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The Future Of The "Wrongful Birth" Cause Of Action

I. Introduction

"Genetic defects represent an increasingly large part of the national health care burden . . . Control of genetic disease may be achieved only by preventing the birth of [afflicted children, because] there is no effective treatment."¹ The tort of "wrongful birth"² establishes a doctor's duty to inform prospective parents of genetic defects, and aids in achieving the goal of preventing these births.³ The tort imposes liability on a defendant physician for damages and expenses incurred by the parents when, but for his failure to inform them of the genetic defects in the fetus, they would have terminated the pregnancy.⁴ The theory of liability is that the physician's negligence precluded the parents from making an informed decision about whether to bear a genetically diseased child.⁵

This relatively new tort is predicated on a woman's constitutional right to decide whether to terminate her pregnancy.⁶

1. Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1496-97 (1978).

2. For definition of this term, see *infra* notes 24-26 and accompanying text.

3. See Note, *supra* note 1, at 1495.

4. Comment, *Wrongful Life and Wrongful Birth Causes of Action — Suggestions for a Consistent Analysis*, 63 MARQ. L. REV. 611, 621 (1980).

5. Martha C. Romney & Dorothy Duffy, *Medicine and Law: Recent Developments*, 25 TORR & INS. L.J. 351, 355 (1990).

6. See *Roe v. Wade*, 410 U.S. 113 (1973). However, a woman's constitutional right to an abortion is not absolute. Rather, it is governed by the trimester approach set forth by the Court:

In the first trimester of pregnancy, "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." *Id.* at 163.

In the second trimester, "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.*

In the third trimester, "if the State is interested in protecting fetal life after via-

Prior to *Roe v. Wade*,⁷ parents could not sustain causes of action for wrongful birth injuries for two reasons. First, they could not claim that the physician's failure to inform caused the birth defect and, second, they could not obtain legal eugenic abortions⁸ in most states.⁹ *Roe* established that "[p]ublic policy now supports, rather than militates against, the proposition that [a woman shall] not be impermissibly denied a meaningful opportunity to [the abortion] decision."¹⁰ Thus, *Roe* provided the missing element of "proximate cause"¹¹ in wrongful birth actions: the showing that a pregnancy can be lawfully terminated is "essential for [establishing] a causal connection between defendant's failure to inform and plaintiffs' damages."¹²

The United States Supreme Court's most recent abortion decision in *Rust v. Sullivan*,¹³ however, threatens the continued recognition of wrongful birth actions. In *Rust*, the Court upheld federal regulations¹⁴ that interpret Title X of the Public Health Service Act¹⁵ and that provide federal funding for family planning services. As a result, the Court held that physicians may not counsel, refer, or provide information regarding abortion as a method of family planning to Title X recipients.¹⁶ Although the Court emphasized that the federal regulations only prohibit abortion related activity connected with Title X projects,¹⁷

bility, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Id.* at 163-64.

7. 410 U.S. 113 (1973).

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

Eugenics is the science which addresses itself to improving the stock, whether human or animal; to means and methods of improving the physical and mental qualities of future generations by control of mating and reproduction. . . .

[E]ugenic abortion would be one based on the probability or possibility that the fetus may be born in a mentally or physically abnormal condition.

Id. at 701; see also *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975) (wherein the court commented that eugenic abortion prevents the birth of a defective child).

9. See *Gleitman*, 227 A.2d at 695-703 (N.J. 1967) (Francis, J., concurring) (discussing the background of abortion in detail).

10. *Berman v. Allan*, 404 A.2d 8, 14 (N.J. 1979).

11. See *infra* note 26 for a discussion of proximate cause.

12. *Jacobs*, 519 S.W.2d at 848.

13. 111 S. Ct. 1759 (1991).

14. 42 C.F.R. §§ 59.1 - 59.10 (1991).

15. 42 U.S.C. §§ 300 et seq. (1991).

16. *Rust*, 111 S. Ct. at 1772.

17. *Id.* at 1775.

Rust's implications are far-reaching. Arguably, in the context of public funding, a physician will refrain from his duty to inform a woman of the probability of her fetus being genetically defective, because it may be viewed as advocating abortion.

Part II of this Comment will trace the development of the wrongful birth tort, emphasizing that its recognition has been premised on the physician's duty to inform, and the woman's constitutional right to decide whether to terminate her pregnancy. Part III will discuss the United States Supreme Court's abortion decisions after *Roe* demonstrating that these decisions, culminating in *Rust*, have rendered a woman's constitutional right nugatory, and have threatened sustainable wrongful birth actions. A proposed Model Statute, with Annotations and Commentary that incorporate these decisions, is appended to this Comment.

This Comment concludes that Title X patients, like other patients, have a "liberty interest in being free from unwarranted governmental intrusion in the informed consent dialogue necessary to medical self-determination."¹⁸ The common law duty to disclose material information has been applied historically in the doctor-patient context, and adopted by nearly every state as a basis for civil liability.¹⁹ *Rust* confines Title X physicians in an "undesired and uncomfortable straitjacket in the practice of [their] profession."²⁰ Moreover, *Rust* signals to the states that they may now relieve doctors of their duty to inform in the context of public funding, while technically leaving the woman's constitutional right to an abortion unfettered.²¹ As a result, the recognition of wrongful birth actions "[m]ay go full circle."²² States may return to policies of promoting childbirth over abortion by relieving these doctors of the duty to inform, thus circumventing the constitutional right to abort.²³

18. REPLY BRIEF FOR PETITIONERS, *RUST*, at 15, *Rust v. Sullivan*, 889 F.2d 401 (2d Cir. 1989) (No. 89-1391), cert. granted, 110 S. Ct. 2559 (1990).

19. *Rust*, 111 S. Ct. at 1778 (Blackmun, J., dissenting, joined by Marshall & Stevens, JJ.).

20. *Id.* at 1786 (Blackmun, J., dissenting, joined by Marshall & Stevens, JJ.) (quoting *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67 n.8 (1976)).

21. *Id.* at 1777.

22. See Romney, *supra* note 5, at 362.

23. *Id.* Courts may return to the rationale of *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967). *Gleitman* is the seminal case in which the New Jersey Supreme Court re-

II. The "Wrongful Birth" Cause of Action

A. *Distinguishing "Wrongful Birth," "Wrongful Life," "Wrongful Pregnancy," and "Wrongful Conception."*

"Wrongful birth" is an action brought by parents "[a]gainst a physician [who] failed to inform [them] of the increased possibility that the mother would give birth to a child suffering from birth defects . . . [,thereby precluding] an informed decision about whether [to have borne] the child."²⁴ In such cases, the parents allege they would have aborted had the physician "[p]roperly advised [them] of the risk of birth defects to the potential child."²⁵ They seek "[r]ecovery for their expenses in caring for the deformed child, and for their own pain and suffering."²⁶

"Wrongful life" is the corresponding action brought by the deformed child to recover damages.²⁷ "An action for 'wrongful

fused to recognize a cause of action for wrongful birth because it was precluded by the countervailing public policy supporting the preciousness of human life. *Id.* at 693.

24. *Phillips v. United States*, 508 F. Supp. 544, 546 n.1 (D.S.C. 1981) (citation omitted).

25. *Id.*

26. *Id.* Plaintiffs' complaints sound essentially in negligence or medical malpractice. *Id.* A successful plaintiff must demonstrate the existence of a duty, the breach of which may be considered the proximate cause of the damages suffered by the injured party. See generally RESTATEMENT (SECOND) OF TORTS § 281 (1965); WILLIAM PROSSER, LAW OF TORTS § 30, at 43 (4th ed. 1971). These elements will be addressed briefly.

Duty. "[T]he physician's professional relationship with the woman clearly establishes a duty of due care." Comment, *supra* note 4, at 649. Physicians are required to impart material information to their patients, as to the likelihood of future children being born defective, to enable them to make an informed decision whether to terminate the pregnancy. See Note, *supra* note 1, at 1504-08.

Breach. The breach of duty is the failure to inform prospective parents of the "risk of fetal defects." Rogers, Thomas DeWitt, III, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S. C. L. REV 713, 749 (1982). As such, it is measured by the failure to conform to the appropriate standard of skill, care, or learning. *Id.*

Proximate Cause. "[T]he parents' assertion that they would have avoided the defective child's birth if they had been properly informed is sufficient to establish the 'causal connection between defendant's failure to inform and plaintiffs' damages.'" *Id.* at 750 (citations omitted).

But see *Wilson v. Kuenzi*, 751 S.W.2d 741 (Mo. 1988) One court has determined that causation cannot be proven in a wrongful birth case. *Id.* at 744-45 (quoting *Becker v. Schwartz*, 46 N.Y.2d 401, 418, 386 N.E.2d 807, 815, 413 N.Y.S.2d 895, 904 (1978) (Wachtler, J., concurring in part and dissenting in part)).

27. *Phillips*, 508 F. Supp at 545 n.1.

pregnancy' or 'wrongful conception' is generally brought by the parents of a healthy, but unwanted, child against a pharmacist or pharmaceutical manufacturer for negligently filling a contraceptive prescription, or against a physician for negligently performing a sterilization procedure or an abortion."²⁸ The latter three torts exceed the scope of this Comment.

B. *Background and Public Policy Considerations of "Wrongful Birth" Actions*

Prior to *Roe v. Wade*,²⁹ some courts refused to recognize a cause of action for "wrongful birth," because of public policy considerations "supporting the preciousness of human life."³⁰ The seminal case is *Gleitman v. Cosgrove*.³¹ Mrs. Gleitman and her husband brought an action in New Jersey Superior Court against her doctor for wrongful birth when their child was born with defects. Mrs. Gleitman had contracted German Measles early in her pregnancy, and the couple alleged that the doctor had negligently assured Mrs. Gleitman that her disease would not affect the fetus.³² The Gleitmans further alleged that they might have aborted had the doctor informed them of the risk.³³ The trial court dismissed the action because abortion was a criminal offense in New Jersey at the time.³⁴

On appeal, the State Supreme Court affirmed the dismissal, but on other grounds.³⁵ The court reasoned that "[i]n order to determine [the Gleitmans'] compensatory damages a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries."³⁶ Such an evaluation was impossible in the court's view.³⁷ Even assuming "[a]n abortion could have been

28. *Id.*

29. 410 U.S. 113 (1973).

30. *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (N.J. 1967).

31. 227 A.2d 689 (N.J. 1967).

32. *Gleitman*, 227 A.2d at 690.

33. *Id.* at 691.

34. *Id.*

35. *Id.* at 693.

