap cannot be performed much earlier than the fifteenth week of pregnancy, and diagnosis (depending on the disorder) may have to wait three weeks while the fetal cells grow.

Id. (footnote omitted).

37. See KEVLES, *supra* note 5, at 257.

38. "Sonography is a method of using sound waves to form a pictorial outline of the fetus *in utero*." Steele, *supra* note 3, at 346 n.c.

39. "Fetoscopy is a technique by which the fetus can be visualized directly by insertion of a lighted optical tube into the uterus through the abdominal wall." *Id.*

40. The chorion is "the outermost fetal membrane; . . . on the maternal surface it

In addition, scientists have recently completed a "map"⁴² of "genetic markers"⁴³ along each of the twenty-three pairs of human chromosomes. The map will be instrumental in pinpointing defective genes involved in many serious genetic disorders.⁴⁴ This discovery will dramatically expand scientists' knowledge and understanding of genetic disease and will undoubtedly increase the demand for genetic counseling even further. Yet even though new medical discoveries are always welcome, they simultaneously place a heavy burden on medical practitioners by expanding their potential liability.

B. Impact on Health Care Practitioners

The technological advances in detecting genetic diseases give rise to many ethical, moral and social dilemmas.⁴⁵ It is presumed, however, that new medical techniques in the area of prenatal testing are used to

possesses villi [hair-like structures] that are bathed by maternal blood; as pregnancy progresses part of the chorion becomes the definitive placenta." *STEDMAN'S MEDICAL DICTIONARY* 274 (5th Unabridged Lawyers' ed. 1982). The chorionic villus sampling detects chromosomal disorders and its advantage is that it can be "offered at about 9 to 11 weeks of pregnancy. Many experts believe it will eventually replace at least two-thirds of the more familiar amniocentesis procedures, which can only be done in about the fourth month of pregnancy." *Tests of Fetuses Rise Sharply Amid Doubts*, N.Y. Times, Sept. 22, 1987, at C10, col. 1.

41. See Annas, *Is a Genetic Screening Test Ready When the Lawyers Say It Is?*, 15 *HASTINGS CENTER REP.*, Dec. 1985, at 16. This test detects certain types of genetic disorders:

Alpha-fetoprotein is a major fetal serum protein secreted by the fetal kidneys, and normally present in amniotic fluid in measurable amounts. It may also, however, enter the amniotic fluid directly from exposed membrane surfaces on the fetus, as in anencephaly [lack of a brain] or open spina bifida [a lesion on an incompletely closed spinal cord]. There is also an association between elevated levels of maternal serum alpha-fetoprotein (MSAFP) and NTDs [neural tube defects, which are genetic disorders—such as anencephaly and spina bifida—that occur approximately 1 to 2 per 1,000 live births]; measuring second trimester concentration of MSAFP has been shown to be an effective means of identifying pregnant women who are at risk of having a fetus with a NTD.

Id.

42. *New Map of Genes May Aid in Fighting Hereditary Diseases*, N.Y. Times, Oct. 8, 1987, at A1, col. 6. A map of genetic markers is explained as follows:

What the scientists call a map is a set of nearly 400 recognizable short pieces of DNA, the genetic material, that occur at known locations on the thread-like strands of chromosomes. These standard pieces are used as markers that serve as reference points for the location of genes along the chromosomes.

Id.

43. *Id.*

44. *Id.* at B4, col. 4. "The achievement is expected to have an immediate impact on the study of diseases that result from the failure or abnormal function of any single gene. More than 3,000 such genetic diseases are known. Most are rare, but taken together they pose a vast public health problem." *Id.* at B4, col. 5.

45. See *supra* note 10 and accompanying text; see also *Tests of Fetuses Rise Sharply*

give a pregnant patient as much information as possible concerning the health of her fetus.⁴⁶ Imparting this information is, in fact, the explicit purpose of genetic counseling.⁴⁷ What course of action is taken thereafter is left entirely to the patient and is essentially a private decision.⁴⁸ Giving the patient the opportunity to make such a decision based on all available, accurate information is the primary responsibility of the genetic counselor.⁴⁹ If an error occurs in giving or interpreting the test, the genetic counselor is faced with an extremely delicate and potentially volatile situation.⁵⁰ Parents who seek genetic counseling expect to receive accurate information as to whether or not they are carriers of a genetic disease. When they are informed by a medical practitioner that they do not carry such a genetic trait, and the child is subsequently born with genetic birth defects, the parents have effectively been deprived of their right to make

Amid Doubts, N.Y. Times, Sept. 22, 1987, at C1, col. 3 ("more than ever before, pregnant women are being confronted with bewildering, unfamiliar decisions").

The recent discovery of the map of genetic markers may lead to gene replacement therapy which would allow "the replacement of a malfunctioning gene in a fetus." Callahan, *How Technology is Reframing the Abortion Debate*, HASTINGS CENTER REP., Feb. 1986, at 37. Although this technique would seem to be a welcome treatment for birth defects *in utero*, one commentator has pointed out that at-risk adults are often counseled against procreation, and affected fetuses are often aborted as early as possible. Lappé, *supra* note 26, at 9.

46. See, e.g., Lewis, *supra* note 6, at 24 ("[g]enetic counseling is a communication process, a two-way question-and-answer session in which the counselor inquires about the health of both parents, as well as other family members, and patients ask for information in understandable terms so they can make informed decisions").

47. See, e.g., Steele, *supra* note 3, at 346 ("[t]he object is to provide those at risk with genetic information so that they can make informed decisions about future reproductive efforts before the birth of a defective child") (footnote omitted). In 1974, an official definition of genetic counseling became accepted by the medical profession:

Genetic counseling is a communication process which deals with the human problems associated with the occurrence, or risk of occurrence, of genetic disorder in a family. This process involves an attempt by one or more appropriately trained persons to help the individual or family to: (1) comprehend the medical facts, including the diagnosis, [and] probable course of the disorder . . . ; (2) appreciate the way heredity contributes to the disorder, and the risk of recurrence in specified relatives; (3) understand the alternatives for dealing with the risk of recurrence; (4) choose the course of action which seems to them appropriate in view of their risk, their family goals, and their ethical and religious standards, and to act in accordance with that decision; and (5) to make the best possible adjustment to the disorder in an affected family member and/or to the risk of recurrence of that disorder.

Ad Hoc Committee on Genetic Counseling, *Genetic Counseling*, 27 AM. J. HUM. GENETICS 240, 240-41 (1975).

48. See *infra* notes 107-10, 148-56 and accompanying text.

49. See *supra* notes 46-47 and accompanying text.

50. See *infra* notes 156-63 and accompanying text.

an informed decision to terminate or continue the pregnancy.⁵¹ As a result, parents who would have chosen to terminate a pregnancy suffer various financial and emotional injuries from the birth of an infant with genetic birth defects.⁵² This claim is the essence of a wrongful birth action.⁵³ Additionally, a suit on behalf of the genetically defective infant claims that the deprivation of an informed decision by his parents wrongfully caused the infant's birth.⁵⁴ This claim is the basis of a wrongful life action.⁵⁵ Thus, wrongful birth and wrongful life actions are merely medical malpractice suits,⁵⁶ and the application of standard negligence principles⁵⁷ indicates that genetic counselors should be subject to liability.

1. *Duty and Informed Consent*

Using due care to obtain and relay relevant genetic data to prospective parents who seek genetic counseling has been held to be part of the health care practitioner's "duty correlative to [the] parents' right to prevent the birth of defective children."⁵⁸

This duty requires health care providers to impart to their patients material information as to the likelihood of future children being

51. See *infra* notes 148-59 and accompanying text.

52. See, e.g., *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 253, 512 N.E.2d 691, 703 (1987); *Berman v. Allan*, 80 N.J. 421, 430, 404 A.2d 8, 14 (1979); *Naccash v. Burger*, 223 Va. 406, 414, 290 S.E.2d 825, 830 (1982).

53. See, e.g., *Siemieniec*, 117 Ill. 2d at 253, 512 N.E.2d at 703; see also *supra* note 15.

54. See, e.g., *Turpin v. Sortini*, 31 Cal. 3d 220, 229-31, 643 P.2d 954, 959-60, 182 Cal. Rptr. 337, 342-43 (1982) (en banc); *Procanik v. Cillo*, 97 N.J. 339, 348, 478 A.2d 755, 760 (1984); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 478, 656 P.2d 483, 494 (1983) (en banc).

55. See, e.g., *Siemieniec*, 117 Ill. 2d at 236, 512 N.E.2d at 695; see also *supra* note 15.

56. See, e.g., *Robak v. United States*, 658 F.2d 471, 476 (7th Cir. 1981); *Turpin*, 31 Cal. 3d at 229-30, 643 P.2d at 959, 182 Cal. Rptr. at 342-43; *Becker v. Schwartz*, 46 N.Y.2d 401, 410, 386 N.E.2d 807, 811, 413 N.Y.S.2d 895, 899 (1978); *Harbeson*, 98 Wash. 2d at 467-68, 656 P.2d at 488-89.

57. See RESTATEMENT (SECOND) OF TORTS § 281 (1977) (statement of elements for cause of action in negligence).

The traditional formula for the elements necessary to such a cause of action may be stated briefly as follows: 1. A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks. 2. A failure on the person's part to conform to the standard required: a breach of the duty . . . 3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as 'legal cause,' or 'proximate cause,' and which includes the notion of cause in fact. 4. Actual loss or damage resulting to the interests of another. . . .

PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (W. Keeton, D. Dobbs, R. Keeton & D. Owen 5th ed. 1984) (citations omitted) [hereinafter PROSSER & KEETON].

58. *Harbeson*, 98 Wash. 2d at 471, 656 P.2d at 491.

born defective, to enable the potential parents to decide whether to avoid the conception or birth of such children. If medical procedures are undertaken to avoid the conception or birth of defective children, the duty also requires that these procedures be performed with due care.⁵⁹

Recognition of such a duty, along with the establishment of an appropriate standard of care⁶⁰ for genetic counselors,⁶¹ supports society's interest in quality health care and deters medical malpractice.⁶²

The informed consent doctrine⁶³ has been held to apply to the legal duty of genetic counselors⁶⁴ because the purpose of genetic counseling

59. *Id.* at 472, 656 P.2d at 491.

