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## Statutory Prohibitions on Wrongful Birth Claims & Their Dangerous Effects on Parents

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# STATUTORY PROHIBITIONS ON WRONGFUL BIRTH CLAIMS & THEIR DANGEROUS EFFECTS ON PARENTS

CAILIN HARRIS\*

**Abstract:** Wrongful birth claims are negligence actions brought on behalf of children born with disabilities or genetic disorders that were not properly diagnosed before the child's birth. The plaintiffs, typically the parents of the afflicted child, argue that without the defendant's negligence, the parents would have had the opportunity to prevent the child's birth and subsequent condition by choosing to terminate the pregnancy. A number of states have responded to the growing prevalence of wrongful birth claims by enacting legislation that bars plaintiffs from bringing wrongful birth actions. These statutes, however, pose a threat to the parental rights of disabled or terminally ill children, as they diminish abortion rights and bar parents from recovering the enormous medical and emotional damages of giving birth to the afflicted child. States should not prohibit this cause of action and, instead, the merits of these claims should be decided through the court system.

## INTRODUCTION

On July 4, 1997, Milda Geler and Edward Faynin, a married couple from New Jersey, gave birth to a baby girl named Shannon.<sup>1</sup> Shannon was healthy and developed normally for the first few months of her life.<sup>2</sup> When she was five months old, however, Shannon began to develop progressive neurological deficits and was eventually diagnosed with Tay-Sachs disease.<sup>3</sup> As a result of the disease, Shannon's condition rapidly worsened, she suffered frequent seizures, and she eventually became blind, deaf, and paralyzed.<sup>4</sup> Shannon died just before her second birthday.<sup>5</sup>

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<sup>1</sup> Geler v. Akawie, 818 A.2d 402, 408 (N.J. Super. Ct. App. Div. 2003).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 407–08 (“Tay-Sachs disease is a genetically-inherited, incurable condition that first appears in an infant at approximately six months of age, progressively causing mental retardation, blindness, seizures, and death between the ages of two and four years.”).

<sup>4</sup> *Id.* at 408–09.

<sup>5</sup> *See id.*

Throughout her pregnancy with Shannon, Milda Geler met regularly with her obstetricians, Dr. Richard Akawie and Dr. Michael Weingarten.<sup>6</sup> As early as the eleventh week of Geler's pregnancy, Dr. Akawie recognized that Geler and Faynin were at high risk of having a child with Tay-Sachs disease.<sup>7</sup> Despite this realization, neither doctor ensured that they conducted the genetic testing that could have diagnosed Shannon's condition.<sup>8</sup>

Sadly, Shannon's illness and suffering caused significant strain on Geler and Faynin's relationship and the couple divorced soon after their daughter died.<sup>9</sup> Additionally, both Geler and Faynin continue to suffer from emotional distress and Faynin occasionally abuses alcohol as a result of his grief over his daughter's death.<sup>10</sup>

Shannon's parents believed that their daughter's suffering and their own hardship in caring for Shannon and witnessing her tragic deterioration could have been prevented.<sup>11</sup> After Shannon's death, Geler and Faynin sued Drs. Akawie and Weingarten for wrongful birth, alleging that the doctors failed to diagnose Shannon's condition while Geler was pregnant.<sup>12</sup> In order to recover damages, parents who sue for wrongful birth must show that the defendant deprived them of the opportunity to choose to terminate their pregnancy.<sup>13</sup> Geler and Faynin contended that had they known that Shannon would suffer so extensively and die within two years of her birth, they would have terminated the pregnancy.<sup>14</sup>

<sup>6</sup> See *id.* at 407–08.

<sup>7</sup> See *id.* at 408. Dr. Akawie noted that Geler and Faynin could both be carriers of the Tay-Sachs gene because both parents were Ashkenazi Jews. *Id.* at 407. Tay-Sachs disease is very common in Ashkenazi Jewish families, affecting approximately one out of 3600 conceptions. *Id.* When both parents are carriers of the Tay-Sachs gene, there is a one in four chance that their child will have the disease. *Id.*

<sup>8</sup> See *id.* at 408. Testing for Tay-Sachs disease in a fetus is typically performed by first identifying the prospective parents as carriers for the Tay-Sachs gene through a simple serum analysis blood test. See *id.* at 407. If both parents are found to be carriers, then amniocentesis, which tests amniotic fluid for a number of conditions, is performed on the fetus to confirm the diagnosis. *Id.*; see *Smith v. Cote*, 513 A.2d 341, 346 (N.H. 1986).