36. *Id.*

37. *Id.*

obtained without making its participants liable to criminal sanctions, substantial policy reasons prevented [the] court from allowing tort damages for the denial of opportunity to take an embryonic life."³⁸ The court believed that it was "[b]asic to the human condition to seek life and hold on to it however heavily burdened."³⁹

Despite public policy considerations, not all state courts followed New Jersey's refusal to recognize the wrongful birth cause of action.⁴⁰ Such courts categorized the causes of action as negligence or medical malpractice.⁴¹ A review of these cases will illustrate the progression of this tort in various states.

In the 1975 case of *Jacobs v. Theimer*,⁴² an expectant mother had contracted rubella. The parents brought an action alleging that, but for the doctor's failure to diagnose and inform them of the mother's condition and of its potential effects on their fetus, they would have terminated the pregnancy.⁴³ Even though eugenic abortions⁴⁴ were prohibited in Texas at the time, the Texas Supreme Court relied on common law negligence in upholding the Jacobses' claim.⁴⁵ The court held that the doctor was duty-bound to make reasonable disclosure of the diagnosis, as a reasonable doctor would make under the circumstances.⁴⁶ Had the Jacobses been fully informed about rubella and its consequences, abortion would have been the only way to have avoided damages. Therefore, a showing that the pregnancy could be terminated "[b]y lawful means [was] essential [to establish] a

38. *Id.*

39. *Id.* The court continued:

'For the living there is hope, but for the dead there is none.' (citation omitted.) The right to life is inalienable in our society. A court cannot say what defects should prevent an embryo from being allowed life such that denial of the opportunity to terminate the existence of a defective child in embryo can support a cause for action.

Id.

40. See *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372 (Wis. 1975).

41. See *infra* notes 42-104 and accompanying text.

42. 519 S.W.2d 846 (Tex. 1975).

43. *Id.* at 847.

44. See *supra* note 8 for a discussion of eugenic abortion.

45. *Jacobs*, 519 S.W.2d at 848.

46. *Id.*

causal connection between [the doctor's] failure to inform and the [Jacobses'] damages."⁴⁷

The *Jacobs* court distinguished *Gleitman*, in which the parents had sued for all past and future expenses in raising the child and for their own mental anguish.⁴⁸ In contrast, the Jacobses sued only for the economic burden related to the child's physical defects. The Texas Supreme Court found such damages reasonable, and awarded them to the parents accordingly.⁴⁹ Public policy considerations were not compelling enough to warrant an opposite result.⁵⁰

The Supreme Court of Wisconsin similarly analyzed the wrongful birth tort in *Dumer v. St. Michael's Hospital*⁵¹ that same year. The facts precipitating this case occurred prior to the decision in *Roe v. Wade*.⁵² The court was faced with the question of whether a doctor had a legal duty to inform a mother of her option to abort absent danger to her health.⁵³ Responding in the negative, the court nonetheless ruled that the doctor had been negligent in failing to diagnose the mother's rubella.⁵⁴ The doctor had a duty to inquire as to whether she was pregnant.⁵⁵ If the mother was pregnant, the doctor had a duty to "[i]nform her of the probable effects of rubella on the fetus, including its irreversible nature."⁵⁶ Plaintiffs were successful in proving they would have sought and submitted to a legal abortion; they were

47. *Id.*

48. *Id.* at 849.

49. *Id.* at 846. The court explained:

These expenses lie within the methods of proof by which courts are accustomed to determine awards in personal injury cases. No public policy obstacle should be interposed to that recovery. It is impossible for us to justify a policy which at once deprives the parents of information by which they could elect to terminate the pregnancy likely to produce a child with defective body, a policy which in effect requires that the deficient embryo be carried to full gestation until the deficient child is born, and which policy then denies recovery from the tortfeasor of costs of treating and caring for the defects of the child.

Id. at 849.

50. *Id.*

51. 233 N.W.2d 372 (Wis. 1975).

52. *Id.* at 377 n.6.

53. *Id.* at 377.

54. *Id.*

55. *Id.*

56. *Id.*

awarded damages sustained as a result of the child's defects.⁵⁷

Three years later, the New York Court of Appeals, New York's highest state court, recognized the wrongful birth tort in the consolidated cases of *Becker v. Schwartz* and *Park v. Chesin*.⁵⁸ In *Becker*, plaintiffs brought an action against defendant doctors after plaintiff mother bore a retarded child with Down's Syndrome.⁵⁹ Plaintiffs contended the doctors had never advised them of the "[i]ncreased risk of Down's Syndrome in children born to women over [thirty-five] years of age."⁶⁰ Plaintiffs further contended that the doctors had not advised them that an amniocentesis test⁶¹ could determine whether the fetus would be born with Down's Syndrome.⁶² The court held that but for the doctors' failure to accurately inform the parents, the mother would have been tested, and depending on the results, would have terminated the pregnancy.⁶³ In *Park*, Hetty Park bore a baby afflicted with polycystic kidney disease⁶⁴ who died five hours after birth. After the death of the baby, Hetty Park consulted with her obstetricians to determine the likelihood of the reoccurrence of the disease in a future fetus.⁶⁵ Allegedly, defendant obstetricians had informed her that the disease was not hereditary, and that the "[c]hances of [her] conceiving a second child with [the affliction was] 'practically nil'."⁶⁶ Park became pregnant and bore a second child with the same disease.⁶⁷ This child, however, survived for thirty months.⁶⁸ The Parks alleged

57. *Id.*

58. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). See also Comment, *supra* note 4, at 615 n.50.

59. *Park*, 46 N.Y.2d at 405, 386 N.E.2d at 808, 413 N.Y.S.2d at 896. "'Down's Syndrome' is a syndrome of mental retardation associated with a variable constellation of physical abnormalities caused by a chromosomal anomaly. (citation omitted)." *Id.* n. 1.

60. *Id.* at 406, 386 N.E.2d at 808, 413 N.Y.S.2d at 897.

61. *Id.* at 406, 386 N.E.2d at 808-09, 413 N.Y.S.2d at 897, n.2.

62. *Id.*

63. *Id.* at 413, 386 N.E.2d at 813, 413 N.Y.S.2d at 901.

64. *Id.* at 407, 386 N.E.2d at 809, 413 N.Y.S.2d at 897. "'Polycystic disease of the kidneys is a condition characterized by numerous cysts [of varying sizes] scattered throughout the kidneys, sometimes resulting in organs that tend to resemble grapelike clusters of cysts.'" *Id.* n.3 (alteration in original) (citation omitted).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

that polycystic disease is an inherited condition and that, had they been informed of its true risk of reoccurrence, they would not have chosen to conceive a second time.⁶⁹

The trial court denied recovery of damages for mental anguish in both cases.⁷⁰ The Court of Appeals affirmed as to emotional damages, but granted recovery for sums expended for the Becker child's long-term institutional care, and the Park child's care and treatment until her death.⁷¹ The recoveries were based on the doctor's breach of a duty to the prospective parents.⁷² Relying on *Jacobs and Dumer*, the court found that "[c]alculation of damages necessary to make plaintiffs whole in relation to the[ir] expenditures required nothing extraordinary."⁷³ However, calculating damages for emotional injuries remained too speculative to permit recovery.⁷⁴

The 1973 United States Supreme Court decision in *Roe v. Wade*⁷⁵ prompted courts almost unanimously to recognize wrongful birth actions, because of public policy recognizing a woman's constitutional right to terminate her pregnancy.⁷⁶ For instance, in *Berman v. Allan*,⁷⁷ twelve years after *Gleitman v. Cosgrove*,⁷⁸ the New Jersey Supreme Court was again faced with a wrongful birth claim. Plaintiffs alleged that defendants had failed to inform Mrs. Berman, who was thirty-five, of the probability of a woman her age bearing a Down's Syndrome child.⁷⁹ They further alleged that defendants failed to advise her of the availability of amniocentesis,⁸⁰ a procedure that would

69. *Id.*

70. *Id.* at 407-08, 386 N.E.2d at 809, 413 N.Y.S.2d at 897-98.

71. *Id.* at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 902-03.

72. *Id.* at 413, 386 N.E.2d at 813, 413 N.Y.S.2d at 901.

73. *Id.*

74. *Id.* at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 902.

75. 410 U.S. 113 (1973).

76. See *infra* notes 105 and 143 for a listing of these jurisdictions. But see James Bopp, Jr., Barry A. Bostrom & Donald A. McKinney, *The Rights and Wrongs of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duq. L. Rev. 461 (1989) (demonstrating the opposite argument based on a Hohfeldian analysis).

77. 404 A.2d 8 (N.J. 1979).

78. 227 A.2d 689 (N.J.1967).

79. *Berman*, 404 A.2d at 10; see *supra* note 59 for a description of Down's Syndrome.

80. *Id.* See *infra* note 96 for explanation of this procedure.

have disclosed the defect.⁸¹ Mrs. Berman asserted that she would have submitted to the amniocentesis procedure and would have aborted the fetus if she had been properly informed of the risks.⁸²

In recognizing the cause of action for wrongful birth, the court distinguished *Gleitman v. Cosgrove*.⁸³ The *Gleitman* court had refused to recognize wrongful birth because the measure of damages was too speculative, and substantial policy reasons precluded tort damages "for the denial of the opportunity to take an embryonic life."⁸⁴ The *Gleitman* court denied recovery for medical and other expenses to raise, educate, and supervise the child.⁸⁵ Even though the costs stemmed from defendants' failure to inform, the court believed plaintiffs could not retain the love and joy of parenting while saddling defendants with the costs of rearing the child.⁸⁶

In contrast to *Gleitman*, the *Berman* court found that placing a monetary value on emotional suffering was not only possible, but was no more difficult than doing so for physical suffering.⁸⁷ The *Berman* court held that the plaintiffs' claim for emotional damages was the "appropriate measure of the harm suffered by the parents deriving from Mrs. Berman's loss of her

81. *Id.*

82. *Id.* During the first trimester, the decision is not subject to state interference. See *supra* note 6.

83. 227 A.2d 689 (N.J. 1967). The *Berman* court observed that:

[i]n light of changes in the law which have occurred in the 12 years since *Gleitman* was decided, the second ground relied upon by the *Gleitman* majority can no longer stand in the way of judicial recognition of a cause of action founded upon wrongful birth. The Supreme Court's ruling in *Roe v. Wade* . . . clearly establishes that a woman possesses a constitutional right to decide whether her fetus should be aborted, at least during the first trimester of pregnancy. Public policy now supports, rather than militates against, the proposition that she not be impermissibly denied a meaningful opportunity to make that decision.

Berman, 404 A.2d at 14.