60. See *James G. v. Caserta*, 332 S.E.2d 872, 879 (W. Va. 1985) ("[w]ith the increased knowledge in this field of genetic counseling, there is the concomitant recognition that the ordinary standard of care may require appropriate tests and counseling with parents who are more likely to bear children with birth defects"). Generally, a physician "must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing. . . ." PROSSER & KEETON, *supra* note 57, § 32, at 187. "It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 443 (1983). At least one commentator has stated that the standard for genetic counselors must include disclosure of all material information needed to make an informed procreative decision. See Note, *A Preference for Nonexistence: Wrongful Life and a Proposed Tort of Genetic Malpractice*, 55 S. CAL. L. REV. 477, 497 (1982). See generally Capron, *supra* note 4, at 673-80 (discussing standards of confidentiality in genetic counseling); Reilly, *Professional Identification: Issues in Licensing and Certification*, in GENETIC COUNSELING: FACTS, VALUES, AND NORMS 291-305 (A. Capron, M. Lappe, R. Murray, T. Powledge, S. Twiss, & D. Bergsma ed. 1979) (discussing pros and cons of regulation of genetic counselors); see also *infra* note 61.

61. Obstetricians are not the only medical practitioners who provide genetic counseling services. "The profession of genetic counseling has grown up hand-in-hand with the progress of advanced screening techniques. Most counselors are graduates of master's degree programs in genetic counseling and have passed a certification exam. But some MDs, PhDs, social workers and nurses who have gained expertise in the field also counsel." Lewis, *supra* note 6, at 24; see Note, *The Injury of Birth: Minnesota's Statutory Prohibition of Postconception Negligence Actions*, 14 WM. MITCHELL L. REV. 701, 704 n.10 (1988); see also *supra* notes 58-60 and accompanying text.

62. See *infra* note 162 and accompanying text.

63. See, e.g., REILLY, *supra* note 32, at 164-65; Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1506-08 (1978). The doctrine generally requires the medical practitioner to explain to the patient:

[t]he nature of the pertinent ailment or condition, the risks of the proposed treatment or procedure, and the risks of any alternative methods of treatment, including the risks of failing to undergo any treatment at all. Thus, although the procedure be skillfully performed, the doctor may nevertheless be liable for an adverse consequence about which the patient was not adequately informed.

PROSSER & KEETON, *supra* note 57, § 32, at 190 (footnotes omitted).

64. See, e.g., *Harbeson v. Parke-Davis, Inc.*, 746 F.2d 517, 522 (9th Cir. 1984).

is to promote informed decisionmaking by prospective parents.⁶⁵ The informed consent doctrine "is based on principles of individual autonomy, and specifically on the premise that every person has the right to determine what shall be done to his own body."⁶⁶ "To allow this determination the health care provider must provide the individual with sufficient information to make an 'intelligent' decision."⁶⁷ Because it would impose an extremely heavy burden on physicians to require disclosure of every possible risk or possible alternative, the courts generally state that a doctor's duty is to disclose the "material" risks⁶⁸ which are commonly known in the medical profession.⁶⁹ According to the Ninth Circuit, materiality includes: (1) defining the nature of the risk; (2) determining its likelihood of occurrence; and (3) whether the reasonable person in the patient's position would attach significance to the risk.⁷⁰ Furthermore, if the physician is a specialist and

65. See *supra* note 47 and accompanying text.

66. PROSSER & KEETON, *supra* note 57, § 32, at 190 (citing *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914) (Cardozo, J.)). In its traditional context, the informed consent doctrine applied only when a physically invasive procedure had taken place and the doctor neglected to inform the patient of some risk or other alternatives to surgery. See, e.g., PROSSER & KEETON, *supra* note 57, § 32, at 190; Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 227-28 (1985).

67. *Harbeson*, 746 F.2d at 522, (citing *Smith v. Shannon*, 100 Wash. 2d 26, 29, 666 P.2d 351, 354 (1983) (emphasis in original)); see *Canterbury v. Spence*, 464 F.2d 772, 786-87 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

68. See, e.g., *Harbeson*, 746 F.2d at 522; *Canterbury*, 464 F.2d at 787; see also PROSSER & KEETON, *supra* note 57, § 32, at 191.

The extent of this duty to disclose has traditionally been based upon a professional medical standard—whether physicians customarily inform their patients about the type of risk involved, or whether a reasonable physician would make the disclosure in the circumstances. Since the use of a professional standard paternalistically leaves the right of choice to the medical community, in derogation of the patient's right of self-determination, a number of recent cases have defined the duty in terms of the patient's need to know the information—based on whether a reasonable person in the patient's position would attach significance to the information.

Id. (footnotes omitted).

69. See generally RESTATEMENT (SECOND) OF TORTS § 299A (1977) ("one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities").

70. *Harbeson*, 746 F.2d at 522-23. In the *Harbeson* case, Mrs. Harbeson began taking the drug Dilantin for treatment of epilepsy during her first pregnancy. *Id.* at 519. Her child was born healthy and normal. *Id.* Before having more children, the Harbesons consulted three physicians about the possible risks associated with taking Dilantin during pregnancy. *Id.* All three doctors informed them "that taking Dilantin during pregnancy could cause cleft palate, which could be surgically repaired, and hirsutism, a temporary condition of excess hair." *Id.* The Harbesons relied on this advice and proceeded to have two more children. *Id.* These two children were subsequently diagnosed as having Fetal

possesses superior knowledge or skills, he is required to use that knowledge and thus may be liable where a general practitioner is not.⁷¹

In the genetic counseling context, the informed consent doctrine should require full disclosure of the material risks—*i.e.*, the risk of genetic birth defects which are known and detectable by accepted medical procedures—to the prospective parents so that they may decide whether they want to continue the pregnancy.⁷² Of course it would not apply to those parents who refuse testing or counseling, or those who would not have had an abortion in any event. The informed consent doctrine should result in imposing such a duty of disclosure on physicians because the right to make private reproductive decisions is constitutionally protected.⁷³ By failing to disclose a material risk of genetic birth defects, the physician deprives the pregnant woman of the ability to make an informed decision regarding continuation or termination of her pregnancy.⁷⁴

Hydantoin Syndrome, which consisted of growth deficiencies, developmental retardation, and other physical, mental and developmental defects. *Id.* The district court found that the three physicians failed to conduct a search of the medical literature, which would have uncovered the "hallmark" article concerning the risks of Dilantin. *Id.* This article stated that major congenital malformations were 2-3 times more likely to occur in children born to mothers taking Dilantin. *Id.* at 523. The Ninth Circuit found this risk to be material because it was likely to occur, it was reasonably foreseeable, and a reasonable patient would have considered the risk significant. *Id.* at 524.

71. See, e.g., *Toth v. Community Hosp. at Glen Cove*, 22 N.Y.2d 255, 262, 239 N.E.2d 368, 372-73, 292 N.Y.S.2d 440, 447 (1968).

72. The Washington Supreme Court expressly held the informed consent doctrine applicable to the disclosure of "material information as to the likelihood of future children being born defective." *Harbeson*, 98 Wash. 2d at 472, 656 P.2d at 491.

73. The right of privacy is frequently asserted in medical decisionmaking cases. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-54 (1973). "In fact, *Roe* has emerged as the key precedent in the trend toward expanded protection of patients' rights in medical decision making." Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 17 (1987) [hereinafter Gallagher]; see also *Andrews v. Ballard*, 498 F. Supp. 1038, 1046-47 (S.D. Tex. 1980) (decision to obtain or reject medical treatment falls within scope of right of privacy); *In re Quinlan*, 70 N.J. 10, 40-41, 355 A.2d 647, 663-64 (right of privacy encompasses right of permanently noncognitive patient to be terminated from life support systems), *cert. denied*, 429 U.S. 922 (1976); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 739, 370 N.E.2d 417, 424 (1977).

74. "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." *Proffitt v. Bartolo*, 162 Mich. App. 35, 46-47, 412 N.W.2d 232, 238 (1987). Even before abortion was legalized, abortions were considered allowable when the fetus suffered severe birth defects. The Supreme Court noted in *Roe v. Wade* that the model abortion codes of both the American Bar Association and the American Legal Institute allowed abortions in such circumstances. 410 U.S. 113, 140, 146 n.40 (1973); see also *Doe v. Bolton*, 410 U.S. 179, 205 (1973). The American Medical Association's Committee on Human Reproduction also approved of abortion in cases where the

In most cases, the physician's duty should extend to the woman's husband as well, particularly if he is actively involved in the genetic counseling with the physician. This is especially true if the father is tested for genetic abnormalities and therefore assumes the role of a patient.⁷⁵ Although *Roe v. Wade* and its progeny afforded constitutional protection to the pregnant woman alone, it has been noted that:

[P]rivacy emerged as a notion . . . involving the privacy of the marital bedroom,^[76] and that typically in the genetics context the interests of the couple, and not solely of the woman, will be at stake. Thus, to the extent that constitutional law is useful to suggest the nature and importance of the interests involved, the duties of the counselor are owed to both prospective parents, although the prospective mother retains exclusive authority over decisions concerning the termination of her pregnancy.⁷⁷

While it seems logical that the genetic counselor should have a duty to impart accurate genetic information to the pregnant patient, the issue is more complex when a duty to the fetus is considered. Some courts have held that a wrongful life action cannot lie because the physician's duty runs only to the mother and not to the fetus.⁷⁸ A few courts have recognized the anomaly, however, of limiting the physician's duty to the mother alone.⁷⁹ Because genetic counseling directly concerns the health and welfare of the fetus, and because the existence of the fetus is wholly dependent on the pregnant woman,⁸⁰ it follows

child "may be born with incapacitating physical deformity or mental deficiency." *Roe*, 410 U.S. at 142. See also *supra* note 9 and accompanying text.

75. See *supra* note 12.

76. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (footnote incorporated).

77. *Capron*, *supra* note 4, at 646.

78. See, e.g., *James G. v. Caserta*, 332 S.E.2d 872, 880 (W. Va. 1985).

79. See, e.g., *Lininger v. Eisenbaum*, 764 P.2d 1202, 1215 (Colo. 1988) (Mullarkey, J., concurring in part and dissenting in part) ("[i]t is well-established that a physician owes a duty of care to an infant who is born alive and the infant has an independent claim for relief based on breach of that duty"); *Procanik v. Cillo*, 97 N.J. 339, 348-49, 478 A.2d 755, 760 (1984); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 480, 656 P.2d 483, 495 (1983) (en banc); accord *Berman v. Allan*, 80 N.J. 421, 434, 404 A.2d 8, 20 (1979) (Handler, J., concurring in part, dissenting in part).

80. While the above mentioned may state the obvious, there is much controversy concerning the legal status of fetuses. See Johnsen, *A New Threat to Pregnant Women's Autonomy*, HASTINGS CENTER REP., Aug. 1987, at 35.