<sup>9</sup> *Geler*, 818 A.2d at 409.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> *Id.* at 406.

<sup>13</sup> See *Sernovitz v. Dershaw*, 57 A.3d 1254, 1256 (Pa. Super. Ct. 2012); *Geler*, 818 A.2d at 406; Kathy Lohr, *Should Parents Be Able to Sue for 'Wrongful Birth'?*, NAT'L PUB. RADIO (May 15, 2012), <http://www.npr.org/blogs/health/2012/05/15/152687638/should-parents-be-able-to-sue-for-wrongful-birth>. In the article, Kari Ann Rinker of the Kansas chapter of the National Organization for Women is quoted as saying, "No one wants to state out loud, 'I would have chosen to abort my child,' but this is often the only way for a parent to seek legal recourse." Lohr, *supra*.

<sup>14</sup> See *Geler*, 818 A.2d at 409.

Wrongful birth claims have become increasingly common, and are a valuable way of allowing parents to recover for the medical expenses and emotional suffering that result from giving birth to an unhealthy child after failed genetic or prenatal testing.<sup>15</sup> Additionally, such claims ensure that physicians perform their duty of providing pregnant women with thorough and accurate information about their pregnancy.<sup>16</sup> Despite the prevalence of wrongful birth claims, some states have prohibited this cause of action.<sup>17</sup> Such laws prevent parents like Geler and Faynin from recovering the enormous medical and emotional damages that result from giving birth to and caring for children like Shannon.<sup>18</sup>

This Note discusses the elements of a wrongful birth claims and analyzes the statutes in some states that prohibit this cause of action. Part I explains the elements of a wrongful birth claim, as well as the history of these claims. Part II discusses the growing prevalence of state statutes that prohibit wrongful birth claims, focusing on statutes in Oklahoma, Pennsylvania, and Arizona. Part III argues that these statutory prohibitions are dangerous in that they bar parents from recovering the enormous costs of raising their disabled or ill child, while also diminishing abortion rights and immunizing physicians from liability when they act negligently. Finally, Part III also argues that wrongful birth claims are the natural extension of medical malpractice law to advancements in prenatal testing and the legalization of abortion rights. As such, they should not be prohibited by states and instead, the merits of these claims should be decided through the court system.

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<sup>15</sup> See *Smith*, 513 A.2d at 345–46; *Sernovitz*, 57 A.3d at 1256. Claims can also be based on failure to counsel parents about the likelihood of giving birth to a physically or mentally impaired child. *Williams v. Univ. of Chi. Hosps.*, 688 N.E.2d 130, 133 (Ill. 1997) (quoting *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 695 (Ill. 1987)).

<sup>16</sup> *Robak v. United States*, 658 F.2d 471, 476 (7th Cir. 1981) (quoting *Berman v. Allan*, 404 A.2d 8, 14 (N.J. 1979)) (explaining that without wrongful birth suits, doctors would be immunized from liability even when they provided “inadequate guidance to [pregnant patients]”); Barbara Hoberock, *Abortion Law Is Criticized, Defended Off Base*, TULSA WORLD, May 10, 2010, at A1.

<sup>17</sup> See *Smith*, 513 A.2d at 345–46. States that have legislatively prohibited the wrongful birth cause of action include Arizona, Minnesota, Missouri, Oklahoma, and South Dakota. ARIZ. REV. STAT. ANN. § 12-719 (2012); MINN. STAT. § 145.424 (2010); MO. REV. STAT. § 188.130 (2000); OKLA. STAT. tit. 63, § 1-741.12 (2013); S.D. CODIFIED LAWS § 21-55-2 (2004).

<sup>18</sup> See *Smith*, 513 A.2d at 345–46; *Geler*, 818 A.2d at 409.