84. *Gleitman*, 227 A.2d at 693. See *supra* notes 23, 30-39 and accompanying text.

85. See *supra* notes 23, 30-39 and accompanying text for a discussion of *Gleitman*. However, the *Berman* court disagreed and reasoned that "[a]ny other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses which, if born, would suffer from genetic defects." *Berman v. Allan*, 404 A.2d 8, 14 (N.J. 1979).

86. *Berman*, 404 A.2d 8, 14. The court held that such an award would "constitute a windfall to the parents and place too unreasonable a financial burden upon physicians." *Id.*

87. *Id.* at 14-15.

right to abort the fetus."⁸⁸

Surprisingly, two years later, the New Jersey Supreme Court reversed its position as to damages in the wrongful birth context in *Schroeder v. Perkel*.⁸⁹ In that case, the physician's failure to diagnose the genetic defect in their first child deprived the parents of choosing whether or not to conceive a second child who might have cystic fibrosis.⁹⁰ Overruling *Berman* in part, the court allowed recovery of medical expenses.⁹¹ Cautious not to "confer a windfall"⁹² on the parents, the court explained its damage determination, stating that "Mr. and Mrs. Schroeder [would] receive no compensating pleasure from incurring extraordinary medical expenses on behalf of Thomas. There is no joy in watching a child suffer and die from cystic fibrosis."⁹³

Gleitman's influence⁹⁴ in wrongful birth cases has diminished considerably during the past two decades.⁹⁵ Three developments help explain the trend toward judicial acceptance of wrongful birth claims. The first is the increased ability of health care professionals to predict and detect the presence of fetal defects.⁹⁶ The second is *Roe v. Wade* and its progeny.⁹⁷ In *Roe*, the

88. *Id.* at 14.

89. 432 A.2d 834 (N.J. 1981).

90. Cystic fibrosis is one of the most common fatal genetic diseases in the United States and affects approximately one out of every 1800 babies. *Id.* See also Note, *supra* note 1, at 1491, 1494.

91. *Schroeder*, 432 A.2d at 842.

92. *Id.*

93. *Id.*

94. See *supra* note 23 for a discussion of *Gleitman*.

95. *Smith v. Cote*, 513 A.2d 341 (N.H. 1986). Abortions could not legally be obtained in many states when *Gleitman* was decided. Today, as a result of *Roe* and scientific advances, it is possible for prospective parents to learn of congenital defects in the fetus, and, consequently, to decide to terminate the pregnancy. Accordingly, courts have recognized that "physicians who perform testing and provide advice relevant to the constitutionally guaranteed procreative choice, or whose actions could reasonably be said to give rise to a duty to provide such testing or advice, have an obligation to adhere to reasonable standards of professional performance." *Id.* at 346.

96. See *Smith*, 513 A.2d at 345-46. "Science's improved capacity to assess risk factors in pregnant women, as well as the development of 'sophisticated biochemical and cytogenic tests for assaying amniotic fluid and maternal and fetal blood,' have greatly enhanced the importance of reproductive counseling." *Id.* at 345 (quoting Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 626 (1979)).

[A]mniocentesis, a procedure in which a physician removes, cultures, and tests fetal cells that have been sloughed into the fluid surrounding the fetus in the amniotic sac, is a signal example of one such test. In the early 1970's, amniocentesis

Supreme Court held that the constitutional right of privacy encompasses a woman's decision whether to abort.⁹⁸ Finally, judicial acceptance of wrongful birth is premised on the theory that it is a logical and necessary extension of existing principles of tort law.⁹⁹ Refusal to recognize this cause of action would frustrate the fundamental policies of tort law: to compensate the victim; to deter negligence; and to encourage due care.¹⁰⁰

In summary, the Supreme Court's decision in *Roe v. Wade* prompted courts to recognize wrongful birth actions because of a

was regarded as an experimental procedure; by the mid-1970's, it was commonly accepted in medical practice.

Id. at 346 (quoting Rogers, Thomas DeWitt, III, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C. L. REV 713, 720-721 (1982)).

97. See *infra* Part III.

98. See *supra* note 6 and accompanying text. Virtually every court has relied on *Roe* as the most compelling rationale for recognizing wrongful birth claims. See, e.g., *Smith*, 513 A.2d at 346 ("[W]e believe that *Roe* is controlling; we do not hold that our decision would be the same in its absence.").

A few courts have also stated that refusal "to recognize wrongful birth claims [w]ould impermissibly burden the constitutional rights involved in conception, procreation, and other familial decisions." *Phillips v. United States*, 508 F. Supp. 544, 550 (D.S.C. 1981) (citations omitted).

"Notwithstanding the disparate views within society on the controversial practice of abortion, we are bound by the law that protects a woman's right to choose to terminate her pregnancy." *Smith, supra*, at 348.

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

Proffitt v. Bartolo, 412 N.W.2d 232, 238 (Mich. 1987).

[P]ublic policy favoring birth over abortion to defeat plaintiff's cause of action cannot succeed because it squarely conflicts with the plaintiff's constitutional right as articulated in *Roe v. Wade*, . . . to seek a termination of pregnancy under certain circumstances. Were the plaintiff merely free to seek the abortion but unable to seek a remedy at law for injuries consequent upon the negligent performance of that abortion, the right would be hollow indeed.

Speck v. Finegold, 439 A.2d 110, 114 (Pa. 1981).

99. *Eisenbrenner v. Stanley*, 308 N.W.2d 209 (Mich. Ct. App. 1981); *Schroeder v. Perkel*, 432 A.2d 834 (N.J. 1981); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982); *Harbeson v. Parke-Davis, Inc.* 656 P.2d 483 (Wash. 1983); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985).

100. *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981) (applying Alabama law); *Gildiner v. Thomas Jefferson University Hospital*, 451 F. Supp. 692 (E.D. Pa. 1978) (applying Pennsylvania law); *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981) (applying South Carolina law); *Smith v. Cote*, 513 A.2d 341 (N.H. 1986).

change in public policy.¹⁰¹ The *Gleitman* rationale lost validity because, in the wrongful birth context, anti-abortion policy was displaced by parents' constitutional right of privacy.¹⁰² Furthermore, the ability to detect birth defects in utero increased greatly.¹⁰³

Consequently, most courts abandoned their belief that damages for wrongful birth were not cognizable at law. Relying on fundamental tort law, the courts concluded that doctors should be required to make amends for losses proximately caused by their negligent deprivation of a woman's right to decide whether to bear a child.¹⁰⁴

C. *The Status of "Wrongful Birth" Today*

Seventeen states and the District of Columbia have recognized the wrongful birth cause of action,¹⁰⁵ while four states have rejected it.¹⁰⁶ For instance, *Schorck v. Huber*¹⁰⁷ rejected the wrongful birth cause of action. In that case, a doctor performed a sterilization procedure on Sharon A. Schork, "[a]ssuring her that [it was] ninety-nine percent effective in preventing pregnancy."¹⁰⁸ Later that year, she delivered a healthy baby and

101. See *infra* notes 105 and 143 for a listing of these cases.

102. Rogers, *supra* note 26, at 754.

103. See generally Note, *supra* note 1.

104. See *infra* note 105 for a listing of these jurisdictions.

105. See *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981) (applying Alabama law); *Philipps v. United States*, 508 F. Supp. 544 (D.S.C. 1981); *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982) (en banc); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988) (en banc); *Haymon v. Wilkerson*, 535 A.2d 880 (D.C. 1987); *Moore v. Lucas*, 405 So.2d 1022 (Fla. Dist. Ct. App. 1981); *Siemienic v. Lutheran Gen. Hosp.*, 512 N.E.2d 691 (Ill. 1987); *Arche v. United States Dept. of Army*, 798 P.2d 477 (Kan. 1990); *Eisenbrenner v. Stanley*, 308 N.W. 2d 209 (Mich. Ct. App. 1981); *Smith v. Cote*, 513 A.2d 341 (N.H. 1986); *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983) (en banc); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372 (Wis. 1975); ME. REV. STAT. ANN. tit. 24, § 2931(3) (West 1990).

106. See *Schorck v. Huber*, 648 S.W.2d 861 (Ky. 1983); *Wilson v. Kuenzi*, 751 S.W.2d 741 (Mo. 1988); *Azzolino v. Dingfelder*, 337 S.E.2d 528 (N.C. 1985); *Spencer v. Siekel*, 742 P.2d 1126 (Okla. 1987).

107. 648 S.W.2d 861 (Ky. 1983).

108. *Id.* at 862.

sued the doctor for negligence in the sterilization procedure.¹⁰⁹ Although the tort was not characterized as a wrongful birth cause of action,¹¹⁰ the court held that “[t]he establishment of a cause of action based on the matter of wrongful conception, wrongful life or wrongful birth is clearly within the purview of the legislature only.”¹¹¹

A Missouri court had difficulty overcoming the obstacle of proximate cause.¹¹² In *Wilson v. Kuenzi*,¹¹³ Barbara Wilson’s baby was born afflicted with Down’s Syndrome.¹¹⁴ The risk of Down’s is “[a]pproximately 1 in 1000 for women in their twenties, and escalates to approximately 1 in 300 for a woman age thirty-six.”¹¹⁵ Such a defect can be detected by amniocentesis.¹¹⁶ Barbara Wilson, age 36 at the time of conception, alleged that her doctor was negligent in not advising her of the availability of amniocentesis.¹¹⁷ The court refused to recognize the cause of action, because it believed that proximate cause could not be proven, and because recognition of such a cause of action would create “a kind of medical paternity suit.”¹¹⁸

Assuming, *arguendo*, that proximate cause could be established, the North Carolina Supreme Court, in *Azzolino v. Dingfelder*,¹¹⁹ reasoned that traditional tort analysis could proceed to the proximate cause step and no further: “In order to allow recovery such courts must then take a step into entirely untraditional analysis by holding the existence of a human life can constitute an injury cognizable at law.”¹²⁰ The plaintiffs did not allege that the doctor had directly caused the genetic de-

109. *Id.*

110. See *supra* notes 23-26 and accompanying text.

111. *Schork*, 648 S.W.2d at 863.

112. *Wilson v. Kuenzi*, 751 S.W.2d 741 (Mo. 1988). See *supra* note 26 for a discussion of proximate cause.

113. *Wilson*, 751 S.W.2d at 741.

114. *Id.* at 741-2. See *supra* note 59 for a definition of Down’s Syndrome.

115. *Wilson*, 751 S.W.2d at 741.

116. *Id.* See *supra* note 96 for a discussion of amniocentesis.

117. *Wilson*, 751 S.W.2d at 741-42.