In attempting to reconcile the sometimes competing interests inherent in the maternal-fetal relationship, we must not lose sight of the biological and psychological realities of that relationship. The fetus is a physical part of a particular woman and is completely dependent upon her for its continued development and very existence. . . . Any legal recognition granted to the fetus as a distinct entity inevitably affects the pregnant woman. Conversely, virtually anything the pregnant woman does potentially has some effect on the fetus.

Id. For further analysis of the conflicts between recognition of fetal rights and women's

that any duty owed the fetus would necessarily occur through the mother.⁸¹ It is reasonably foreseeable that the combined result of the physician's advice and its subsequent impact on the mother's decision will significantly affect the fetus.⁸² Physicians should owe two duties that are wholly interdependent because parents seek genetic counseling not only for themselves, but also for their future children.⁸³

2. Causation

It has been argued that wrongful birth and wrongful life actions cannot lie because the genetic counselor does not cause the child's birth defects—rather, the parents' genes cause the disease.⁸⁴ The pertinent issue, however, is not the source of the genetic flaw; rather, it is the genetic counselor's failure to advise the patient adequately, thereby depriving the patient of the chance to make an informed decision.⁸⁵ This negligence proximately causes the birth of a genetically impaired child—an event which the parents specifically sought to

rights to personal autonomy, see Gallagher, *supra* note 73, at 9-58; Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599-625 (1986).

81. See *supra* note 80; cf. Comment, "Wrongful Life": The Right Not To Be Born, 54 TUL. L. REV. 480, 490 (1980) (one approach to duty is that duty owed to parents inures derivatively to child); RESTATEMENT (SECOND) OF TORTS § 311 (1977) ("one who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results . . . to such persons as the actor should expect to be put in peril by the action taken").

82. See, e.g., *Harbeson*, 98 Wash. 2d at 480-81, 656 P.2d at 495-96 (holding that a physician's duty extends to persons not yet conceived at the time of the negligent act or omission because it is foreseeable that future children are endangered by physicians' negligence in advising the mother erroneously).

83. See, e.g., *Lininger v. Eisenbaum*, 764 P.2d 1202, 1214-15 (Colo. 1988) (Mullarkey, J., concurring in part, dissenting in part). "Parents, as natural and legal guardians of children, have the legal capacity to make many decisions in behalf of children who are incapable of doing so." PROSSER & KEETON, *supra* note 57, § 32, at 115.

84. See, e.g., *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 236, 512 N.E.2d 691, 695 (1987); *Becker v. Schwartz*, 46 N.Y.2d 401, 417-18, 386 N.E.2d 807, 816, 413 N.Y.S.2d 895, 904-05 (1978) (Wachtler, J., dissenting in part); *Ellis v. Sherman*, 512 Pa. 14, 19, 515 A.2d 1327, 1329 (1986).

85. See, e.g., *Robak v. United States*, 658 F.2d 471, 477 (7th Cir. 1981) (wrongful birth action not based on injuries to fetus but on defendant physician's failure to diagnose plaintiff's rubella and its effects on her fetus); *James G. v. Caserta*, 332 S.E.2d 872, 881 (W. Va. 1985). "The relevant causal relationship in wrongful life cases is between the defendant's negligence and the subsequent birth of the child, not between the defendant's negligence and the genetic impairment of the child." *Continental Casualty Co. v. Empire Casualty Co.*, 713 P.2d 384, 393 (Colo. App. 1985), *aff'd in part, rev'd in part*, *Empire Casualty Co. v. St. Paul Fire & Marine Ins. Co.*, 764 P.2d 1191 (Colo. 1988), *overruled in part*, *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988); see also *supra* note 9 and accompanying text; *infra* notes 91, 159 and accompanying text.

avoid by obtaining the genetic counselor's advice (provided that they planned to abort in such circumstances).⁸⁶ Moreover, it is a natural and foreseeable result of negligent genetic counseling that a child with birth defects will be born.⁸⁷

In addition to establishing proximate cause through the medical practitioner's failure to provide material information, a plaintiff must also establish cause in fact by proving that she would not have undergone the treatment—in the genetic counseling context, the pregnancy—had she known of the material risk involved.⁸⁸ Most courts have adopted an objective standard of causation, *i.e.*, whether a reasonable person in plaintiff's position would have withheld consent to the treatment,⁸⁹ while other courts have adopted a subjective causation test, *i.e.*, whether that particular plaintiff would have avoided the treatment, had sufficient information been provided.⁹⁰

3. *Injury and Calculation of Damages*

In wrongful birth actions, the injury suffered by parents is the birth of the genetically impaired child because the parents specifically sought to avoid this occurrence, but through the doctor's breach of duty, they were deprived of the choice to terminate the pregnancy.⁹¹ This injury results in two types of damages: (1) economic injury associated with the extraordinary medical and educational costs of raising a handicapped child;⁹² and (2) emotional distress.⁹³ Traditionally the

86. Whether the parents would have chosen to abort would be a triable issue of fact. See *infra* note 88 and accompanying text.

87. See, *e.g.*, *Gallagher v. Duke Univ.*, 852 F.2d 773, 779 (4th Cir. 1988); *Berman v. Allan*, 80 N.J. 421, 445, 404 A.2d 8, 20-21 (1979) (Handler, J., concurring in part, dissenting in part); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 481, 656 P.2d 483, 496 (1983) (en banc).

88. See *supra* note 68.

89. See PROSSER & KEETON, *supra* note 57, § 32 at 191.

90. *Id.* at 192. The objective causation test is probably more appropriate in the context of wrongful birth and wrongful life suits. The subjective causation test would be too easily satisfied because any plaintiff could claim that she would have sought an abortion. The objective test, however, would determine whether a reasonable person in the plaintiff's position would have sought an abortion. See *infra* notes 169-70 and accompanying text.

91. See, *e.g.*, *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 466-67, 656 P.2d 483, 488 (1983) (en banc) ("parents' right to prevent a defective child and the correlative duty flowing from that right is the heart of the wrongful birth action").

92. See, *e.g.*, *Robak v. United States*, 658 F.2d 471, 476 (7th Cir. 1981); *Turpin v. Sortini*, 31 Cal. 3d 220, 237-39, 643 P.2d 954, 965-66, 182 Cal. Rptr. 337, 348-49 (1982) (en banc); *Haymon v. Wilkerson*, 535 A.2d 880, 885-86 (D.C. 1987); *Becker v. Schwartz*, 46 N.Y.2d 401, 412-13, 386 N.E.2d 807, 813-14, 413 N.Y.S.2d 895, 901-02 (1978); *James G. v. Caserta*, 332 S.E.2d 872, 882-83 (W. Va. 1985) (parents also recovered child's postmajority expenses because child would never be self-supporting).

93. See, *e.g.*, *Phillips v. United States*, 575 F. Supp. 1309, 1319-20 (D.S.C. 1983) (par-

courts refused to find that the birth of any child could ever be an injury to parents,⁹⁴ and also declined to award emotional distress damages.⁹⁵ The courts did, however, realize that extraordinary costs were involved in the rearing of a handicapped child, and so most successful wrongful birth plaintiffs recovered medical and educational costs on an economic injury theory.⁹⁶ As noted by one court:

In authorizing . . . recovery by the parents, courts have recognized (1) that these are expenses that would not have been incurred "but for" the defendants' negligence and (2) that they are the kind of pecuniary losses, which are readily ascertainable and regularly awarded as damages in professional malpractice actions.⁹⁷

Wrongful life suits have generally not succeeded because the infant plaintiff alleges that his very life is an injury to him, *i.e.*, but for the physician's negligence, the infant would not have been born.⁹⁸ The courts generally refuse to recognize this kind of claim as a valid cause of action because of the presumption that life in any condition is pref-

ents of Down's syndrome child recovered \$500,000 for emotional distress; court reduced award by 50% due to "offsetting benefits" theory of torts (*see infra* note 95)); *Naccash v. Burger*, 290 S.E.2d 825, 831 (Va. 1982) ("evidence shows an unbroken chain of causal connection directly linking the erroneous Tay-Sachs report, the deprivation of the parents' opportunity to accept or reject the continuance of Mrs. Burger's pregnancy, and the emotional distress the parents suffered following the birth of their fatally defective child"); *see also infra* notes 180-81.

94. *See, e.g.*, *Gleitman v. Cosgrove*, 49 N.J. 22, 29, 227 A.2d 689, 693 (1967) (to calculate damages "a court would have to evaluate the denial to [parents] of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries").

95. *See, e.g.*, *Becker*, 46 N.Y.2d at 414-15, 386 N.E.2d at 814, 413 N.Y.S.2d at 902 ("parents may yet experience a love that even an abnormality cannot fully dampen"). The court in *Becker* did not award emotional distress damages because the joy the parents would derive in raising the child offset any emotional distress caused by the genetic defect. *Id.* at 413, 386 N.E.2d at 813, 413 N.Y.S.2d at 901. This rationale is known as the "offsetting benefits" theory of torts. *See* RESTATEMENT (SECOND) OF TORTS § 920 (1977). "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable." *Id.*

96. *See supra* note 92.

97. *Turpin v. Sortini*, 31 Cal. 3d 220, 238, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982) (en banc).

98. *See supra* notes 15, 54-55, and accompanying text. The court in *Lininger v. Eisenbaum* criticized the courts which have recognized wrongful life actions because they did not expressly hold that the infant was injured; rather, those cases were decided on equitable principles. 764 P.2d 1202, 1211-12 (Colo. 1988); *Procanik v. Cillo*, 97 N.J. 339, 351-52, 478 A.2d 755, 762 (1984) ("whatever logic inheres in permitting parents to recover for the cost of extraordinary medical care incurred by a birth-defective child, but in denying the child's own right to recover those expenses, must yield to the injustice of that result.")

erable to nonexistence, and therefore can never be an injury.⁹⁹ The courts have also stated that damages in wrongful life actions are too speculative to calculate.¹⁰⁰

III. Historical Background

Although wrongful birth and wrongful life actions are simply specific types of medical malpractice suits, there has been much opposition to them due in large part to anti-abortion sentiment. The courts, however, have gradually come to recognize wrongful birth, and a small minority of courts have come to recognize wrongful life as well. Despite this judicial trend—at least for wrongful birth claims—a few state legislatures have enacted statutes barring both claims, while only one state has legislation which permits both.

A. The Judicial Trend

The seminal case which served as the model for most of the wrongful birth and wrongful life cases was *Gleitman v. Cosgrove*.¹⁰¹ In *Gleitman*, the defendant physician negligently advised Mrs. Gleitman that her exposure to rubella during the first trimester of her pregnancy would have no effect at all on the infant,¹⁰² and the child was subsequently born with severe congenital birth defects.¹⁰³ In denying recovery to both the infant and his parents,¹⁰⁴ the New Jersey Supreme Court relied on two rationales which have become the most widely cited reasons for barring wrongful life actions. First, public policy supports the sanctity of human life and presumes that existence in any state of health is always preferable to nonexistence;¹⁰⁵ and sec-

99. See *infra* notes 105-06, 111-15 and accompanying text. See generally Pace, *The Treatment of Injury in Wrongful Life Claims*, 20 COLUM. J.L. & SOC. PROBS. 145, 145-66 (1986) (concluding that wrongful life actions must fail for want of injury).