## I. THE WRONGFUL BIRTH CAUSE OF ACTION & STATE LEGISLATIVE RESPONSES

The wrongful birth cause of action is a type of negligence claim brought by the parents of children born with disabilities or genetic disorders.<sup>19</sup> Implicit in this theory of liability is the argument that without the defendant's negligence, the plaintiff-parents would have had the opportunity to prevent their child's birth by choosing to terminate the pregnancy or, if possible, consider treatment options at birth or in utero.<sup>20</sup> As the prevalence of wrongful birth claims has increased with the advent of prenatal and genetic testing, as well as the recognition of abortion rights, some states have responded by enacting statutes that bar wrongful birth claims.<sup>21</sup>

### A. *The Wrongful Birth Cause of Action*

The wrongful birth cause of action is part of a group of pregnancy-related medical malpractice claims that have become more prevalent due to advancements in genetic testing, as well as the recognition of abortion rights and availability of such procedures.<sup>22</sup> Wrongful birth suits are typically brought by parents who claim they would not have conceived or given birth to a child were it not for the defendant's negligence in performing genetic or prenatal testing, testing that if done correctly could have revealed the risk or presence of a health condition in the fetus.<sup>23</sup>

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<sup>19</sup> See *Robak v. United States*, 658 F.2d 471, 476 (7th Cir. 1981) (explaining that the wrongful birth cause of action "is not a significant departure from previous tort law").

<sup>20</sup> See *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 695 (Ill. 1987); *Greco v. United States*, 893 P.2d 345, 347 (Nev. 1995); *Geler v. Akawie*, 818 A.2d 402, 409 (N.J. Super. Ct. App. Div. 2003); Jeffrey S. Dungan & Sherman Elias, *Prenatal Diagnostic Testing*, MERCK MANUAL HOME HEALTH HANDBOOK FOR PATIENTS & CAREGIVERS (updated Apr. 2014), [http://www.merckmanuals.com/home/womens\\_health\\_issues/genetic\\_disorders\\_detection/prenatal\\_diagnostic\\_testing.html](http://www.merckmanuals.com/home/womens_health_issues/genetic_disorders_detection/prenatal_diagnostic_testing.html) (describing the option of treating some conditions in utero).

<sup>21</sup> See ARIZ. REV. STAT. ANN. § 12-719 (2012); MINN. STAT. § 145.424 (2010); MO. REV. STAT. § 188.130 (2000); OKLA. STAT. tit. 63, § 1-741.12 (2013); S.D. CODIFIED LAWS § 21-55-2 (2004); *Smith v. Cote*, 513 A.2d 341, 345-46 (N.H. 1986).

<sup>22</sup> *Robak*, 658 F.2d at 475-76; *Smith*, 513 A.2d at 345-46; *Greco*, 893 P.2d at 348.

<sup>23</sup> *Williams v. Univ. of Chi. Hosps.*, 688 N.E.2d 130, 133 (Ill. 1997). A plaintiff in a wrongful birth action is essentially telling her doctors that,

If you had done what you were supposed to do, I would have known early in my pregnancy that I was carrying a severely deformed baby. I would have then terminated the pregnancy and would not have had to go through the mental and physical agony of delivering this child, nor would I have had to bear the emotional suffering attendant to the birth and nurture of the child, nor the extraordinary expense necessary to care for a child suffering from such extreme deformity and disability.

The wrongful birth cause of action is often compared to and confused with wrongful conception (also known as wrongful pregnancy) and wrongful life causes of action.<sup>24</sup> Parents bring a wrongful conception claim to seek damages for the expenses of an unwanted pregnancy and birth that occurs after a failed sterilization procedure.<sup>25</sup> A wrongful life claim is brought by, or on behalf of, a child seeking compensation for the defendant's failure to properly counsel the child's parents about the child's condition.<sup>26</sup> In contrast, a wrongful birth claim is brought by the parents, who claim that were it not for the defendant's negligence, they would have known about the fetus's condition, and they would have had the opportunity to decide whether or not to abort the fetus.<sup>27</sup>

### 1. Genetic & Prenatal Testing

In making a wrongful birth claim, the parents must first show that the defendant was negligent in conducting prenatal or genetic testing or counseling the parents on the testing results.<sup>28</sup> Some forms of testing screen the parents for genetic conditions that they may pass on to their children, while prenatal testing screens the fetus itself for abnormalities.<sup>29</sup> For many pregnant women, the first component of prenatal testing of the fetus is a screening test, usually conducted by serum testing of the mother's blood, or an ultrasound screening of