118. *Id.* at 744-45.

119. 337 S.E.2d 528 (N.C. 1985).

120. *Id.* at 533-34. Reverting to the *Gleitman* rationale, the court found that this step would require the court to find that life with severe defects amounts to a legal injury. *Id.* at 534.

fect.¹²¹ Thus, the court denied recovery because "the only damages the plaintiffs allege they have suffered arise, if at all, from the failure of the [doctor] to take steps which would have led to abortion of the already existing and defective fetus."¹²² The court was also concerned that "[a]s medical science advances the capability to detect genetic imperfections in a fetus, physicians in jurisdictions recognizing wrongful birth will be forced to carry an increasingly heavy burden in determining what information is important to parents when attempting to obtain their informed consent for the fetus carried to term."¹²³ This would be too burdensome on physicians.¹²⁴ The court illustrated its position by this example:

A clinical instructor asks his students to advise an expectant mother on the fate of a fetus whose father has chronic syphilis. Early siblings were born with a collection of defects such as deafness, blindness, and retardation. The usual response of the students is: "Abort!" The teacher then calmly replies: "Congratulations, you have just aborted Beethoven."¹²⁵

The extent of the doctor's duty and corresponding liability was a concern to the Oklahoma Supreme Court in *Spencer v. Seikel*.¹²⁶ In *Spencer*, the parents were informed by their doctor that the fetus had hydrocephalus,¹²⁷ which retards brain development.¹²⁸ The parents sued their physician under the Oklahoma Informed Consent Law,¹²⁹ alleging he had been negligent in failing to disclose material information concerning abortion as an available alternative.¹³⁰ The doctor argued that "[a]bortion was forbidden by statute in Oklahoma once the fetus

121. *Id.*

122. *Id.*

123. *Id.* at 535.

124. *Id.*

125. *Id.* (citing Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 J. FAM. L. 15, 38-39 (1980), (quoting, Feinman, *Getting Along with the Genetic Genie*, LEGAL ASPECTS OF MED. PRAC. Mar. 1979, at 38.).

126. 742 P.2d 1126 (Okla. 1987).

127. *Id.* at 1128. "Hydrocephalus [is] a condition [that] results from the backing up of cerebrospinal fluid into the brain ventricles." *Id.*

128. *Id.* "The child was born with virtually no brain." *Id.*

129. *Id.*

130. *Id.*

was viable, unless the mother's life or health was in danger."¹³¹ Thus, the doctor argued that "[h]e had no duty to disclose information about an alternative treatment not legally available to his patient."¹³² The court agreed with the doctor, yet expressly refused to create a "[c]ommon knowledge exception" to the requirement for informed consent.¹³³ The court believed that plaintiffs had knowledge of the alternative at the time Mrs. Spencer claimed such knowledge was "[c]ritical to her decision."¹³⁴ Furthermore, plaintiffs neither alleged nor proved that the doctor had failed to exercise the degree of skill or knowledge required of him, because the doctor fully disclosed the hydrocephalus and its effects.¹³⁵

"Once a wrongful birth action is properly characterized as a traditional tort action, the plaintiffs are entitled to compensation for all damages flowing from the defendant's negligent conduct."¹³⁶ However, some courts have struggled with evaluating the consequences of a wrongful birth, and the corresponding compensation.¹³⁷

D. *Damages in Wrongful Birth Action*

The primary purpose of tort law is to compensate plaintiffs for injuries sustained due to the wrongful conduct of others. The

131. *Id.*

132. *Id.*

133. *Id.* at 1129. In fact, the court found it would be an unreasonable burden to require doctors to inform patients of alternative treatments not available in Oklahoma, but available in other states. *Id.*

134. *Id.*

135. *Id.*

136. See Comment, *supra* note 4, at 634. *Contra*, *Azzolino v. Dingfelder*, 337 S.E.2d 528, 533-34 (N.C. 1985), *cert. denied*, 107 S. Ct. 131 (1986) (holding that "in order to allow recovery [for wrongful birth] courts must . . . take a step into entirely untraditional analysis by holding that the existence of a human life can constitute an injury cognizable at law").

137. See Comment, *supra* note 4, at 634. "[T]he question of damages has presented a difficult and troublesome problem to the courts that have considered 'wrongful birth' claims, with that difficulty engendering widely divergent approaches . . ." *Phillips v. U.S.* 508 F. Supp. 544, 551 (D.S.C. 1981). See also *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981) (holding that child-rearing costs should be recoverable); *Smith v. Cote*, 513 A.2d 341 (N.H.1986) (only extraordinary costs are recoverable); compare *Berman v. Allan*, 404 A.2d 8 (N.J. 1979) (emotional damages, but not medical costs, are recoverable) with *Schroeder v. Perkel*, 432 A.2d 834 (N.J. 1981) (overruling *Berman* in part and permitting recovery of extraordinary medical expenses).

normal measure of tort damages is the amount that compensates the plaintiff for all damages proximately caused by the defendant's negligence.¹³⁸

When a child is born with impairments, courts have generally allowed the plaintiff to recover expenses occasioned by the impairments.¹³⁹ "[C]ourts have been at odds,"¹⁴⁰ however, regarding recovery for the costs of raising the child beyond "those occasioned by his or her defect."¹⁴¹ Although such "[d]amages appear to be properly compensable . . . [as] costs the parents would have avoided but for the [physician's] negligence, several arguments have been advanced [to the contrary]."¹⁴² This section discusses the problems that arise in calculating damages.

1. *Economic Burden*

The jurisdictions recognizing wrongful birth are currently unanimous in allowing damages for the parent's economic loss due to the child's condition.¹⁴³ These courts have rejected the

138. RESTATEMENT (SECOND) OF TORTS §901 et seq. The Restatement provides: The rules for determining the measure of damages are based upon the purposes for which actions of tort are maintainable. These purposes are:

- (a) to give compensation, indemnity or restitution for harms;
- (b) to determine rights;
- (c) to punish wrongdoers and deter wrongful conduct; and
- (d) to vindicate parties and deter retaliation or violent and lawful self-help.

Id. at §901. See also *Berman*, 404 A.2d 8 (holding that the doctor should be required to make amends for damage he proximately caused); see also *supra* note 85 and accompanying text.

139. *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372, 377 (Wis. 1975).

140. See Comment, *supra* note 4, at 635.

141. *Id.*

Courts generally allow only the extraordinary expenses relating to the child's condition that must be borne by the parents. *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 492, n.8 (Wash. 1983); see also *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975).

Some courts have also compensated the parents for their pain and suffering or mental anguish. See *Schroeder v. Perkel*, 432 A.2d 834 (N.J. 1981); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983).

One court has allowed all expenses incident to the care of the child, without discounting those expenses not directly related to the child's condition that would be necessary for a normal child. *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981).

142. See Comment, *supra* note 4, at 635.

143. These jurisdictions are: *Robak*, 658 F.2d 471 (7th Cir. 1981) (applying Alabama law); *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978); *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982); *Schroeder v. Perkel*, 432 A.2d 834 (N.J. 1981);

*Gleitman v. Cosgrove*¹⁴⁴ rationale, which found calculation of such damages impossible.¹⁴⁵

a. *Mitigation of Damages*

"On occasion, defendants in wrongful birth actions have contended that the plaintiffs could have mitigated their damages . . . by placing the [newborn] for adoption."¹⁴⁶ This argument is based on the "rule of avoidable consequences,"¹⁴⁷ which "requires a plaintiff to take any reasonable measures available to minimize the financial consequences of a defendant's negligent conduct."¹⁴⁸ Whether it is reasonable to require the plaintiffs to mitigate their damages by placing an impaired child for adoption is a highly debated question.¹⁴⁹ As one court stated: "under the principle that a tortfeasor takes his victim as he finds him, he cannot complain if the emotional and mental makeup of the plaintiff parents is inconsistent with . . . placing the child for adoption."¹⁵⁰

Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Naccash v. Burger, 290 S.E.2d 825 (Va. 1982); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983); and Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975).

144. 227 A.2d 689, 693 (N.J. 1967); see also *supra* notes 23, 30-39 and accompanying text.

145. *Gleitman*, 227 A.2d at 693.

It is impossible for us to justify a policy which at once deprives the parents of information by which they could elect to terminate the pregnancy likely to produce a child with a defective body, a policy which in effect requires that the deficient embryo be carried to full gestation until the deficient child is born, and which policy then denies recovery from the tortfeasor of costs of treating and caring for the defects of the child.

Jacobs, 519 S.W.2d at 849.

"The contention of the defendant physicians takes too myopic a view of the responsibilities of a physician treating a child with a genetically transferable disease such as cystic fibrosis." *Schroeder*, 432 A.2d at 838.

146. Note, however, that a plaintiff's duty to mitigate only requires that "reasonable measures be taken." *Troppi v. Scarf*, 187 N.W.2d 511, 519 (Mich. Ct. App. 1971). It has been held that requiring a parent to choose abortion or adoption is an unreasonable measure. *Schork v. Huber*, 648 S.W.2d 861, 866-67 (Ky. 1983) (Leibson, J., dissenting).

147. WILLIAM PROSSER, TORTS § 65, at 422 (1971).

148. See Comment, *supra* note 4, at 636.

149. *Id.* See also *Troppi v. Scarf*, 187 N.W.2d 511, 519 (Mich. Ct. App. 1971).

150. *Id.* at 637 (quoting *Troppi v. Scarf*, 187 N.W.2d at 520).

b. "Incidental Benefits" Rule

Some courts have offset the benefits of parenthood against "the plaintiff parents' claimed losses in an attempt to accurately assess damages . . . consistent with the principles of tort law."¹⁵¹ The "incidental benefits" rule of the RESTATEMENT (SECOND) OF TORTS states:

When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in doing so 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.¹⁵²

This rule has been applied to cases in which parents of a healthy but unplanned infant have sued for the costs of rearing and educating the child.¹⁵³ Yet, a markedly different trend has developed in wrongful birth cases.¹⁵⁴ Although parents of deformed children should also be allowed to seek damages they have sustained because of the defendant's negligence — offset by the numerous benefits that a child provides them — they have been allowed to recover only those costs over and above the costs of rearing a normal, healthy child.¹⁵⁵ Both *Jacobs* and *Dumer* limited the parents' recovery to expenses they had reasonably and necessarily suffered and were likely to suffer in the future — the additional medical, hospital, and supportive expenses that would be required to rear a deformed child in contrast to a healthy child.¹⁵⁶ The New Jersey Supreme Court

151. See Comment, *supra* note 4, at 638.

152. RESTATEMENT (SECOND) OF TORTS § 920 (1977).

153. See *supra* note 28 and accompanying text for discussion of such a cause of action. See also, Comment, *supra* note 4, at 639. "To hold a physician responsible for the costs of rearing a child whose birth he negligently caused, reduced by any benefits the parents receive from the child places liability on the physician that is neither unreasonably burdensome nor disproportionate to the culpability of his conduct." *Id.* See also *Rivera v. State*, 94 Misc.2d 157, 404 N.Y.S.2d 950 (1978); *contra Fassoulas v. Ramey*, 450 So.2d 822, 823-24 (Fla. 1984) (holding that "a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child." . . . [but] [t]here is no valid policy argument against parents being recompensed for . . . special upbringing costs associated with a deformed child . . .").