100. See *infra* note 106 and accompanying text.

101. 49 N.J. 22, 227 A.2d 689 (1967). It should be noted that this case was decided after *Griswold v. Connecticut*, 381 U.S. 479 (1965), but before *Roe v. Wade*, 410 U.S. 113 (1973). *Gleitman* was later overruled in part by *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979) (recognizing cause of action for wrongful birth, but only allowing parents recovery for emotional distress), and in turn, *Berman* was overruled in part by *Procanik v. Cillo*, 97 N.J. 339, 355, 478 A.2d 755, 757 (1984) (recognizing cause of action for wrongful life and allowing infant plaintiff to recover special damages of extraordinary medical expenses attributable to his affliction). For a detailed analysis of *Gleitman*'s impact on later cases, see Rogers, *supra* note 15, at 721-30, 742-48.

102. *Gleitman*, 49 N.J. at 24, 227 A.2d at 690.

103. *Id.* The infant was blind, deaf, mute and probably mentally retarded. *Id.* at 49, 227 A.2d at 703 (Jacobs, J., dissenting).

104. *Id.* at 48-49, 227 A.2d at 692-93.

105. "It is basic to the human condition to seek life and hold on to it however heavily burdened." *Id.* at 30, 227 A.2d at 693; accord *Blake v. Cruz*, 108 Idaho 253, 260, 698

ond, damages are incalculable because a court cannot measure the value of never having been born.¹⁰⁶

After the Supreme Court decided *Roe v. Wade*¹⁰⁷ in 1973, courts generally recognized that procreative self-determination was part of an individual's right to privacy.¹⁰⁸ Moreover, as the popularity of family planning through the use of contraceptives and sterilization procedures increased in the post-*Roe* years,¹⁰⁹ many courts began to recognize wrongful birth actions.¹¹⁰

Wrongful life actions, however, did not meet with such ready acceptance.¹¹¹ In rejecting wrongful life actions, the courts have stated

P.2d 315, 322 (1984); *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 238-39, 512 N.E.2d 691, 697 (1987); *Bruggeman v. Schimke*, 239 Kan. 245, 254, 718 P.2d 635, 642 (1986); *Strohmaier v. Associates in Obstetrics & Gynecology, P.C.*, 122 Mich. App. 116, 121, 332 N.W.2d 432, 434-35 (1982); *Smith v. Cote*, 128 N.H. 231, 248, 513 A.2d 341, 352-53 (1986); *Becker v. Schwartz*, 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978); *Nelson v. Krusen*, 678 S.W.2d 918, 925 (Tex. 1984); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 772-73, 233 N.W.2d 372, 375-76 (1975).

106. *Gleitman*, 49 N.J. at 28-29, 227 A.2d at 692-93. "The infant plaintiff would have us measure the difference between his life with defects against the utter void of non-existence, but it is impossible to make such a determination." 49 N.J. at 28, 227 A.2d at 692.

107. 410 U.S. 113 (1973); see also *supra* note 9 and accompanying text.

108. See, e.g., *Hartke v. McKelway*, 707 F.2d 1544, 1552 (D.C. Cir. 1983) (procreative decision is couple's "choice and the courts are required to respect it"), *cert. denied*, 464 U.S. 983 (1983); *Rogers*, *supra* note 15, at 722-23; see also *infra* notes 148-55 and accompanying text.

109. See, e.g., *Hartke*, 707 F.2d at 1552 ("when a couple has chosen not to have children, or not to have any more children, the suggestion arises that for them, at least, the birth of a child would not be a net benefit"); *Tropi v. Scarf*, 31 Mich. App. 240, 253, 187 N.W.2d 511, 517 (1971) ("public policy cannot be said to disfavor contraception"); see also *supra* note 5.

110. See, e.g., *Robak v. United States*, 658 F.2d 471, 475 (7th Cir. 1981) ("[s]ince *Roe v. Wade*, . . . precedents [of state courts] have been unanimous in recognizing a cause of action for the parents of a child born as a result of a physician's negligence") (footnote omitted); *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 258, 512 N.E.2d 691, 705-06 (1987); *Eisbrenner v. Stanley*, 106 Mich. App. 357, 361-62, 308 N.W.2d 209, 211 (1981); *Smith v. Cote*, 128 N.H. 231, 238-39, 513 A.2d 341, 345-46 (1986); *Berman v. Allan*, 80 N.J. 421, 436, 404 A.2d 8, 14 (1979) (holding that *Roe v. Wade* invalidates *Gleitman v. Cosgrove's* rationale for rejecting wrongful birth actions); *Becker v. Schwartz*, 46 N.Y.2d 401, 417, 386 N.E.2d 807, 815, 413 N.Y.S.2d 895, 903 (1978) (Fuchsberg, J., concurring); *Naccash v. Burger*, 223 Va. 406, 414, 290 S.E.2d 825, 829-30 (1982); *James G. v. Caserta*, 332 S.E.2d 872, 882 (W. Va. 1985).

111. See, e.g., *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 695 (E.D. Pa. 1978) (recognizing wrongful birth but rejecting wrongful life); *Elliott v. Brown*, 361 So. 2d 546, 548 (Ala. 1978) (rejecting wrongful life); *Lininger v. Eisenbaum*, 764 P.2d 1202, 1212-13, (Colo. 1988) (recognizing wrongful birth but rejecting wrongful life); *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 251, 512 N.E.2d 691, 702 (1987) (same); *Berman v. Allan*, 80 N.J. 421, 430, 404 A.2d 8, 13 (1979) (same); *Becker v. Schwartz*, 46 N.Y.2d 401, 416, 386 N.E.2d 807, 814, 413 N.Y.S.2d 895, 902-03 (1978) (same); *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975) (rejecting wrongful life); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 773, 233 N.W.2d 372, 376 (1975) (same).

that the genetically defective infant suffers no legally cognizable injury by being born.¹¹² For example, in *Becker v. Schwartz*,¹¹³ the New York Court of Appeals declined to hold that a genetically impaired infant's life could be wrongful, stating that "[w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians."¹¹⁴ Other state courts, when deciding a wrongful life case for the first time, have found *Becker's* rationale persuasive.¹¹⁵

Currently, wrongful life actions are still rejected by most courts.¹¹⁶ In fact, only three states have accepted them judicially—California,¹¹⁷ New Jersey¹¹⁸ and Washington.¹¹⁹ These courts have held that allowing the infant a cause of action does not conflict with the sanctity of human life,¹²⁰ and that life, particularly life with severe birth de-

112. See *supra* notes 98-99 and accompanying text; *infra* notes 113-15 and accompanying text.

113. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). *Becker* concerned a 37 year old woman who gave birth to a Down's syndrome child. Plaintiffs were never advised of the increased risk to pregnant women over age 35 and also were never advised of the availability of an amniocentesis test. *Id.* at 405-06, 386 N.E.2d at 808-09, 413 N.Y.S.2d at 896-97; see also *supra* note 15. *Becker's* companion case, *Park v. Chessin*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978), concerned a woman who gave birth to a child with polycystic kidney disease. She had previously given birth to a child with the same disease who died five hours after birth. Defendant obstetricians had advised her that the disease was not hereditary, and that the chances of the disease reoccurring in another child were "practically nil." *Becker*, 46 N.Y.2d at 406-07, 386 N.E.2d at 809, 413 N.Y.S.2d at 897.

114. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. The court further stated: "[s]imply put, a cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make." *Id.* at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

115. See, e.g., *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 243, 512 N.E.2d 691, 698 (1987); *Bruggeman v. Schimke*, 239 Kan. 245, 250-51, 718 P.2d 635, 640-41 (1986); *Eisbrenner v. Stanley*, 106 Mich. App. 357, 366, 308 N.W.2d 209, 213 (1981); *Wilson v. Kuenzi*, 751 S.W.2d 741, 744-45 (Mo.) (en banc), cert. denied, 109 S. Ct. 229 (1988); *Smith v. Cote*, 128 N.H. 231, 247, 513 A.2d 341, 351 (1986); *Azzolino v. Dingfelder*, 315 N.C. 103, 109-10, 337 S.E.2d 528, 533 (1985), cert. denied, 479 U.S. 835 (1986). But see *Procanik v. Cillo*, 97 N.J. 339, 358, 478 A.2d 755, 765 (1984) (Handler, J., concurring in part, dissenting in part) ("the [c]ourt itself need not express a preference of life over nonlife but only to understand that individuals in necessitous situations have the right to make that choice").

116. See, e.g., *Lininger v. Eisenbaum*, 764 P.2d 1202, 1212-13 (Colo. 1988) (en banc); *Siemieniec*, 117 Ill. 2d at 251, 512 N.E.2d at 702; *Pitre v. Opelousas Gen. Hosp.*, 517 So. 2d 1019, 1024-25 (La. App. 1987), aff'd in part, rev'd in part, 530 So. 2d 1151 (La. 1988).

117. *Turpin v. Sortini*, 31 Cal. 3d 220, 239, 643 P.2d 954, 966, 182 Cal. Rptr. 337, 349 (1982) (en banc).

118. *Procanik v. Cillo*, 97 N.J. 339, 355-56, 478 A.2d 755, 764 (1984).

119. *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 483, 656 P.2d 483, 497 (1983) (en banc).

120. See *Turpin*, 31 Cal. 3d at 233-34, 643 P.2d at 961-62, 182 Cal. Rptr. at 345;

fects, is not always preferable to nonlife.¹²¹ Furthermore, these decisions treat wrongful life actions like other medical malpractice actions,¹²² and note that in most circumstances parents make the medical choices on behalf of an infant or fetus.¹²³ Damages are limited, however, to the extraordinary expenses to be incurred during the child's lifetime as a result of the genetic defect; if these expenses are recovered by the parents in a wrongful birth action, they may not be recovered again by the child in a wrongful life action.¹²⁴ These courts have been unwilling to award the infant general damages because: (1) general damages are incalculable;¹²⁵ or (2) the fact that the infant is alive will offset any award of general damages.¹²⁶

B. Recent Legislative Developments

Since 1986, six states have enacted statutes¹²⁷ prohibiting wrongful

Procanik, 97 N.J. at 353, 478 A.2d at 763; *Harbeson*, 98 Wash. 2d at 481-82, 656 P.2d at 496.