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*Greco*, 893 P.2d at 348. Plaintiffs may also bring wrongful birth claims based on genetic conditions that should have been discovered prior to conception, for example, by diagnosing the parents as carriers of genetic conditions or by diagnosing genetic conditions in older children that may be present in subsequent children. *See Schroeder v. Perkel*, 432 A.2d 834, 834 (N.J. 1981) (describing a claim in which parents argued that defendants failed to diagnose their older daughter with cystic fibrosis before they conceived a second child who also suffered from the disease); *Geler*, 818 A.2d at 408–09 (describing a claim in which parents asserted that defendants failed to perform genetic testing on them that would have allowed them to diagnose their fetus as having a terminal illness).

<sup>24</sup> *See Williams*, 688 N.E.2d at 132.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 133. Most courts, however, reject wrongful life claims brought by children because the theory of liability requires the implicit argument that the child would be better off having never been born. *Greco*, 893 P.2d at 347 (quoting *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967), *abrogated by Berman v. Allan*, 404 A.2d 8 (N.J. 1979)). As the court explained, these judgments are “very difficult, if not impossible, to make.” *Id.*

<sup>27</sup> *See Williams*, 688 N.E.2d at 133.

<sup>28</sup> *Id.* at 132–33 (quoting *Stemieniec*, 512 N.E.2d at 695).

<sup>29</sup> *See Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 692 (E.D. Pa. 1978) (plaintiff-parents' claim was based on their physicians' negligent failure to diagnose their fetus with Tay-Sachs disease during amniocentesis); *Geler*, 818 A.2d at 406–07; Rachel Rebouché & Karen H. Rothenberg, *Mixed Messages: The Intersection of Prenatal Genetic Testing and Abortion*, 55 *HOW. L.J.* 983, 987–88 (2012); Dungan & Elias, *supra* note 20. To predict the possibility of a child being born with Tay-Sachs disease, for example, doctors can test the parents of the child to determine if they are carriers. *Geler*, 818 A.2d at 407. If both parents are found to be carriers of the Tay-Sachs gene, then amniocentesis is performed on the fetus to confirm the presence of the disease. *Id.*

the fetus to determine the fetus's risk for genetic abnormalities.<sup>30</sup> With this type of testing, doctors can screen fetuses for chromosomal abnormalities, as well as hundreds of other genetic disorders.<sup>31</sup> This type of prenatal testing is extremely prevalent and is widely accepted.<sup>32</sup> The American Congress of Obstetricians and Gynecologists ("ACOG") recommends that obstetricians test all pregnant women for genetic abnormalities before twenty weeks of gestation.<sup>33</sup>

If initial serum or ultrasound screening indicates that the fetus has a high risk of being born with an abnormality, then the mother typically undergoes additional, more invasive testing to diagnose a fetal abnormality by determining the genotype of the fetus.<sup>34</sup> This additional testing is usually performed through amniocentesis or chorionic villus sampling ("CVS").<sup>35</sup> If amniocentesis or CVS indicates the presence of a genetic abnormality, parents should, according to ACOG, receive genetic counseling on their options.<sup>36</sup> Such counseling can include information about abortion, potential treatments for the fetus

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<sup>30</sup> Rebouché & Rothenberg, *supra* note 29, at 987–88. Serum and ultrasound screening tests are limited in that they usually cannot definitively diagnose a fetal abnormality. *See id.* at 988. Instead, these tests provide information on the probable risk that a fetus carries a particular genetic disorder, usually expressed as the percentage likelihood that the fetus has a genetic condition. *Id.* at 988–89. Serum testing, for example, detects biochemical markers that are associated with certain disorders. *See id.* at 988. Ultrasound screenings can detect evidence of an elevated risk of chromosomal abnormality in the fetus. Dungan & Elias, *supra* note 20. For example, ultrasound screening can be performed to measure whether there is abnormal fluid near the back of a fetus's neck, an indication of an increased risk of Down syndrome or other chromosomal abnormality. *Id.* In addition, ultrasound screening can detect obvious structural birth defects, including defects in the brain, spinal cord, heart, and stomach. *Id.*

<sup>31</sup> Rebouché & Rothenberg, *supra* note 29, at 988.