154. See Comment, *supra* note 4, at 640.

155. See *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372, 377 (Wis. 1975).

156. *Jacobs*, 519 S.W.2d at 850; *Dumer*, 233 N.W.2d at 377.

agreed in *Berman v. Allan*:

In essence, Mr. and Mrs. Berman desire to retain all the benefits inhering in the birth of the child — i.e. the love and joy they will experience as parents — while saddling defendants with the enormous expenses attendant upon her rearing. . . . [W]e find that such an award would be wholly disproportionate to the culpability involved, and that allowance of such a recovery would both constitute a windfall to the parents and place too unreasonable a financial burden upon physicians.¹⁵⁷

2. *Emotional Pain and Suffering*

The “incidental benefits” rule was also applied when plaintiffs sought damages for emotional pain and suffering in *Becker v. Schwartz*.¹⁵⁸ The court held:

[P]arents of a deformed infant will suffer the anguish that only parents can experience upon the birth of a child . . . afflicted with an abnormality, and certainly dependent upon the extent of the affliction, parents may yet experience a love that even an abnormality cannot fully dampen. To assess damages for emotional harm endured by the parents of such a child would, in all fairness, require consideration of this factor in mitigation of the parents’ emotional injuries.¹⁵⁹

Rejecting the “incidental benefits” rule, the New Jersey Supreme Court, in *Schroeder v. Perkel*,¹⁶⁰ rationalized that the parents receive “no joy in watching a child suffer and die from cystic fibrosis.”¹⁶¹ The dissent in *Schork v. Huber*¹⁶² also rejected the “incidental benefits” rule, explaining:

[I]t is likewise inappropriate to consider permitting the defendant to set off potential emotional benefits. Who knows whether the joys from rearing a child will outweigh the heartaches? We cannot offset the well recognized, foreseeable expenses of child rearing

157. 404 A.2d 8, 14 (N.J. 1979). See also *supra* notes 83-88 for additional commentary from *Berman*.

158. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

159. *Id.* at 414-15, 386 N.E.2d at 814, 413 N.Y.S.2d at 902.

160. 432 A.2d 834 (N.J. 1981).

161. *Id.* at 842. See also *supra* note 89 and accompanying text for a discussion of *Schroeder*.

162. 648 S.W.2d 861 (Ky. 1983).

with the joy we can only hope for. We cannot disregard the parents' claim that they expect emotional distress from the disruption of their careful family planning, but allow the tortfeasor an offset for the bundle of joy he hopes to have contributed to their lives. Both the positive emotional benefit and the negative emotional detriment of child rearing are too speculative and conjectural, too subjective and personal, to fit within the parameters of the subject of damages.¹⁶³

Some courts deny recovery of damages for emotional pain and suffering because the "calculation of damages for plaintiffs' emotional injuries remains too speculative to permit recovery notwithstanding the breach of a duty flowing from defendants to themselves."¹⁶⁴ Other courts hold that the monetary equivalent of emotional distress is an "appropriate measure of the harm suffered by the parents deriving from . . . loss of [the mother's] right to abort the fetus."¹⁶⁵

Some courts measure recovery for emotional distress using the "bystander rule," in which recovery for emotional distress is awarded only if it is "engendered by a shock received" during childbirth.¹⁶⁶ Other courts believe that merely witnessing the birth of an impaired child is sufficient.¹⁶⁷ Finally, some "courts have refused to recognize the parents' cause of action for wrongful birth on the theory that public policy prevents the birth of a child from being viewed as an injury to its parents."¹⁶⁸

E. Legislation

Various states have passed statutes recognizing or limiting wrongful birth actions.¹⁶⁹ These statutes preclude causes of ac-

163. *Id.* at 866 (Leibson, J., dissenting).

164. *Becker v. Schwartz*, 46 N.Y.2d 401, 415, 386 N.E.2d 807, 814, 413 N.Y.S.2d 895, 902 (1978).

165. *Berman v. Allan*, 404 A.2d 8, 14 (N.J. 1979).

166. *Andalon v. Superior Court*, 208 Cal. Rptr. 899, 901 (Cal. Ct. App. 1984).

167. *Blake v. Cruz*, 698 P.2d 315, 319 (Idaho 1984) (citing *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 492 (Wash. 1983) (en banc)). *Cf. Arche v. United States Dept. of Army*, 798 P.2d 477, 482 (Kan. 1990) (denying recovery to parents who witnessed the birth of their deformed child because the child's injury occurs during the development of the fetus, and, therefore, the parents are not aware of the injury at the time).

168. *See Comment, supra* note 4, at 627.

169. *See generally* IDAHO CODE § 5-334 (1990); IND. CODE § 34-1-1-11 (1986 & Supp. 1991); ME. REV. STAT. ANN. tit. 24, § 2931(3) (West 1990); MINN. STAT. ANN. § 145.424

tion predicated upon the inability to obtain an abortion. The language of the existing state statutes varies,¹⁷⁰ “but all of the laws embody a form of the basic prohibition contained in model legislation: [t]here shall be no cause of action on behalf of any person based on the claim that but for an act or omission, a person would not have been permitted to have been born alive but would have been aborted.”¹⁷¹

The Minnesota, Indiana, and Missouri statutes prohibit causes of action based on “negligent” conduct.¹⁷² South Dakota, Idaho, and Pennsylvania statutes are broader, prohibiting actions based on intentional as well as negligent conduct.¹⁷³ South Dakota’s law, for instance, prevents an award of damages based on claims that, but for the “conduct of another,” a person would not have been born alive.¹⁷⁴ Idaho’s statute mirrors the model.¹⁷⁵ The Pennsylvania wrongful birth statute proscribes actions claiming that “but for an act or omission of a defendant, a per-

(West 1989); MO. ANN. STAT. § 188.130 (Vernon 1988 & Supp. 1992); 42 PA. CONS. STAT. ANN. § 8305 (1982 & Supp. 1991); S.D. CODIFIED LAWS ANN. § 21-55-2 (Rev. 1987); UTAH CODE ANN. § 78-11-24 (1992).

170. See *infra* notes 172-77 for the text of these statutes.

171. Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2019 (1987).

172. MINN. STAT. ANN. § 145.424 (West 1989), provides: “Wrongful birth action prohibited. No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, [a child] would have been aborted.” *Id.* at §145.424 (2).

IND. CODE § 34-1-1-11 (Burns 1986 & Supp. 1991), provides: “No person shall maintain a cause of action or receive an award of damages on [his behalf] based on the claim that but for the negligent conduct of another [he] would have been aborted.” *Id.*

MO. ANN. STAT. § 188.130 (Vernon 1988 & Supp. 1992), provides: “No person shall maintain a cause of action or receive an award of damages based on the claim that but for the negligent conduct of another, a child would have been aborted.” *Id.*

173. See *infra* notes 174-77 for the text of these statutes. “South Dakota, Idaho and Pennsylvania, . . . appear to prohibit actions based on intentional as well as negligent actions because those statutes do not refer to degrees of wrongdoing.” Romney, *supra* note 5, at 358.

174. S.D. CODIFIED LAWS ANN. § 21-55-2 (Rev. 1987), provides: “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.” *Id.*

175. IDAHO CODE § 5-334 (1990), provides: “A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.” *Id.* at 5-334(1).

son once conceived would not or should not have been born."¹⁷⁶ Maine's statute is not as severe, allowing recovery of limited damages for costs associated with a child's impairment.¹⁷⁷

In *Hickman v. Group Health Plan, Inc.*,¹⁷⁸ a Minnesota case, the parents of a handicapped child sought to "[i]nvalidate wrongful birth legislation on the ground that it interfere[d] with the right to decide to abort as defined in *Roe*."¹⁷⁹ Their efforts failed.¹⁸⁰ The Minnesota Supreme Court upheld its state's wrongful birth statute as constitutional,¹⁸¹ concluding that it did not involve state action and therefore did not violate the Fourteenth Amendment.¹⁸² The court upheld the statute by deferring

176. 42 PA. STAT. CONS. ANN., § 8305 (1989 & Supp. 1991), provides: "Wrongful birth. — There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born." *Id.*

177. ME. REV. STAT. ANN. tit. 24, § 2931 (West 1990), provides: "Birth of unhealthy child; damages limited. 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.* at § 2931(3).

178. 396 N.W.2d 10 (Minn. 1986).

179. See Note, *supra* note 171, at 2017.

180. *Id.*; *Hickman*, 396 N.W.2d at 14.

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

Before addressing the Hickmans' constitutional challenges to subdivision 2, we find it helpful to discuss the legal basis of the wrongful birth cause of action. At common law, no cause of action existed for either wrongful birth or wrongful death . . . Like wrongful death, wrongful birth presents a myriad of public policy problems, including difficulty in ascertaining damages, increased litigation, and distinguishing between legislative and judicial roles . . . Because of those problems and the fact that no such action exists at common law, we consider the establishment of wrongful birth or wrongful life suits to be best within the exclusive jurisdiction of the legislature. In MINN. STAT. § 145.424, the legislature has made its intent clear: no wrongful birth or wrongful life suits are to be permitted. The legislature has now spoken on the subject and, barring constitutional violations, that should end that matter.

Id. at 13. Cf. *C.S. v. Nielson*, 767 P.2d 504 (Utah 1988) (declining to rule on the constitutionality of the Utah statute because plaintiffs' cause of action, a wrongful conception cause of action, was incorrectly characterized as a wrongful birth action, and, therefore, the statute was inapplicable).