121. See *Turpin*, 31 Cal. 3d at 234, 643 P.2d at 961, 182 Cal. Rptr. at 344-45; *Procanik*, 97 N.J. at 354, 478 A.2d 763; *Harbeson*, 98 Wash. 2d at 481, 656 P.2d at 496. In *Turpin*, the court noted the following:

[I]t is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society. . . . Moreover, while our society and our legal system unquestionably place the highest value on all human life, we do not think that it is accurate to suggest that this state's public policy establishes—as a matter of law—that under all circumstances 'impaired life' is 'preferable' to 'nonlife'. . . . [P]ublic policy supports the right of each individual to make his or her own determination as to the relative value of life and death.

Turpin, 31 Cal. 3d at 233, 643 P.2d at 961-62, 182 Cal. Rptr. at 344-45.

122. See *supra* notes 16, 56 and accompanying text.

123. See, e.g., *Turpin*, 31 Cal. 3d at 234 n.9, 643 P.2d at 962 n.9, 182 Cal. Rptr. at 345 n.9; see also *supra* note 83.

124. See *Turpin*, 31 Cal. 3d at 237-39, 643 P.2d at 965-66, 182 Cal. Rptr. at 348-49 (either parents or child may recover out-of-pocket extraordinary expenses); *Procanik*, 97 N.J. at 351-52, 478 A.2d at 762 (either child or parents may recover extraordinary medical expenses incurred during infancy, and infant may recover those expenses during his majority); *Harbeson*, 98 Wash. 2d at 480, 656 P.2d at 495 ("[i]f the parents recover such costs for the child's minority in a wrongful birth action, the child will be limited to the costs to be incurred during his majority").

125. See *Turpin*, 31 Cal.3d at 236, 643 P.2d at 963, 182 Cal. Rptr. at 346; *Procanik*, 97 N.J. at 354, 478 A.2d at 763; *Harbeson*, 98 Wash.2d at 481, 656 P.2d at 496.

126. See *Turpin*, 31 Cal.3d at 237-38, 643 P.2d at 964, 182 Cal. Rptr. at 347.

127. See IDAHO CODE § 5-334 (Supp. 1988); IND. CODE ANN. § 34-1-1-11 (Burns 1988 Supp.) (prohibiting wrongful life only); MINN. STAT. § 145.424 (1989); MO. ANN. STAT. § 188.130 (Vernon Supp. 1989); S.D. CODIFIED LAWS ANN. § 21-55-1 to -4 (1987); UTAH CODE ANN. § 78-11-24 (1987). The language used in each statute is similar to that of South Dakota's, for example: "There shall be no cause of action or award of damages on behalf of any person based on the claim that, but for the conduct of another, a person would not have been permitted to have been born alive." S.D. CODIFIED LAWS

birth and wrongful life actions, despite the general judicial trend in favor of allowing wrongful birth actions.¹²⁸ While the constitutionality of such statutes has been questioned,¹²⁹ one state's highest court has already upheld its statute as constitutional.¹³⁰ In *Hickman v. Group Health Plan, Inc.*,¹³¹ the Supreme Court of Minnesota reversed the trial court, which had held Minnesota's statute prohibiting wrongful birth actions to be unconstitutional under *Roe v. Wade*.¹³² The court's reversal stated that there was: (1) no due process violation because no state action was involved;¹³³ (2) no equal protection violation because no suspect class was involved,¹³⁴ and (3) no significant burden on a woman's right to an abortion was present.¹³⁵

The dissent declared, however, that due process was violated because the state, through its statute, injected itself into the physician-patient relationship,¹³⁶ and that state interference with a woman's de-

ANN. § 21-55-2 (1987). Similar legislation has been introduced in 21 other states. See *Wrongful Birth Actions*, *supra* note 29, at 2019 n.7.

128. See *supra* note 109 and accompanying text.

129. See *Wrongful Birth Actions*, *supra* note 29, at 2017-34 (arguing that prohibition of wrongful birth actions is unconstitutional as violating due process and equal protection); cf. Henifin, Hubbard & Norsigian, *Prenatal Screening*, in REPRODUCTIVE LAWS FOR THE 1990S: A BRIEFING HANDBOOK 129, 146 (N. Taub & S. Cohen ed. 1988) (stating that "these statutes are overbroad because they prevent recovery for medical negligence and denial of patient choice"). But see Note, *Legislative Prohibition of Wrongful Birth Actions*, 44 WASH. & LEE L. REV. 1331, 1351 (1987) (although legislative prohibition of wrongful birth actions is not unconstitutional under *Roe v. Wade* and its progeny, physicians should compensate plaintiffs for their negligence).

Utah explicitly declares that its state policy is "right to life." UTAH CODE ANN. § 78-11-23 (1987). While Utah's Wrongful Life Act has not yet been put to the test, one commentator has argued that the law probably cannot withstand a constitutional challenge. Note, *Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah's Statutory Breakwater*, 1984 UTAH L. REV. 833, 862-63; cf. Note, *Alquijay v. St. Luke's-Roosevelt Hospital: The Inequitable Umbrella of Wrongful Life*, 12 J. CONTEMP. L. 137, 148 (1986) ("moral reprehension toward abortion is not a legally acceptable reason to deny an infant's claim of wrongful life").

130. *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 13-15 (Minn. 1986).

131. 396 N.W.2d 10 (Minn. 1986). Mrs. Hickman was 34 years old when she gave birth to a child with Down's syndrome. *Id.* at 11. The Hickmans asserted that, had they known the condition of the fetus, they would have aborted. *Id.* The parties disputed whether defendant physician ever offered to conduct an amniocentesis. *Id.*

132. *Id.*; see also *supra* note 9 and accompanying text.

133. *Id.* at 13. For a detailed analysis of due process and state action, see J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 421-520 (3d ed. 1986) [hereinafter NOWAK, ROTUNDA & YOUNG].

134. *Hickman*, 396 N.W.2d at 14. For a detailed analysis of equal protection, see NOWAK, ROTUNDA & YOUNG, *supra* note 133, at 521-801.

135. *Hickman*, 396 N.W.2d at 13. *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny established that a state may not interfere with a woman's right to an abortion during the first trimester. See also *infra* notes 148-54 and accompanying text.

136. *Hickman*, 396 N.W.2d at 18-19 (Amdahl, C.J., dissenting).

cision-making process is constitutionally impermissible under *Roe* and its progeny.¹³⁷

Only one state, Maine, has enacted a statute that allows wrongful birth and wrongful life actions.¹³⁸ Unfortunately, the statute has not yet been judicially interpreted;¹³⁹ and the provision that applies to negligent genetic counseling merely specifies that only special damages will be awarded.¹⁴⁰ The statute does not make a distinction between wrongful birth and wrongful life actions.¹⁴¹

IV. A Model Statute

Because courts are generally reluctant to formulate social policy,¹⁴² and also because wrongful birth and wrongful life actions involve controversial issues,¹⁴³ many courts have stated that these issues should be addressed by the legislatures.¹⁴⁴ The gradual recognition of wrong-

The rights under *Roe* are decisionally based, and subdivision 2 [of Minnesota's statute prohibiting wrongful birth actions] constitutes an official interference with the decisionmaking process. While, facially, it is the doctor's conduct which deprives the woman of the information she needs to make an informed decision, the deprivation of the information carries with it the imprint of the state. *Roe* contemplates that a woman makes an informed decision within the setting of the doctor-woman relationship . . . and the entry of the state into that relationship has been found to be constitutionally impermissible under *Roe* and its progeny. Subdivision 2 constitutes a subtle entry into that relationship and interference with the informed decisionmaking process.

Id. at 19 (citation omitted).

137. *Id.*; see also *Wrongful Birth Actions*, *supra* note 29, at 2019-23; cf. *Ochs v. Borrelli*, 187 Conn. 253, 258, 445 A.2d 883, 885 (1982) ("[p]ublic policy cannot support an exception to tort liability when the impact of such an exception would impair the exercise of a constitutionally protected right").

138. See ME. REV. STAT. ANN. tit. 24, § 2931 (Supp. 1988).

139. The most recent wrongful birth case in Maine was a wrongful conception case, involving a negligently performed tubal ligation which resulted in the birth of a healthy, but unplanned, child. See *Macomber v. Dillman*, 505 A.2d 810 (Me. 1986).

140. See ME. REV. STAT. ANN. tit. 24, § 2931(3) (Supp. 1988). "Damages for the birth of an unhealthy child born as a result of professional negligence shall be limited to damages associated with the disease, defect or handicap suffered by the child." *Id.*

141. See *id.*

142. See *infra* notes 144, 147 and accompanying text.

143. The controversy stems from moral issues as much as from legal ones:

Prenatal screening for genetic disabilities raises many possible scenarios: (1) the sad but understandable choice of women to protect themselves and other family members from the problems of raising a disabled child; (2) the prospect of bearing a child whom parents fear will lead a lifetime of pain; and (3) the eugenic specter of mothers as 'stewards of quality control,' aborting fetuses who would become socially unacceptable, stigmatized people.

REPRODUCTIVE LAWS FOR THE 1990S: A BRIEFING HANDBOOK 6 (N. Taub & S. Cohen ed. 1988) (numbers added).

144. See, e.g., *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 251, 512 N.E.2d 691, 702 (1987) ("wrongful life . . . should not be recognized in this [s]tate absent clear

ful birth actions, the general rejection of wrongful life actions,¹⁴⁵ and the diverse approaches to the determination of recoverable damages,¹⁴⁶ indicate that public policy in this area is not easily deter-

legislative guidance"); *Proffitt v. Bartolo*, 162 Mich. App. 35, 59, 412 N.W.2d 232, 243 (1987) ("the conflicting economic and moral interests are best resolved in the Legislature"); *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 13 (Minn. 1986) ("we consider the establishment of wrongful birth or wrongful life suits to be best within the exclusive jurisdiction of the legislature"); *Bani-Esraili v. Lerman*, 69 N.Y.2d 807, 808, 505 N.E.2d 947, 948, 513 N.Y.S.2d 382, 383 (1987) ("[t]he argument that public policy is better served by permitting plaintiff to recover the cost of his son's postmajority extraordinary expenses is more appropriately addressed to the [L]egislature"); *Becker v. Schwartz*, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 901 (1978) ("[r]ecognition of so novel a cause of action requiring, as it must, creation of a hypothetical formula for the measurement of an infant's damages is best reserved for legislative, rather than judicial, attention"); *Azzolino v. Dingfelder*, 315 N.C. 103, 116, 337 S.E.2d 528, 536 (1985) ("the myriad problems arising from claims for wrongful life and wrongful birth can be resolved properly only by a legislative body"); *James G. v. Caserta*, 332 S.E.2d 872, 881 (W. Va. 1985) ("in this jurisdiction, a claim for wrongful life does not exist in the absence of any statute giving rise to such a cause of action"). *But see Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 696 (E.D. Pa. 1978) ("[t]he determination of the scope of the common law doctrine of negligence is within the province of the judiciary"); *Lininger v. Eisenbaum*, 764 P.2d 1202, 1208 (Colo. 1988) (en banc) ("in light of our finding that we are merely applying common law negligence principles and not 'creating' a new cause of action unknown at common law, we see no reason to defer the resolution of this issue to the legislature").