<sup>32</sup> Sonia Mateu Suter, *The Routinization of Prenatal Testing*, 28 AM. J.L. & MED. 233, 234 (2002). Routine serum and ultrasound screenings are used for many aspects of prenatal care beyond diagnosis of fetal abnormalities. *See* Dungan & Elias, *supra* note 20. For example, a mother's blood is usually tested for indicators of miscarriage, slow fetal growth, placental abruption, or the presence of additional fetuses. *Id.* Additionally, blood tests also provide information on the fetus's risk of being born with neural defects like anencephaly, or spinal cord defects like spina bifida. *Id.* Ultrasound screening, also routine, is used to confirm the length of a pregnancy, to determine the presence of multiple fetuses, to determine whether the fetus has died, and also to detect a number of birth defects. *Id.*

<sup>33</sup> Rebouché & Rothenberg, *supra* note 29, at 988.

<sup>34</sup> *See id.* at 989–90. Determining the genotype of a fetus will provide information about the presence of a genetic condition, but, like screening, it is limited in its ability to definitively predict how the condition will manifest in the potential child. *See id.*

<sup>35</sup> *Id.* at 989. CVS and amniocentesis require the physician to extract fetal cells, either through the mother's abdomen or vagina. *Id.* Amniocentesis is performed at fifteen to seventeen weeks of gestation, while CVS can be performed earlier, at ten to fourteen weeks of gestation. *Id.* There is a one percent risk of miscarriage associated with both procedures. *Id.* Because both procedures are costly, uncomfortable for the mother, and carry the risk of miscarriage, only about two percent of pregnant women choose to undergo these types of testing. *See id.*

<sup>36</sup> *See id.* at 990.

during pregnancy, and preparations for raising a child with the condition.<sup>37</sup> At this point, parents who receive an abnormal diagnosis may choose to continue with the pregnancy, to terminate the pregnancy, or if possible, to begin initial treatment for the condition prenatally.<sup>38</sup>

Prenatal genetic testing will likely become more common in the future.<sup>39</sup> Recently developed noninvasive tests to collect fetal DNA are more accurate than standard blood tests in screening for chromosomal and genetic abnormalities.<sup>40</sup> As the American healthcare landscape changes and genetic prenatal testing becomes more advanced, there promises to be an increase in more accurate and less costly and invasive testing.<sup>41</sup>

## 2. Components of a Wrongful Birth Claim

As a type of medical malpractice claim, wrongful birth claims share the basic elements of the negligence cause of action.<sup>42</sup> The first of these basic elements requires the parents to establish the existence of the physician's duty to the plaintiffs, typically based on a doctor-patient relationship between the physician and the pregnant woman.<sup>43</sup> The plaintiffs must demonstrate that the physician breached that duty by failing to adhere to the applicable standard of care.<sup>44</sup> Next, the plaintiffs must also show a proximate causal connection be-

<sup>37</sup> See *id.*

<sup>38</sup> *Id.*; Dungan & Elias, *supra* note 20. Some fetal abnormalities that are detected early can be treated before birth. Dungan & Elias, *supra* note 20. For example, the mother of a female fetus with congenital adrenal hyperplasia, a disorder that causes the adrenal glands to produce excessive amounts of male hormones, can take corticosteroid to prevent the female fetus from developing male characteristics. *Id.*

<sup>39</sup> See Rebouché & Rothenberg, *supra* note 29, at 985, 990.

<sup>40</sup> Diana W. Bianchi et al., *DNA Sequencing Versus Standard Prenatal Aneuploidy Screening*, 370 *NEW ENG. J. MED.* 799, 799 (2014).

<sup>41</sup> See *id.*; Rebouché & Rothenberg, *supra* note 29, at 985–86, 990 (noting that the Affordable Care Act requires healthcare plans to cover many prenatal services, including genetic screening and testing and that non-invasive testing will soon take the place of current screening).

<sup>42</sup> See *Robak*, 658 F.2d at 476; *Molloy v. Meier*, 660 N.W.2d 444, 450 (Minn. Ct. App. 2003).