182. Concluding that state action was not involved, the court stated:

First, we do not believe that the due process and equal protection clauses of the Fourteenth Amendment apply to this case. Prerequisite to a possible violation of the Fourteenth Amendment is state action or involvement. . . . How can it be argued that state action is involved in this case? The relationship here is strictly between doctor and patient. The statute does not forbid the doctor to inform the patient of new tests and the risks they entail. It does not directly touch on the expectant mother's right to choose an abortion. Due process does not require that

to the legislature because the statute did not interfere with a woman's constitutional right to an abortion.¹⁸³

As evidenced by both the legislation discussed above and the *Hickman* decision, the states have already found ways to justify legislation prohibiting wrongful birth claims.¹⁸⁴ These states have relied on the United States Supreme Court's decisions,¹⁸⁵ including the most recent in *Rust v. Sullivan*.¹⁸⁶ The next section and Appendix A discuss these decisions and address the erosion of the constitutional right to an abortion and its deleterious effect on the future of the wrongful birth cause of action.

III. United States Supreme Court's Influence on the Tort of "Wrongful Birth": Decisions After *Roe v. Wade*

Since *Roe v. Wade*,¹⁸⁷ decisions have narrowed instead of expanded a woman's right to an abortion.¹⁸⁸ As will be discussed, "public funding" is the ostensible rationale for a "chipping away" at the abortion right. For instance, in *Maher v. Roe*,¹⁸⁹ two indigent women challenged a Connecticut Welfare Department regulation that limited Medicaid benefits for first trimester abortions to those that were "'medically necessary'."¹⁹⁰ Medicaid would pay for treatment related to childbirth, but not for non-therapeutic abortions.¹⁹¹ The issue was whether the regulation "'impinge[d] upon a fundamental right explicitly or im-

the state adopt regulations prohibiting purely private conduct. *Hickman*, 396 N.W.2d at 13.

183. The court deferred to the legislature and reasoned:

Second, even if there were sufficient state action, the United States Supreme Court has clearly held to the rule that, in order to be in violation of *Roe v. Wade*, the state must directly affect or impose a significant burden on a woman's right to an abortion (citations omitted). . . . section 145.424, subdivision 2 does not directly interfere with the woman's right to choose a safe abortion. The two parties, doctor and patient, are still left free to make whatever decision they feel is appropriate.

Id. at 13-14.

184. See *supra* notes 172-77 for the texts of these statutes.

185. See *infra* Part III.

186. 111 S. Ct. 1759 (1991).

187. 410 U.S. 113 (1973).

188. See *Romney*, *supra* note 5, at 354.

189. 432 U.S. 464 (1977).

190. *Id.* at 466.

191. *Id.*

licitly protected by the Constitution.'"¹⁹² The Court contrasted *Roe*, holding that the Connecticut regulation did not block her path to an abortion.¹⁹³ In *Roe*, "[t]he Texas statute [had] imposed severe criminal sanctions . . . on physicians and other medical personnel who performed abortions . . ." "¹⁹⁴ The law was a "stark example of impermissible interference with the pregnant woman's decision to terminate her pregnancy."¹⁹⁵ The Connecticut regulation, on the other hand, did not interfere with the woman's constitutional right to an abortion.¹⁹⁶ Despite upholding the regulation, the *Maher* Court concluded that it was not retreating from *Roe*, but was merely drawing a distinction between direct state interference with a protected activity and state encouragement of an alternative activity:

An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigence that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*.¹⁹⁷

On the same day, the Court confronted the identical issue in *Poelker v. Doe*.¹⁹⁸ In *Poelker*, an indigent woman was refused a nontherapeutic abortion in a public hospital in St. Louis, Missouri.¹⁹⁹ She challenged the constitutionality of the city policy, which provided publicly financed hospitals with money for childbirth but not for nontherapeutic abortions.²⁰⁰ Upholding

192. *Id.* at 470 (quoting *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)).

193. *Id.* at 474.

194. *Id.* at 472.

195. *Id.*

196. *Id.* at 474.

197. *Id.*

198. 432 U.S. 519 (1977).

199. *Id.*

200. *Id.* at 521.

the St. Louis policy, the court reemphasized its position in *Maher*: “[W]e find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions.”²⁰¹

Public funding has also justified the refusal of certain medically necessary abortions.²⁰² In *Harris v. McRae*,²⁰³ the Court upheld the Hyde Amendment,²⁰⁴ which prohibited Medicaid funds from reimbursing certain medically necessary abortions except to protect the life of the mother.²⁰⁵ Despite the factual differences in *Maher* and *Poelker*, the court maintained its prior reasoning:

The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigence. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in *Wade*.²⁰⁶

201. *Id.*

202. *Harris v. McRae*, 448 U.S. 297, 315 (1980).

203. *Id.*

204. *Id.* at 322. The Court noted that:

Since September 1976, Congress has prohibited — either by amendment to the annual appropriations bill for the Department of Health, Education, and Welfare or by joint resolution — the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances. This funding restriction is commonly known as the “Hyde Amendment,” after its original congressional sponsor, Representative Hyde. The current version of the Hyde Amendment, applicable for fiscal year 1980, provides: ‘[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.’ Pub. L. 96-123, § 109, 93 Stat. 926.

Id. at 302.

205. *Id.*

206. *Id.* at 316-17.

Thus, according to *Maher, Poelker, and McRae*, a state's decision to use public facilities and staff to encourage childbirth over abortion also withstands constitutional attack. In *Webster v. Reproductive Health Services*,²⁰⁷ the Supreme Court upheld a Missouri statute prohibiting public employees from performing or assisting in the performance of abortions not necessary to protect the mother's life.²⁰⁸ *Maher, Poelker, and McRae* had established that a state may refuse to fund abortions. Thus, the Court believed that it would "strain logic to reach a contrary result for the use of public facilities and employees."²⁰⁹

These decisions illustrate the erosion of the fundamental constitutional right to an abortion, as established in *Roe*. When public funding, public facilities, or public employees are involved, states may refuse to perform and/or to reimburse for nontherapeutic and therapeutic abortions.²¹⁰ Only one exception remains — when the woman's life is in danger.²¹¹

Although discussion of "public funding" was exhaustive in these abortion decisions, the Supreme Court had much more to say.²¹² The Supreme Court picked up the discussion of public funding and abortion in yet another context in the recent case of *Rust v. Sullivan*.²¹³ In *Rust*, the Supreme Court upheld the federal regulations²¹⁴ interpreting Title X of the Public Health Service Act,²¹⁵ which provide federal funding for family planning

207. 109 S. Ct. 3040 (1989).

208. *Id.* at 3058.

209. *Id.* at 3052. "If the State may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds,' *Maher*, (citation omitted), surely it may do so through the allocation of other public resources, such as hospitals and medical staff." *Id.*

210. See *Harris v. McRae*, 448 U.S. 297 (1980) (refusing to allow public funding for certain therapeutic abortions); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977) (refusing to allow public funding for non-therapeutic abortions); see also *supra* notes 188-205 and accompanying text.

211. See *supra* notes 6, 187-209 and accompanying text.

212. See *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

213. *Id.*

214. 42 C.F.R. §§ 59.1 — 59.10 (1988). The regulations were promulgated in 1988 by the Secretary of the United States Department of Health and Human Services and codified at 42 C.F.R. §§ 59.1- 59.10 (1988).

215. "In 1970 Congress enacted Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-41 (1982), to provide low-income women with access to family planning services." BRIEF FOR PETITIONERS, *NEW YORK*, at 3, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989) (No. 89-1392), cert. granted, 110 S. Ct. 2559 (1990).

services.²¹⁶ Section 1008 of Title X provides that “[n]one of the funds appropriated under this title [42 U.S.C. §§ 300 et seq.] shall be used in programs where abortion is a method of family planning.”²¹⁷

For seventeen years, the Secretary of the United States Department of Health and Human Services “had consistently interpreted this section to mean that Title X providers may not perform abortions, but . . . must provide nondirective counseling to pregnant patients.”²¹⁸ Adopting a contrary position, the Secretary, in 1988, enacted new regulations specifying that a Title X project may not provide counseling on the use of abortion as a method of family planning.²¹⁹ Moreover, the regulations broadly prohibit members of a Title X project from engaging in activities that “encourage, promote or advocate abortion as a method of family planning,”²²⁰ and require that Title X projects be or-

216. *Id.*

217. 42 U.S.C. § 300a-6 (1991).

218. BRIEF FOR PETITIONERS, NEW YORK, *supra* note 215, at 5.

219. 42 C.F.R. § 59.8 (1988). *Prohibition on counseling and referral for abortion services; limitation of program services to family planning.*

(a)(1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by “steering” clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

Id.

220. 42 C.F.R. § 59.10 (1988). *Prohibition on activities that encourage, promote or*

ganized so they are "physically and financially separate"²²¹ from prohibited abortion activities. In essence, as stated by Petitioner, the State of New York, family planning programs may no longer whisper the word "abortion" to their patients:

Abortion — a legal alternative to an unwanted pregnancy — [cannot] be mentioned, even in response to a direct inquiry, [not even during] a conference between physician and patient, [regardless of whether] it is medically indicated for the individual involved.²²²

In response to Petitioner's argument that the regulations violate a woman's Fifth Amendment right to choose whether to abort, the Court adhered to the position it had adopted in *Maher* and had reaffirmed in *Webster*:

The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion. . . . (citation omitted). Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the government had chosen not to fund family-planning services at all.²²³

Petitioner next argued that the regulations impermissibly infringed on the doctor-patient relationship and deprived a Title X client of information concerning abortion as a method of family planning.²²⁴ Thus, the regulations arguably "violate[d] a woman's Fifth Amendment right to medical self-determination and [her right] to make informed medical decisions free of govern-

advocate abortion.

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or to increase the availability or accessibility of abortion for family planning purposes.

Id.

221. 42 C.F.R. § 59.9 (1988). *Maintenance of program integrity.*

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act and § 59.8 and § 59.10 of these regulations from inclusion in the Title X program.

Id.

222. BRIEF FOR PETITIONERS, NEW YORK, *supra* note 215, at 5.

223. *Rust v. Sullivan*, 111 S. Ct. 1759, 1776-77 (1991).

224. *Id.* at 1772.

ment-imposed harm."²²⁵ The Court's response was that "a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered."²²⁶ Although it would be easier for a woman seeking an abortion to receive information about abortion from a Title X project doctor, "the Constitution does not require that the Government distort the scope of its mandated program in order to provide that information."²²⁷

By restricting a physician's speech in order to "'reduce the incidence of abortion',"²²⁸ the Supreme Court presents the parents of deformed children with a double obstacle in a successful wrongful birth action.²²⁹ Parents will now be unable to establish the requisite duty of the physician to inform.²³⁰ Thus, these parents will never even reach the merits of their cause of action based on the constitutional right to an abortion.