145. *See supra* notes 116-28 and accompanying text.

146. The only aspect that the courts generally agree on is that ordinary childrearing costs are not recoverable in wrongful birth or wrongful life cases. The currently accepted approach to damages is that *either* the parents *or* the infant may recover the extraordinary medical expenses associated with the infant's disease, but there will be only *one* recovery per family. There is much disagreement over whether there should be an award for postmajority expenses; and there is no uniformity concerning the parents' emotional distress claim. *See, e.g., Turpin v. Sortini*, 31 Cal. 3d 220, 237-40, 643 P.2d 954, 965-66, 182 Cal. Rptr. 337, 347-49 (1982) (deaf infant or her parents could recover extraordinary medical and educational expenses during minority, and infant could not recover those expenses upon majority; infant could not recover for emotional distress); *Siemieniec*, 117 Ill. 2d at 262-63, 512 N.E.2d at 707-08 (parents of infant with hemophilia recovered extraordinary medical expenses during infant's minority, but not upon majority; no emotional distress award); *Procanik*, 97 N.J. at 355-56, 478 A.2d at 764 (infant or parents of infant with congenital rubella syndrome could recover special damages during minority, and infant could recover those expenses upon majority; infant could not recover for emotional distress; parents could recover for emotional distress but were barred by statute of limitations); *Becker*, 46 N.Y.2d at 413-15, 386 N.E.2d at 813-14, 413 N.Y.S.2d at 901-03 (parents of infant with Down's syndrome recovered extraordinary medical expenses but not emotional distress); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 477-83, 656 P.2d 483, 492-97 (1983) (parents of infant or infant with fetal hydantoin syndrome could recover extraordinary expenses during minority and majority; parents could recover emotional distress after offset for emotional benefits of raising child; no emotional distress award for child) (en banc); *Naccash v. Burger*, 223 Va. 406, 414-19, 290 S.E.2d 825, 830-33 (1982) (parents of infant who died of Tay-Sachs disease recovered medical expenses and emotional distress but not funeral expenses); *cf. Kingsbury v. Smith*, 122 N.H. 237, 241-42, 442 A.2d 1003, 1004-05 (1982) (for analysis of approaches to damages when healthy child is born in a wrongful conception case); *Scheid, Benefits vs. Burdens: The*

mined.¹⁴⁷ Nevertheless, the significance of giving prospective parents the opportunity to make a private procreative decision cannot be stressed enough. In light of the Supreme Court's holdings in *Griswold v. Connecticut*,¹⁴⁸ *Roe v. Wade*¹⁴⁹ and their progeny,¹⁵⁰ married couples¹⁵¹ are entitled to make reproductive choices¹⁵² and a pregnant woman has the right to have an abortion.¹⁵³ This right is constitu-

Limitation of Damages in Wrongful Birth, 23 J. FAM. L. 57 (1984-85) (same). See generally Comment, *The Legal Recognition of Medical Malpractice Tort Claims Based upon Theories of Wrongful Birth and Wrongful Life*, 15 N.C. CENT. L.J. 274, 279-86 (1985) (categorizing the various views toward money damages assessments).

147. See, e.g., *Wilbur v. Kerr*, 275 Ark. 239, 245, 628 S.W.2d 568, 572 (1982) (Dudley, J., dissenting) (discussing "the lack of a standard by which we determine when to apply public policy and the lack of a meaningful definition by which we discover what constitutes public policy"). See generally Symmons, *Policy Factors in Actions for Wrongful Birth*, 50 MOD. L. REV. 269 (1987) (for analysis of all conflicting policy factors).

148. 381 U.S. 479 (1965).

149. 410 U.S. 113 (1973); see also *supra* note 9 and accompanying text.

150. See, e.g., *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973). See also *supra* note 9 and accompanying text.

151. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

152. See *id.* "[State prohibition of the use of contraceptives] is repulsive to the notions of privacy surrounding the marriage relationship." *Id.* The right of procreative freedom is now a generally accepted principle, subject to certain limitations. See, e.g., *Ochs v. Borrelli*, 187 Conn. 253, 258, 445 A.2d 883, 885 (1982); *Haymon v. Wilkerson*, 535 A.2d 880, 882 (D.C. Ct. App. 1987); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175 (Minn. 1977); *Bowman v. Davis*, 48 Ohio St. 2d 41, 46, 356 N.E.2d 496, 499 (1976) (*per curiam*).

In a comprehensive model statute barring interference with reproductive choice, reproductive choice has been defined as:

- a. an individual's choice to exercise her constitutional right to the performance of an abortion to the extent protected by state and federal constitutional law
- b. an individual's choice to exercise her/his constitutional right to be sterilized or to refuse sterilization to the extent protected by state and federal constitutional law
- c. an individual's choice to carry a pregnancy to term
- d. an individual's choice to obtain and to use any lawful prescription for drugs or other substances designed to avoid pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at, or immediately after fertilization
- e. an individual's choice to become pregnant through in vitro fertilization, artificial insemination, or any other procedure.

Gertner, *Interference with Reproductive Choice*, in *REPRODUCTIVE LAWS FOR THE 1990S: A BRIEFING HANDBOOK* 233, 243 (N. Taub & S. Cohen ed. 1988).

153. See *Roe*, 410 U.S. at 153; see also *supra* note 9 and accompanying text. Although *Roe*'s explicit holding stated that the abortion decision is to be decided by a pregnant woman in consultation with her physician, in practice physicians limit their role to outlining all the medical risks, benefits and alternatives, leaving the actual decision to the sole discretion of the pregnant woman. See, e.g., REILLY, *supra* note 32, at 163-67; *cf. Danforth*, 428 U.S. at 71-74 (states may not give pregnant woman's spouse or parents right to veto woman's decision to abort).

tionally protected under the fundamental right to privacy,¹⁵⁴ and many courts have since held that public policy supports procreative choice.¹⁵⁵ While society should not encourage couples to have only "perfect" children, the choice should remain private.¹⁵⁶ Because parents frequently make medical decisions on behalf of their children,¹⁵⁷ only parents should decide whether their child's life would be worth living with the particular genetic disease. Various personal factors are involved in these decisions, such as the severity of the genetic disease, the family's size and economic status, as well as religious, moral, emotional and social considerations.¹⁵⁸ Thus, the negligent deprivation of a couple's opportunity to make an informed reproductive decision is clearly a wrong for which they should be compensated.¹⁵⁹

In some cases an informed reproductive decision could involve termination of a pregnancy based on factors other than birth defects—for example, the sex of the fetus. If, however, the parents brought a lawsuit (claiming that they wanted a boy instead of a girl and would have aborted, had they known the fetus was a girl), the offsetting ben-

154. See *Griswold*, 381 U.S. at 483-85. "[T]he [f]irst [a]mendment has a penumbra where privacy is protected from governmental intrusion." *Id.* at 483.

155. See, e.g., *Hartke v. McKelway*, 707 F.2d 1544, 1552 (D.C. Cir.), *cert. denied*, 464 U.S. 983 (1983); *Ochs v. Borrelli*, 187 Conn. 253, 258, 445 A.2d 883, 885 (1982); *Macomber v. Dillman*, 505 A.2d 810, 816 n.3 (Me. 1986) (Scolnik, J., concurring in part, dissenting in part); *Troppi v. Scarf*, 31 Mich. App. 240, 253, 187 N.W.2d 511, 517 (1971).

156. See, e.g., *Procanik*, 97 N.J. at 366, 478 A.2d at 770 (Handler, J., concurring in part, dissenting in part) ("[a]n individual—as distinct from the court—has the right to determine that 'a defective life is worth less than no life at all' ") (emphasis in original).

One commentator has noted the following:

It is . . . wrong for the state to substitute its judgment for that of a child (as exercised by the child's parents) on whether the child's particular burdens make existence or nonexistence preferable. The sphere of privacy that protects each family's decisions about reproduction would crumble if the state could impose a uniform rule that life is always preferable; indeed, it would be ironic if a woman enjoyed less protection to avoid bringing a genetically impaired child into the world than were she to desire abortion for her own sake unconnected with the well-being of the potential child.

Capron, *supra* note 4, at 653.

157. See *infra* note 166.

158. See *supra* notes 10-12 and accompanying text.

159. See, e.g., *Procanik v. Cillo*, 97 N.J. 339, 360, 478 A.2d 755, 767 (1984) (Handler, J., concurring in part, dissenting in part) ("[n]ot only must [parents] deal with the unanticipated shock of discovering that their child is handicapped, but also they must cope with the belief that but for their failure to decide their child's fate they might have spared the child a life of affliction"); *Berman v. Allan*, 80 N.J. 421, 440, 404 A.2d 8, 18 (1979) (Handler, J., concurring in part, dissenting in part) ("[t]o be denied the opportunity—indeed, the right—to apply one's own moral values in reaching that [procreative] decision, is a serious, irreversible wrong"); Zuskas, *supra* note 1, at 93 (discussing parents' feelings of mourning and guilt upon birth of handicapped infant).

efits doctrine¹⁶⁰ would nullify their damages claim.