<sup>43</sup> See *Molloy*, 660 N.W.2d at 450 (explaining that medical malpractice claims must show a physician-patient relationship in order to demonstrate that the doctor owed the plaintiff a duty of care); *Smith*, 513 A.2d at 346 (“If the plaintiff establishes that a physician-patient relationship with respect to the pregnancy existed between the defendants and her, it follows that the defendants assumed a duty to use reasonable care in attending and treating her.”).

<sup>44</sup> *Robak*, 658 F.2d at 476 (explaining that a wrongful birth claim “involves a failure by a physician to meet a required standard of care, which resulted in specific damages to the plaintiffs”); *Greco*, 893 P.2d at 348; *Fernandez v. Admirand*, 843 P.2d 354, 358 (Nev. 1992). The standard of care is a question of fact that is determined based on the standards of the medical profession. *Smith*, 513 A.2d at 346. If the court finds that the applicable standard of care demanded that the defendants test for or diagnose a fetus's condition, and the defendants failed to fulfill that obligation, then they breached their duty of due care. *Id.* at 347.



tween the negligent conduct and the resulting injury.<sup>45</sup> Finally, the plaintiffs must establish that actual loss or damages resulted from the physician's negligence.<sup>46</sup> These damages may include the unwanted medical costs and emotional damages of giving birth to an unhealthy or disabled child.<sup>47</sup>

Wrongful birth claims can be brought based on the defendant's negligence at multiple points before or during the mother's pregnancy.<sup>48</sup> When a wrongful birth claim is based on negligence before pregnancy, the cause of action may stem from a physician's alleged failure to diagnose a genetic condition or disease in an earlier child, if a later child is born with the same condition.<sup>49</sup> In addition, the cause of action can also be brought based on a physician's negligence in performing or failing to perform genetic testing on the child's parents.<sup>50</sup> Similarly, the cause of action may be brought based on a physician's failure to perform or properly handle a prenatal genetic or diagnostic test on the fetus.<sup>51</sup> Additionally, wrongful birth claims can also be based on

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<sup>45</sup> See *Provenzano v. Integrated Genetics*, 22 F. Supp. 2d 406, 416 (C.D.N.J. 1998); *Greco*, 893 P.2d at 348.

<sup>46</sup> See *Arche v. U.S., Dep't of the Army*, 798 P.2d 477, 481 (Kan. 1990); *Shull v. Reid*, 258 P.3d 521, 524–25 (Okla. 2011).

<sup>47</sup> *Arche*, 798 P.2d at 481 (holding that the “expenses caused by the child's handicaps may be recovered, but not those expenses natural to raising any child”); *Shull*, 258 P.3d at 525 (holding that damages could be recovered for the losses proximately caused by the defendant's negligence, but not for the parents' emotional distress); *Dungan & Elias*, *supra* note 20 (describing treatment options in utero).

<sup>48</sup> See *Johnson v. Super. Ct.*, 124 Cal. Rptr. 2d. 650, 653 (Ct. App. 2002) (allowing plaintiff-parents' claim based on infertility doctors' and sperm bank's failure to test donor sperm for a hereditary kidney condition); *Geler*, 818 A.2d at 406 (explaining that the plaintiff-parents' claim was based on the defendants' negligence in failing to test the plaintiffs and their fetus for Tay-Sachs disease); *Sernovitz v. Dershaw*, 57 A.3d 1254, 1256 (Pa. Super. Ct. 2012) (explaining that plaintiff-parents' wrongful birth claim was based on the defendants' failure to properly diagnose the mother as a carrier of the hereditary condition familial dysautonomia).

<sup>49</sup> See *Schroeder*, 432 A.2d at 834 (permitting plaintiff-parents' claim based on the defendants' failure to timely diagnose their older child with cystic fibrosis before they conceived a second child who also suffered from the disease).

<sup>50</sup> See *Geler*, 818 A.2d at 406; *Sernovitz*, 57 A.3d at 1256 (alleging that doctor's failure to inform parents that mother carried a gene mutation deprived parents of the informed option to choose to terminate the pregnancy).