IV. Conclusion

The foundation of a wrongful birth action is the physician's duty to inform and the woman's correlative constitutional right to terminate her pregnancy. *Rust v. Sullivan*²³¹ threatens the existence of wrongful birth actions because states may relieve doctors of their duty to inform, in the context of public funding. This, in turn, renders the right to an abortion nugatory. States may interpret public funding as the key to circumventing a woman's constitutional right to an abortion, and as a signal to implement policies to promote childbirth over abortion. If challenged, these policies will probably be upheld by the Supreme

225. *Id.* at 1777.

226. *Id.*

227. *Id.*

228. *Id.* at 1785 (Blackmun, J. dissenting, joined by Marshall & Stevens, JJ.) (quoting 42 C.F.R. § 59.2 (1990)).

229. See *supra* notes 24-26 for a discussion of wrongful birth. The parents must establish that, had they been informed by their physician of the genetic defect, they would have obtained an abortion. This would satisfy the requisite causal connection between the doctor's failure to inform and the plaintiff's damages. Now, however, the parents are faced with the added obstacle that the physician's speech is restricted.

230. See *supra* notes 24-26 for a discussion of the requisite duty of the physician to inform.

231. 111 S. Ct. 1759 (1991).

Court.

By restricting a physician's speech to further "reduce the incidence of abortion,"²³² the Supreme Court presents the parents of deformed children with a double obstacle to overcome in maintaining a successful wrongful birth action. These parents will now be unable to establish the requisite duty of the physician to inform. Thus, these parents will never reach the merits of the constitutional right to an abortion. These women, usually indigent,²³³ will be forced to carry pregnancies full term without being properly informed of the consequences. They will be deprived of their constitutional right to an abortion, their liberty interest in medical self-determination, and will not have a cause of action against the physician for failure to inform because he will now be protected by the program's regulations.

The Supreme Court's reliance on public funding as its rationale for depriving indigent women of the medical information necessary to exercise their constitutional right to an abortion is wholly chimerical. Ultimately, public funds will subsidize the normal rearing costs, as well as the extraordinary medical costs, associated with an impaired child. Consequently, the parents and the impaired children will suffer irreparably with the financial burden coming to rest on public funds. .

In reality, as stated by Justice Blackmun: "It is crystal clear that the aim of this [section] . . . is not simply to ensure that [public] funds are not used to perform abortions, but 'to reduce the incidence of abortion.'"²³⁴ If the Supreme Court's reasoning was actually influenced by public funding, it would not uphold these regulations because they not only prevent the use of public funds for abortion but also deprive indigent women of the access to medically essential information. These women, deprived of this medical information, have nowhere to turn. Thus, the Supreme Court, in an attempt to reach its preordained result, adopts a rationale that is callous, insensitive, disingenuous and strains logic.²³⁵

232. *Id.* at 1785 (Blackmun, J., dissenting, joined by Marshall & Stevens, J.J.) (quoting 42 C.F.R. § 59.2 (1990)).

233. See *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977).

234. *Rust* at 1785. (Blackmun, J. dissenting, joined by Marshall, Stevens JJ.).

235. See generally *Rust*, 111 S. Ct. at 1778-88 (Blackmun, J., dissenting, joined by

ADDENDUM

There has been a great deal of controversy over the rule banning abortion counseling that was upheld in *Rust v. Sullivan*²³⁶ in May 1991.²³⁷ For example, in November 1991, the House of Representatives sustained President Bush's veto of a bill that would have lifted his ban of federally financed abortion counseling.²³⁸ This rule banning abortion counseling has been "dubbed [a] 'gag rule' by critics"²³⁹ who say it shackles doctors and prevents pregnant women from obtaining information pertinent to an abortion.

On March 20, 1992, just prior to the publication of this Comment, the Department of Health and Human Services announced enforcement guidelines for the federal regulations²⁴⁰ that govern Title X of the Public Health Service Act.²⁴¹ The announcement stated "that doctors in Federally financed family planning clinics may give limited advice on abortions, though nurses and counselors may not."²⁴²

At first blush, the announcement seemed promising.²⁴³ However, "an official of the national organization that represents

Marshall & Stevens, JJ.).

236. 111 S. Ct. 1759 (1991).

237. As one commentator has observed: "The counseling rules have drawn opposition not only from advocates of abortion rights but from groups like the American Medical Association because they appeared to muzzle doctors when they were speaking privately to women about their options when they become pregnant." Philip J. Hilts, *White House Allows Some Advice at Public Clinics About Abortion*, N.Y. TIMES, Mar. 21, 1992, at A1, A10, col 1.

238. William J. Eaton, *House Sustains Bush's Abortion Counseling Ban*, L.A. TIMES, Nov. 20, 1991, at A1.

239. David G. Savage, *Abortion Gag Rule Revised. Critics Say White House Trying to Have it Both Ways*, SAN FRANCISCO CHRONICLE, Mar. 21, 1992, at A1.

240. 42 C.F.R. §§ 59.1 — 59.10 (1991).

241. 42 U.S.C. §§ 300 et seq. (1991).

242. See Hilts, *supra* note 237, at A1.

The decision provides an exception in the so-called 'gag rule' that forbids the clinics from giving women information on abortions. Under the guidelines, doctors would be able to refer women to facilities that provide abortions. However, administration officials said the doctor's advice must be based on medicine and not on social concerns.

Abortion Gag Rule Loosened, NEWSDAY, Mar. 21, 1992, at 7.

243. "The Health and Human Services Department issued [enforcement] guidelines . . . in a letter to regional offices that seemed to make an important exception to the counseling ban. . . Enforcement of the rule, which had been delayed by political and legal fights, will take effect within 45 days." See Hilts, *supra* note 237, at A1, A10, col 1.

90 percent of the clinics called [this] action a 'cynical attempt by the administration to have it both ways'.²⁴⁴ "Planned Parenthood of America Foundation immediately denounced the guidelines, saying that they actually solidified the gag policy instead of relaxing it."²⁴⁵ Yet, the Department of Health and Human Services stated that the "doctors are ungagged."²⁴⁶

Examination of the five page letter from the Department of Health and Human Services discloses that there is nothing at all clear about the guidance proffered.²⁴⁷ The only relevant parts of this five page guidance letter state:

Speech about Abortion

Title X projects may not counsel, refer or steer clients to abortion. The regulation does not, however, forbid Title X projects from mentioning the word "abortion". In general, Title X staff should state that abortion counseling and abortion referral are not services provided by Title X projects. Title X staff will make it clear that they can refer a client to the prenatal and social services necessary to promote her own health and that of her unborn child. Referrals may be made by Title X projects to full-service health care providers that perform abortions, but not to providers whose principal activity is providing abortion services.²⁴⁸

Physicians in Title X

The February 2, 1988, Title X regulation will be implemented in accordance with the November 5, 1991, memorandum of the President and the November 19, 1991, memorandum of the Secretary

244. See Savage, *supra* note 239, at A1.

245. See *Abortion Gag Rule Loosened*, *supra* note 242, at 7.

246. *Id.*; see Hilts, *supra* note 237, at A1, A10, col 1.

247. Memorandum from William R. Archer III, Deputy Assistant Secretary for Population Affairs of the Department of Health and Human Services, to Regional Health Administrators; Subject: Implementation of Title X Abortion Regulation, March 20, 1992. The first paragraph of the letter states:

This guidance on the Title X regulation is for use by Regional Office staff in implementing the February 2, 1988, regulations construing the statutory prohibition on abortion as a method of family planning in Title X projects, salient provisions which are found at 42 CFR sections 59.7 through 59.10. This guidance supplements the previous guidance provided by memorandum dated May 30, 1991, regarding implementation of the February, 1988, regulation and is designed to clarify certain operational questions which have arisen concerning the implementation and scope of the regulation.

Id. at 1.

248. *Id.* at 3.

to the Assistant Secretary for Health. The first numbered paragraph in both the President's and the Secretary's memoranda provides:

'Nothing in these regulations is to prevent a woman from receiving complete medical information about her condition from a physician.'

This statement is intended to apply to medical information provided only by a physician directly to his or her patient, in a clinic visit or a subsequent telephone conversation directly with the physician.²⁴⁹

One interpretation of this modification in the rule was that "the Bush Administration was trying to straddle the issue by loosening the restraints on abortion clinics while at the same time assuring anti-abortion forces that it was still firmly in their corner."²⁵⁰ This interpretation was supported by the opinion of White House officials themselves:

[We do not] want to represent the exception for doctors as a significant change in the regulations, but merely as a clarification to show that the Government is not interfering with the doctor-patient relationship, an issue that was the focus of much criticism from medical groups and abortion-rights organizations. But [we] do intend to step between women and other medical counselors who want to talk about abortion.²⁵¹

In sum, these guidelines that may have been intended to lift the constraints on the doctor-patient relationship, have, in fact, obscured the permissible scope of that relationship, because, in reality, they are driven by political motivations that probably will not be resolved until the Clinton Administration addresses the issue.

Rachel Tranquillo Grobe†

249. *Id.* at 4.

250. See Hilts, *supra* note 237, at A1. "[A] strategist with the National Abortion Rights Action League, asserted that with today's move Mr. Bush was trying to appease the anti-abortion side while making an empty gesture to the other side." *Id.* at A10, col 1.

251. *Id.*

† I dedicate this article to my husband, Herb.

Appendix

PROPOSED "ALL STATES" STATUTE

Chapter 10. Public Health and Welfare Security Act.

Subchapter X. Claims Based Upon Wrongful Birth Of Deformed Child Not Absolutely Prohibited.

§ 1. WRONGFUL BIRTH.

The provisions of this section shall not preclude causes of action based on claims that, but for the wrongful act or omission of another, tests or treatment would have been provided that would have made possible the prevention, cure, or amelioration of any disease, defect, deficiency, or handicap in the child born with birth and or genetic defects²⁵² E X C E P T that:

— if a public employee in the capacity of physician or otherwise, is responsible for the wrongful act or omission because of public funding prohibitions against informed consent that would implicate the promotion, referral, or counseling of abortion, no cause of action may be maintained.

252. Modeled after ME. REV. STAT. ANN. tit. 24, § 2931 (4) (West 1990), which provides:

This section shall not preclude causes of action based on claims that, but for a wrongful act or omission, maternal death or injury would not have occurred or handicap, disease, defect or deficiency of an individual prior to birth would have been prevented, cured or ameliorated in a manner that preserved the health and life of the affected individual.

Id. at § 2931(4); *see also* MINN. STAT. ANN. § 145.424, subd.(3) (West 1989), which provides:

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

Id. at § 145.424, subd.(3).