The courts generally recognize that medical practitioners have a duty to provide parents who seek genetic counseling with accurate genetic information in order to allow the parents to make an informed reproductive decision.¹⁶¹ In most cases the physician's duty should extend not only to the mother and the fetus, but also to the father, particularly when he has been involved in the testing and counseling. A breach of this duty which proximately causes the birth of a genetically defective child—an event which the parents sought to avoid through genetic counseling—constitutes a valid negligence claim. Thus, negligent genetic counseling is ordinary medical malpractice and genetic counselors should be held liable for their negligence.¹⁶²

The birth of an infant with genetic birth defects injures parents who specifically sought to avoid this event by seeking medical advice, and who will now have greater psychological and financial burdens than parents of healthy children. The child is injured in that his parents

160. See *supra* note 95.

161. See *supra* notes 58-74 and accompanying text.

162. See, e.g., *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 696 (E.D. Pa. 1978) ("recognition of a cause of action for negligence in the performance of genetic testing would encourage the accurate performance of such testing by penalizing physicians who fail to observe customary standards of good medical practice"); *Turpin v. Sorcini*, 31 Cal. 3d 220, 239, 643 P.2d 954, 966 n.15, 182 Cal. Rptr. 337, 349 (1982) ("[p]ermitting recovery of these extraordinary out-of-pocket expenses whether the cost is to be borne by the parents or the child should also help ensure that the available tort remedies in this area provide a comprehensive and consistent deterrent to negligent conduct") (en banc); *Linger v. Eisenbaum*, 764 P.2d 1202, 1215 (Colo. 1988) (Mullarkey, J., concurring in part, dissenting in part) ("it is anomalous to recognize the parents' claim and deny the child's claim. . . . denial of the child's claim only serves to immunize negligent conduct"); *Haymon v. Wilkerson*, 535 A.2d 880, 886 (D.C. Ct. App. 1987) ("[t]o hold otherwise would in effect 'immunize from liability' the physician providing inadequate guidance to persons who would choose to exercise their constitutional right to terminate pregnancy where the child, if born, would suffer from genetic defects"); *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 235-36, 512 N.E.2d 691, 695 (1987); *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 19 (Minn. 1986) (Amdahl, C.J., dissenting) ("[t]he possibility that a doctor will be held responsible for negligent conduct stands as a safeguard that the woman will be fully informed"); *Berman v. Allan*, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979); *Rogers, supra* note 15, at 757. One court has noted that if physicians are not held liable in wrongful life actions, the financial burden will ultimately fall upon the state:

By deciding that the physician has no responsibility to the child to pay for his or her extraordinary expenses in an action brought on behalf of the child, we are shifting that responsibility in many cases to the state, which will have to care for the child (and the adult, if the child lives) far into the future in the more aggravated cases where other funds are unavailable. The net economic effect of our holding may be that when the physician fails to give proper information to the parents, all of the people of the state pay the price.

Proffitt v. Bartolo, 162 Mich. App. 35, 58, 42 N.W.2d 232, 243 (1987).

never had the chance to decide on his behalf whether life with genetic defects would be better than not being born at all; indeed, the child will bear the added burden of his parents' feelings of guilt, sorrow and perhaps resentment.¹⁶³ The injury resulting from the physician's negligence impacts both parents and infant; therefore, wrongful life actions should not be barred while wrongful birth actions are recognized. Because a family will be permitted only one recovery in any event, there is no danger of double recoveries.¹⁶⁴

In addition, the traditional reasons given when rejecting wrongful birth and wrongful life actions—*i.e.*, life is never an injury and damages are incalculable¹⁶⁵—are not persuasive. Recognition of wrongful birth and wrongful life actions would not somehow disavow the sanctity of life; rather, it would permit prospective parents to make private decisions concerning the lives of their future children on behalf of those children. Quality of life decisions based on individuals' moral and religious beliefs must remain private.

Furthermore, damages in wrongful birth and wrongful life actions are no more speculative than in any other medical malpractice case. A dollar value is not placed on the infant's life; rather, it is placed on the ordinary expenses of raising a child, the extraordinary medical expenses associated with the genetic disease, and on emotional distress—an injury which is never easily calculated.

163. One interesting analysis of the kind of damages caused by negligent genetic counseling has termed the parents' injury "impaired parental capacity" and the infant's injury "diminished childhood." See *Berman v. Allan*, 80 N.J. 421, 434-36, 404 A.2d 8, 15-16 (1979) (Handler, J., concurring in part, dissenting in part). "Through the failure of the doctors . . . the parents were given no opportunity to cushion the blow, mute the hurt, or prepare themselves as parents for the birth of their seriously impaired child. Their injury is real and palpable." *Id.* at 439, 404 A.2d at 17-18. The infant's "diminished childhood" is explained as follows:

[T]he injury consists of a diminished childhood in being born of parents kept ignorant of her defective state while unborn and who, on that account, were less fit to accept and assume their parental responsibilities. The frightful weight of the child's natural handicap has been made more burdensome by defendants' negligence because her parents' capacity has been impaired; they are less able to cope with the extra-heavy parental obligations uniquely involved in providing a child so afflicted with the unfaltering love, constant devotion and extraordinary care such as a child specially requires.

Id. at 442, 404 A.2d at 19.

164. While both the parent and the child will be able to recover for emotional distress damages (offset by enjoyment of the child's life), the parties will not thereby obtain a double recovery for a single injury. Because parent and child each suffer emotional injury, they are each entitled to a recovery for emotional distress. Furthermore, damages for medical expenses will not be recovered twice (once by the parents and again by the child); rather, such expenses will be compensated only once—either to the parents or to the child. See *infra* notes 174-77 and accompanying text.

165. See *supra* notes 105-06, 114 and accompanying text.

For the above reasons, this Note suggests that legislation be enacted to: (1) help guide the courts with these sensitive issues; (2) reinforce and protect the private reproductive rights of prospective parents; and (3) deter medical malpractice and encourage due care on the part of medical practitioners. The following model statute is offered as a guideline:

Wrongful Birth and Wrongful Life Medical Malpractice Actions
Arising from Negligent Genetic Counseling.

(1) *Definitions:*

(a) A "wrongful birth action" is a medical malpractice action brought by parent(s) of an infant with genetic birth defects when the health care practitioner who provided genetic counseling services was negligent in providing genetic information and thereby prevented the parent(s) from making an informed reproductive decision. Both parents, rather than the mother alone, are entitled to bring suit where the father is a participant in the genetic counseling and has thus established a physician-patient relationship.

(b) A "wrongful life action" is a medical malpractice action brought on behalf of an infant with genetic birth defects when the health care practitioner who provided genetic counseling services to the infant's parents was negligent in providing genetic information and thereby prevented the infant's parent(s) from making an informed reproductive decision.

(c) "Genetic counseling" is the process by which prospective parent(s) obtain information concerning genetic disorders from health care practitioners in order to make informed reproductive decisions. Genetic counseling refers to both pre-conception and post-conception counseling. The genetic counseling process includes: (i) conducting medically-accepted genetic tests on the parent(s) and/or fetus; (ii) communication of the test results from the genetic counselor to the parent(s); and (iii) communication of the material risks associated with the genetic disorder and available alternatives.

(d) "Health care practitioner" refers to anyone who provides genetic counseling, including, but not limited to, physicians, nurses, hospitals, laboratories, and social workers.

(2) Negligent acts or omissions, by a health care practitioner providing genetic counseling services, which prevent a prospective parent(s) from making an informed reproductive decision, are actionable provided that all the requisite elements of negligence are established. Such a medical malpractice action is a wrongful birth action when brought by the parent(s) of an infant with genetic

birth defects; while a wrongful life action is brought on behalf of the infant.

(3) For both wrongful birth and wrongful life actions it must be established by plaintiff that the parent(s) would not have undergone or continued the pregnancy if she (they) had been fully and properly informed.

(4) Recoverable damages in wrongful birth and wrongful life actions include general damages arising from ordinary childrearing expenses, and special damages encompassing the extraordinary medical and educational expenses associated with the infant's particular genetic disorder. The amount of damages shall be determined by the trier of fact based upon all the appropriate and relevant circumstances, including, but not limited to, the severity of the genetic disease, the type and amount of medical treatment and special education the child will require, and the child's probable life expectancy. Damages shall be distributed as follows:

(a) Wrongful birth actions: Parents may recover general and special damages for the duration of the infant's minority. Emotional distress damages are recoverable if deemed appropriate by the factfinder and may be offset by any benefits the parents will derive in raising the child.

(b) Wrongful life actions: An infant may recover post-majority general and special damages. There may be an award for emotional distress in appropriate circumstances to be determined by the factfinder which may be offset by any benefits of being alive.

The model statute recognizes wrongful birth and wrongful life actions and is premised on four important policy considerations: (1) procreative choice is constitutionally protected within the right of privacy;¹⁶⁶ (2) individuals, not courts, should determine for their children whether existence with genetic birth defects is preferable to nonexistence;¹⁶⁷ (3) this type of medical malpractice should not go undeterred;¹⁶⁸ and (4) victims of genetic counseling negligence should be compensated in accordance with established principles of tort

166. See *supra* note 9 and accompanying text; see also *supra* notes 148-59 and accompanying text.

167. See *supra* notes 156-59 and accompanying text. An informative analogy can be made to cases involving medical care for children. Parental decision making for a child's medical care is traditionally respected by the courts. See, e.g., *Bowen v. American Hosp. Assoc.*, 476 U.S. 610, 647 (1986) (law requiring treatment of handicapped infants over parental objections held invalid); *Weber v. Stony Brook Hosp.*, 60 N.Y.2d 208, 212-13, 456 N.E.2d 1186, 1188, 469 N.Y.S.2d 63, 65 (stranger to family of infant with spina bifida and serious complicating disorders could not override parents' refusal to subject infant to surgery), *cert. denied*, 464 U.S. 1026 (1983).

168. See *supra* note 162 and accompanying text.

law.¹⁶⁹

The first two sections of the model statute set forth definitions and the required elements of a cause of action. The third section relates to cause in fact¹⁷⁰ and is intended to prevent frivolous claims. If the parents of the genetically impaired child would not have sought an abortion in any event, then they do not have a cause of action. The standard to be applied by the jury should be that of a reasonable person in the plaintiff's position—with the same religious, ethical, emotional and financial background, to the extent that those factors can be determined.¹⁷¹

The fourth section of the model statute addresses the problem of recoverable damages. Most courts have held that ordinary childrearing expenses are not recoverable¹⁷² because the parents were planning to have a child anyway. What they did not intend and actually sought to avoid, however, was the birth of a child with genetic birth defects. Because the parents would have terminated the pregnancy or would not have conceived if they had known of the genetic defects, *all* childrearing expenses should be recoverable including extraordinary medical expenses associated with the infant's disease such as special education, medical treatments and physical therapy.

But for the medical practitioner's negligence, there would be no child to raise at all; and under traditional tort principles, damages are intended to restore an injured person as nearly as possible to the position he or she would have been in had the wrong not occurred.¹⁷³ The same damages should not be recovered again, however, by the infant.¹⁷⁴ Because parents are responsible for the support of their children until the age of majority, it is appropriate to award damages to

169. See *supra* note 57 and accompanying text; *infra* note 173 and accompanying text.

170. See *supra* note 88 and accompanying text.

171. See *supra* notes 88-90 and accompanying text.

172. See *supra* note 146 and accompanying text.

173. See generally RESTATEMENT (SECOND) OF TORTS § 901 comment a (1979). See also Robak v. United States, 658 F.2d 471, 478-79 (7th Cir. 1981) (“[i]t is a fundamental tenet of tort law that a negligent tortfeasor is liable for *all* damages that are the proximate result of his negligence. . . . These expenditures must include the costs of raising a normal child, for the Robaks would not have had to bear them but for defendant's negligence”).