<sup>51</sup> See *Haymon v. Wilkerson*, 535 A.2d 880, 881 (D.C. 1987); *Gildiner*, 451 F. Supp. at 694–95; *Sernovitz*, 57 A.3d at 1256; Aimee Green, *Despite Abuse from Critics, Attorney Says Parents of Down Syndrome Child Pursued 'Wrongful Birth' Suit to Secure Her Financial Future*, OREGONIAN, Mar. 9, 2012, available at [http://www.oregonlive.com/portland/index.ssf/2012/03/despite\\_abuse\\_from\\_critics\\_par.html](http://www.oregonlive.com/portland/index.ssf/2012/03/despite_abuse_from_critics_par.html). In *Gildiner v. Thomas Jefferson University Hospital*, a doctor incorrectly told the plaintiff-parents that amniocentesis eliminated “any possibility that the fetus would have Tay-Sachs disease.” 451 F. Supp. at 693–94. The Gildiners' son, however, was born with Tay-Sachs disease, and the couple sued their doctors for the medical expenses and emotional suffering that resulted from their son being born with the disease. *Id.* at 694–95. The court concluded that “the public policy of Pennsylvania supports the recognition of a cause of action for damages arising from negligence in the performance of testing for

negligence during pregnancy when a physician fails to discover and inform parents of non-genetic fetal defects, such as a health condition in the mother that could adversely affect the health of the fetus.<sup>52</sup>

In addition to duty and negligence, plaintiffs bringing wrongful birth claims must establish proximate causation.<sup>53</sup> Notably, a wrongful birth claim does not allege that the defendant's negligence actually caused the child's injury.<sup>54</sup> Instead, the plaintiffs allege that because of the defendant's negligence, they did not know about the fetus's impairments and, therefore, they did not have the opportunity to use that information to evaluate whether to terminate the pregnancy.<sup>55</sup> Thus, parents are not suing for the child's impairment itself, but rather for the loss of their choice not to give birth to the unhealthy child.<sup>56</sup> Courts typically use a subjective standard to determine causation, asking whether the particular plaintiffs were deprived of the chance to "accept or reject a parental relationship."<sup>57</sup> It is not necessary for parents to prove decisively that they would have aborted an unhealthy fetus because the crux of their claim is that the defendant's negligence deprived them of the opportunity to make that choice.<sup>58</sup>

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Tay-Sachs disease[]" and that the Gildiners could recover damages for their son's medical treatment. *Id.* at 695–96. Parents of children born with non-terminal diseases like Down syndrome have also sued for wrongful birth when their medical providers failed to diagnose the condition prenatally. See *Haymon*, 535 A.2d at 881 (allowing a mother of a child born with Down syndrome to recover medical expenses that would not have occurred but for her doctor's failure to counsel her properly regarding prenatal testing options); *Green*, *supra* (awarding parents of a child with Down syndrome \$2.9 million after the doctor told the mother that her prenatal testing results were normal).

<sup>52</sup> See *Robak*, 658 F.2d at 471 (explaining that plaintiff-parents brought a wrongful birth claim based on the defendants' failure to diagnose the mother with rubella while she was pregnant, which resulted in fetal defects).

<sup>53</sup> See *Provenzano*, 22 F. Supp. 2d at 416; *Greco*, 893 P.2d at 348.

<sup>54</sup> See *Provenzano*, 22 F. Supp. 2d at 413–14, 418 (explaining that the child's genetic condition was not at issue, but that the actual injury was the child's "very birth, or otherwise put, the deprivation of the [plaintiffs'] opportunity to abort [the] fetus"); *Greco*, 893 P.2d at 348 (comparing a wrongful birth claim to a medical malpractice claim against a doctor for failing to diagnose cancer in a timely manner and explaining that while the doctor did not cause the cancer, the doctor's negligence meant that the patient did not have the opportunity to treat the disease properly).

<sup>55</sup> See *Geler*, 818 A.2d at 409; *Greco*, 893 P.2d at 348.

<sup>56</sup> See *Provenzano*, 22 F. Supp. 2d at 418; *Geler*, 818 A.2d at 409; *Greco*, 893 P.2d at 348.