COMMENTARY

The "wrongful birth" section of the "All States" statute, appears to be a violation of a woman's constitutional right to terminate her pregnancy. It also appears to deprive her of her liberty interest in medical self determination,²⁵³ which precludes a subsequent cause of action for wrongful birth of a deformed child.

However, Part I of this Commentary will discuss the rationale of The United States Supreme Court that supports "All States" legislation of Title X of the Health Law. Part II of this Commentary will address Practice Pointers for the lawyer in advising clients deprived of their reproductive choice.

PART I — RATIONALE SUPPORTING "ALL STATES" LEGISLATION

It is well known that because *Roe v. Wade* established a woman's constitutional right to an abortion, wrongful birth actions predicated on the abortion decision have been actionable in "All States." Thus, prohibiting wrongful birth actions because public employees have been relieved of their duty to inform would seem to be unconstitutional.

Prior to *Rust v. Sullivan*,²⁵⁴ an aggrieved plaintiff would challenge this statute in preparation of a wrongful birth suit by alleging that it violates constitutional privacy guarantees. "The right of privacy . . . encompasses a woman's right to decide whether to terminate her pregnancy."²⁵⁵ "[A] woman cannot effectively exercise [her right] unless the physician has fully informed her of all of her options."²⁵⁶ Her "ability to rely on the physician's advice . . . is critical" to her decision.²⁵⁷ "[She] seeks

253. *Rust v. Sullivan*, 111 S. Ct. at 1784 (Blackmun, J., dissenting, joined by Marshall & Stevens, JJ.).

254. 111 S. Ct. 1759 (1991).

255. BRIEF FOR PETITIONERS, NEW YORK, *supra* note 215, at 47 (quoting City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 419 (1983) (citing *Roe v. Wade*, 410 U.S. 113 (1973))).

256. *Id.* (quoting *Akron*, 462 U.S. at 445). "By suppressing medically pertinent information and injecting a restrictive ideological message unrelated to considerations of maternal health, the state places formidable obstacles in the path of Title X clients' freedom of choice and thereby violates their Fifth Amendment rights." *Rust*, 111 S. Ct. at 1785 (Blackmun, J., dissenting, joined by Marshall & Stevens, JJ.).

257. BRIEF FOR PETITIONERS, RUST at 33, *Rust v. Sullivan*, 889 F.2d 4401 (2d Cir.

a physician's aid not only for medication or diagnosis, but also for guidance, professional judgment, and vital emotional support. ²⁵⁸

Thus, censoring the speech of physicians will "irreparably damage the trust and reliance necessary to the [physician-patient] relationship. [These indigent] women [may] mistakenly interpret [the] silence about abortion to mean that it is not an available option or . . . it is inappropriate for them."²⁵⁹ Plaintiff's argument would conclude that although the fundamental right protected by *Roe v. Wade* is still intact it ceases to be a right at all, because it is now unenforceable in the context of public funding.²⁶⁰

Notwithstanding these arguments, the legislators of this state are confident that the constitutionality of "All States" statute will be upheld by the United States Supreme Court, if challenged, based on the same rationale that upheld the regulations challenged in *Rust v. Sullivan*²⁶¹ earlier this year. The rationale of the United State Supreme Court is set forth in the Model Annotations that follow.

ANNOTATIONS

1. RIGHT OF PRIVACY

"Public policy now supports, rather than militates against, the proposition that [a woman shall] not be impermissibly denied a meaningful opportunity to [the abortion] decision." *Berman v.*

1989) (No. 89-1391), *cert. granted*, 110 S. Ct. 2559 (1990). *See also* *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (holding that the interests of a woman seeking medical advice about a pregnancy are best served "by allow[ing] the attending physician the room he needs to make his best medical judgment."). *Id.* n.60. "[F]ull vindication of the woman's fundamental right necessarily requires that her physician be given the room he needs to make his best medical judgment." *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 427 (1983) (quoting *Doe v. Bolton*, 410 U.S. 179, 192 (1973)). Regulations tending to "confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession' cannot endure." *Rust*, 111 S. Ct. at 1786 (Blackmun, J., dissenting, joined by Marshall & Stevens, JJ.) (quoting *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67 n.8 (1976)).

258. *Rust*, 111 S. Ct. at 1785 (Blackmun, J., dissenting, joined by Marshall & Stevens, JJ.).

259. REPLY BRIEF FOR PETITIONERS, NEW YORK, at 13, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989)(No. 89-1392), *cert. granted*, 110 S. Ct. 2559 (1990).

260. *Rust*, 111 S. Ct. at 1786 (Blackmun, J., dissenting, joined by Marshall & Stevens, JJ.).

261. 111 S. Ct. 1759 (1991).

Allan, 404 A.2d 8, 14 (N.J. 1979).

This section does not impermissibly burden a woman's Fifth Amendment rights. *Rust v. Sullivan*, 111 S. Ct. 1759, 1777 (1991).

"[R]efusal to fund abortion counseling and advocacy leaves the pregnant woman with the same choices as if the [state] had chosen not to fund family-planning services at all." *Rust*, 111 S. Ct. at 1776. (citing *Webster v. Reproductive Health Services*, 209 S. Ct. 3040, 3052 (1989); *Harris v. McRae*, 448 U.S. 297, 317 (1980)).

"[F]inancial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of the governmental restrictions on access to abortion, but rather of her indigence." *Rust*, 111 S.Ct. at 1778. (citing *Harris v. McRae*, 448 U.S. 297, 316 (1980)).

2. INFORMED CONSENT

This section does not impermissibly burden the woman's liberty interest in being free from unwarranted intrusion in the informed consent dialogue with her physician necessary to medical self-determination. *Rust*, 111 S. Ct. at 1777.

"[A] doctor's ability to provide, and a woman's right to receive information concerning abortion and abortion related services outside the context of [public funding] remains unfettered." *Rust*, 111 S. Ct. at 1777.

Nor does this section impermissibly burden the common law duty to disclose material information in the doctor-patient context. *But cf. Robak v. United States*, 658 F.2d 471 (7th Cir. 1981) (applying Alabama law); *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981); *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982) (en banc); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988) (en banc); *Haymon v. Wilkerson*, 535 A.2d 880 (D.C. 1987); *Moores v. Lucas*, 405 So.2d 1022 (Fla. Dist. Ct. App. 1981); *Siemienic v. Lutheran Gen. Hosp.*, 512 N.E.2d 691 (Ill. 1987); *Arche v. United States Dept. of Army*, 798 P.2d 477 (Kan. 1990); *Eisenbrenner v. Stanley*, 308 N.W. 2d 209 (Mich. Ct. App. 1981); *Smith v. Cote*, 513 A.2d 341 (N.H. 1986); *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983) (en banc); *James G. v. Caserta*, 332 S.E.2d 872 (W. Va. 1985); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372 (Wis. 1975); ME. REV. STAT. ANN. tit. 24, § 2931(3) (West 1990) (all recognizing a cause of action for wrongful

birth arising from a woman's allegation that she was precluded from making an informed decision whether to abort because her physician failed to adequately notify her during pregnancy that her child might have birth defects).

This section does not violate "a woman's Fifth Amendment right to medical self-determination and to make informed medical decisions free of government-imposed harm." *Rust*, 111 S. Ct. at 1777.

It does not conflict with *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986).

"Critical to . . . decisions in *Akron* and *Thornburgh* to invalidate governmental intrusion into the patient/doctor dialogue was . . . that the laws in both cases required all doctors within their respective jurisdictions to provide all pregnant patients contemplating an abortion with a litany of information, regardless of whether the patient sought the information or whether the doctor thought the information necessary to the patient's decision." *Rust*, 111 S. Ct. at 1777.

This section "[m]erely define[s] the scope of the services that a [publicly funded] health care professional may provide in the context of a specific limited program." BRIEF FOR RESPONDENT, SULLIVAN, at 17, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989) (No. 89-1391, 89-1392), cert. granted, 110 S. Ct. 2559 (1990).

3. PUBLIC FUNDING

Although "under *Roe* the government may not prohibit a woman, during the first trimester, from choosing to [abort], the government is not obligated to provide the means to exercise [this] right." BRIEF FOR RESPONDENT, SULLIVAN at 13-14 (citing *Webster v. Reproductive Health Services*, 109 S. Ct. 3051-53 (1989); *Harris v. McRae*, 448 U.S. 297, 312-18 (1980); *Poelker v. Doe*, 432 U.S. 519, 521 (1977); *Maher v. Roe*, 432 U.S. 464, 473-74 (1977)).

"*Webster*, *McRae*, *Poelker*, and *Maher* establish that the government need not finance abortions or provide public facilities and personnel for their performance. [Therefore,] the government need not finance the provision of information about abortion, whether that information is provided in the form of counseling, referral, or advocacy." BRIEF FOR RESPONDENT, SULLIVAN at 14.

[A] doctor's ability to provide, and a woman's right to receive,

information concerning abortion and abortion related services outside the context of public funding remains unfettered. *Rust*, 111 S. Ct. at 1777.

PART II. PRACTICE POINTERS FOR COUNSEL

It seems that a wrongful birth action will fail in the context of publicly funded family-planning programs. Parents of deformed children cannot assert that, but for the failure of the physician to inform them of the genetic defect or deformity, they would have terminated the pregnancy. In the context of a publicly funded family-planning program, physicians may be relieved of their duty to inform if it will implicate the promotion, referral, or counseling of abortion.

Prior to *Roe*,²⁶² wrongful birth actions were unsuccessful for a different reason.²⁶³ Eugenic abortion²⁶⁴ was illegal in most states, and, therefore, the causal connection (ability to obtain a legal abortion) between the physician's negligence (failure to inform) and the plaintiff's damages (the deformed child) could not be established. Today, almost twenty years later, the causal connection (legal abortion) is still somewhat intact because there has not been an outright reversal of *Roe*. However, the wrongful birth cause of action is again in danger because failure of the physician to inform is not actionable in a publicly funded family planning program.

Therefore, in counseling clients who have been deprived of their reproductive choice and, as a result, have a genetically defective or deformed child, it is imperative to determine the context of the alleged negligence. Did the physician fail to inform because the program was publicly funded with the limited scope of pre-pregnancy family planning services, thereby precluding the discussion of abortion regardless of the situation at hand? If yes, the fact that the client was pregnant and that the physician failed to inform her of a deformity in the child with the alternative of abortion will not be actionable because this information would exceed the scope of the program.

262. 410 U.S. 113 (1973).

263. See *supra* note 23 for a discussion of the seminal case of *Gleitman v. Cosgrove*.

264. See *supra* note 8 for a discussion of eugenic abortion.