174. See, e.g., Turpin v. Sortini, 31 Cal. 3d 220, 239, 643 P.2d 954, 966, 182 Cal. Rptr. 337, 348 (1982) (holding that either parents or child could recover extraordinary medical expenses necessary to treat child's ailment) (en banc); Procanik v. Cillo, 97 N.J. 339, 351, 478 A.2d 755, 762 (1984) (“[r]ecovery of the cost of extraordinary medical expenses by either the parents or the infant, but not both, is consistent with the principle that the doctor's negligence vitally affects the entire family”) (citation omitted); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 481, 656 P.2d 483, 495 (1983) (en banc).

the parents for the infant's minority.¹⁷⁵ The post-majority expenses should be awarded directly to the infant because parents are not legally obligated to support children beyond the age of minority.¹⁷⁶ The parents should hold the post-majority award in trust for the child; in many cases, of course, it is likely that the child will continue to live with his parents for his entire life.¹⁷⁷

The damages section gives the jury considerable freedom in making an appropriate damages award. While there have been many judicial approaches to damages,¹⁷⁸ the most equitable approach is to let the trier of fact make the determination in view of all the relevant circumstances, such as the severity of the disease,¹⁷⁹ life expectancy of the child, costs of medical treatments for the specific disease, costs of special education for the child, the parents' economic status, and the number of other dependents.¹⁸⁰ Because jurors are often asked to calculate the dollar value of injuries resulting from medical malpractice, a jury award in wrongful birth and wrongful life suits is appropriate and no more speculative than in ordinary malpractice cases.

Whether damage for emotional distress should be awarded would again be determined by the factfinder according to the relevant cir-

175. See, e.g., *Harbeson*, 98 Wash. 2d at 479, 656 P.2d at 495.

176. Compare *Bani-Esraili v. Lerman*, 69 N.Y.2d 807, 808, 505 N.E.2d 947, 948, 513 N.Y.S.2d 382, 383 (1987) (parents of infant with Cooley's anemia could recover expenses for child's medical treatment during minority only) with *Procanik v. Cillo*, 97 N.J. 339, 352, 478 A.2d 755, 762 (1984) (infant or parents of infant with congenital rubella syndrome could recover medical expenses during minority and infant could recover those expenses during majority).

177. In *Robak v. United States*, 503 F. Supp. 982, 983 (N.D. Ill. 1980), *aff'd in part, rev'd in part*, 658 F.2d 471 (7th Cir. 1981), the parties agreed that the damage award would be placed in a reversionary trust. *Id.* The court stated that the trust would accomplish two desirable purposes in that: (1) the child would be provided for throughout her life; and (2) because of the severe defects suffered by the child as a result of rubella syndrome, she would probably have a shorter life span than that projected by life insurance tables, thereby reducing her maintenance costs to a lesser amount than the full trust proceeds. *Id.* Whatever remained in the trust after the child's death would revert back to the defendant. *Id.*

178. See *supra* note 146.

179. For example, in *Turpin*, the infant plaintiff's genetic birth defect was hereditary deafness and the court noted that a jury would not evaluate this type of injury in the same manner as a more debilitating disease such as Tay-Sachs disease. *Turpin*, 31 Cal. 3d at 235, 643 P.2d at 962-63, 182 Cal. Rptr. at 345-46. *But cf. Siemieniec*, 117 Ill. 2d at 242-45, 512 N.E.2d at 698-99 (rejecting cause of action for wrongful life because it would require courts to classify the types of genetic birth defects that are actionable from those that are nonactionable).

180. See *infra* notes 182-83. It has been suggested that wrongful birth statutes should explicitly state that parents are not required to mitigate damages by putting the child up for adoption or institutionalizing him. Note, *The Injury of Birth: Minnesota's Statutory Prohibition of Postconception Negligence Actions*, 14 WM. MITCHELL L. REV. 701, 755 n.245 (1988).

cumstances.¹⁸¹ The jury should specifically consider the psychological impact on the parents and their perceived ability to cope with the physical, emotional and financial hardships.¹⁸² As to the child's emotional distress, the jurors should consider how much pain or suffering the child endures, and whether life in such an impaired state is really better than nonexistence. Again, jurors often compute the monetary value of pain and suffering and emotional distress; thus there is no reason why it would be inappropriate for wrongful birth and wrongful life claims.

Furthermore, the damage awards may be offset by the benefits that the parents will receive in raising the child and by the benefits the child receives from living, if deemed appropriate by the jury.¹⁸³ Most children, whether or not born with genetic birth defects, provide joy to their parents; certainly children with only mild birth defects can derive a great deal of joy from life. In the wrongful birth scenario,

181. Because it is foreseeable that the birth of a child with genetic defects will cause the parents considerable emotional trauma, *see supra* notes 11-12, parents ought to be awarded damages for emotional distress. *See, e.g.,* *Siemieniec v. Lutheran Gen. Hosp.*, 117 Ill. 2d 230, 270, 512 N.E.2d 691, 711 (1987) (Simon, J., concurring in part, dissenting in part). Justice Simon noted the following:

[I]t is patently foreseeable that [the] birth of a child so afflicted, after the parents based the decision not to abort on the doctor's inaccurate assurance that the risk was very low, could result in emotional trauma to the parents. The measurement of damages for this type of emotional distress is no more difficult than in cases where the emotional distress has been intentionally inflicted or negligently inflicted on a person within the zone of physical danger.

Id.; *see also supra* note 93 and accompanying text. There is a divergence of opinion as to whether a jury can competently assess damages for emotional distress in genetic counseling malpractice actions. *Compare Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 475, 656 P.2d 483, 493 (1983) (jury should calculate parents' emotional injury and offset by countervailing emotional benefits attributable to child's birth) (en banc) *with Procanik v. Cillo*, 97 N.J. 339, 354, 478 A.2d 755, 763 (1984) (infant's claim for emotional distress is too speculative and "would stir the passions of jurors about the nature and value of life, the fear of non-existence, and about abortion").

182. *See, e.g., Turpin v. Sortini*, 31 Cal. 3d 220, 239, 643 P.2d 954, 965, 182 Cal. Rptr. 337, 348 (1982) (en banc) ("[w]hile the law cannot remove the heartache or undo the harm, it can afford some reasonable measure of compensation toward alleviating the financial burdens'") (quoting *Gleitman v. Cosgrove*, 49 N.J. 22, 49, 227 A.2d 689, 703 (1967) (Jacobs, J., dissenting)); *Procanik*, 97 N.J. at 360, 478 A.2d at 766 (Handler, J., concurring in part and dissenting in part). "[P]arents [of handicapped infants] may harbor negative feelings of disbelief, fear, anger, inferiority or rejection that are difficult to express. They may fear being unable to handle their children's handicaps and that the child may be a burden, especially to a normal sibling." *Id.* (citation omitted); *see also supra* notes 11-12.

183. *See* RESTATEMENT (SECOND) OF TORTS § 920 (1977); *see also Procanik*, 97 N.J. at 368, 478 A.2d at 771 (1984) (Handler, J., concurring in part, dissenting in part) ("when the burden outweighs the benefits, the difference between the burden of life with defects and the benefits of that impaired existence can be the measure of damages"); *supra* note 95.

however, parents often experience grief, remorse and guilt because they specifically sought to spare their child's suffering by preventing his birth.¹⁸⁴

V. Conclusion

Wrongful birth and wrongful life actions arising from negligent genetic counseling are valid medical malpractice actions. The medical practitioner offering the genetic counseling services has a duty to report accurate genetic information to the parents to allow the parents to make an informed reproductive decision. Procreative self-determination is constitutionally protected and is an extremely important private right. The deprivation of the opportunity to make an informed reproductive decision may have serious, and even tragic, consequences. Although there are many different types of genetic birth defects, some of the more debilitating diseases cause severe grief, shock and guilt as well as financial burdens to unsuspecting parents. Because the parents specifically sought to avoid these hardships by seeking the genetic counselor's advice, any breach of the medical practitioner's duty to the parents and child should result in liability.

Imposing liability on genetic counselors is consistent with existing tort law because plaintiffs are required to show every element of negligence before a physician can be held liable. Requiring genetic counselors to provide the material risks of genetic birth defects will preserve parents' right to determine whether they will have children; and public policy favors family planning. In addition, this kind of liability exposure may deter medical malpractice by ensuring that all health care practitioners, hospitals and laboratories implement their own rigorous rules, regulations and procedures concerning genetic counseling and diagnostic testing.

Anti-abortion sentiment should not give rise to legislation barring wrongful birth and wrongful life actions. *Griswold*, *Roe*, and other

184. See *supra* notes 156-63, 182-83; see also *Gallagher v. Duke Univ.*, 852 F.2d 773, 776-77 (4th Cir. 1988). In *Gallagher*, Mr. and Mrs. Gallagher sought genetic counseling after their first child suffered from severe, multiple birth defects. *Id.* at 774-75. Mrs. Gallagher specifically informed her doctor that she did not wish to conceive unless she had a normal chance of giving birth to a healthy child. *Id.* at 779. After the doctor determined that the first child's chromosomes reflected no genetic abnormalities, the Gallaghers conceived a second child who was also born with severe, multiple birth defects. *Id.* at 775. Because the child was profoundly impaired and because no evidence of benefits of parenthood was introduced, the court held that the jury had not been required to offset the extraordinary costs of caring for the child by any benefits. *Id.* at 776-77. The court also held that the jury's verdict of \$1,031,000 was neither speculative nor conjectural. *Id.* at 777. In addition, the court affirmed the award of emotional distress damages to both mother and father. *Id.* at 779.

Supreme Court cases hold that procreative choice is every individual's private right. Other states should follow Maine's lead by enacting legislation recognizing the validity of wrongful birth and wrongful life actions, to ensure that such private reproductive rights are protected.

Juries are capable of determining the impact of a seriously handicapped child upon a family and reflecting that impact in their calculation of damages. If the child's genetic defect is slight, the jury award will be comparatively low. If, however, the genetic disease is so severe that the child and parents will endure much psychological and financial suffering, there should be larger compensatory damages. Because the circumstances of genetic counseling malpractice actions can vary widely, the most equitable result will be reached through a jury verdict. In this manner, the damage award can be tailored to meet the particular needs of the plaintiffs. Although money is poor compensation for the parents' distress and the child's life of affliction, it is the only remedy the law provides; it will also help to relieve some of the heavy financial burden parents must bear so that they can begin adjusting to the monumental responsibility of raising a handicapped child.

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