<sup>57</sup> See *Provenzano*, 22 F. Supp. 2d at 416–17; *Schroeder*, 432 A.2d at 840. Courts typically focus on subjective "but for" causation to establish the element of proximate causation. See *Robak*, 658 F.2d at 477; *Provenzano*, 22 F. Supp. 2d at 416; *Smith*, 513 A.2d at 347 (stating that proof of causation would be established if the plaintiff could "show that, but for the defendants' negligent failure to inform [the mother] of the risks of bearing a child with birth defects, [the mother] would have obtained an abortion").

<sup>58</sup> See *Provenzano*, 22 F. Supp. 2d at 416 (explaining that plaintiffs need not conclusively prove that they would have aborted the fetus, "[r]ather, proximate cause may be established by evidence

Courts often struggle with how to appropriately award damages in wrongful birth cases.<sup>59</sup> Although most courts are willing to compensate parents for the extraordinary medical costs associated with giving birth to and caring for an unhealthy child, some courts are hesitant to award parents damages covering the total cost of caring for their child.<sup>60</sup> In most wrongful birth cases, the parents desired a child and planned to support their child, which, courts have stated, is the obligation of all parents.<sup>61</sup> Thus, while the costs of raising the child that stem from the child's disability or condition may be recovered, those costs that are inherent in raising any child may not be recovered.<sup>62</sup> Some courts also award parents damages for the emotional distress of giving birth to and caring for an unhealthy or disabled child.<sup>63</sup>

### B. Wrongful Birth Claims in the Courtroom

Although the increase in wrongful birth claims since the 1980s is due in part to the recognition of a legal right to abortion in *Roe v. Wade*, the first wrongful birth claim was brought well before *Roe*.<sup>64</sup> In *Gleitman v. Cosgrove*,

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demonstrating that the defendant's negligence deprived the plaintiffs of their right to accept or reject a parental relationship).

<sup>59</sup> See *Arche*, 798 P.2d at 481; *Greco*, 895 P.2d at 349.

<sup>60</sup> See *Robak*, 658 F.2d at 478–79 (noting that the majority of courts allow plaintiffs to recover all damages associated with the birth of the child). But see *Arche*, 798 P.2d at 481 (holding that the plaintiff-parents could recover costs associated with the child's disability, "but not those expenses natural to raising any child"); *Shull*, 258 P.3d at 525 (holding that plaintiffs in wrongful birth suits could recover only "extraordinary expenses, not the normal and foreseeable costs of raising a normal, healthy child"). In granting the plaintiff-parents damages for all of the costs of raising their unhealthy child, the court in *Robak v. United States* explained that injuries in wrongful birth actions are not based on injuries to the child, but rather injuries to the parents themselves. See 658 F.2d at 479. The court further reasoned that because the defendant's failure to inform the plaintiff of the fetus's possible health condition denies the plaintiff the opportunity to choose to abort the pregnancy, the birth of the child and all expenses related to raising the child are the proximate result of the defendant's negligence. *Id.* Thus, the court concluded that it is inappropriate to deduct the costs of raising a normal child from the costs of raising the unhealthy child because, if not for the defendants' negligence, the plaintiffs would not have given birth to a child at all. *Id.* at 478–79.

<sup>61</sup> See *Arche*, 798 P.2d at 481; *Shull*, 258 P.3d at 523–24.

<sup>62</sup> See *Arche*, 798 P.2d at 481; *Shull*, 258 P.3d at 525. But see *Greco*, 893 P.2d at 350 (rejecting the defendant's argument that the plaintiffs' damage award should be offset by the costs of raising a healthy child, and instead following the "clear and workable" standard for compensatory damages in negligence cases).

<sup>63</sup> *Greco*, 893 P.2d at 351 (awarding emotional distress damages to the plaintiff-mother and noting that many other courts also do so). But see *Arche*, 798 P.2d at 482; *Shull*, 258 P.3d at 525 (holding that emotional distress damages could not be recovered in a wrongful birth case because the injury at issue was not caused by the defendants).

<sup>64</sup> See *Roe v. Wade*, 410 U.S. 113, 114 (1973), holding modified by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Smith*, 513 A.2d at 345–46 (citing W. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 370 (5th ed. 1984)) (explaining that the growing preva-

a couple sued their physician for the wrongful birth of their son in 1959.<sup>65</sup> Early in her pregnancy, the mother informed her physician that she had recently been diagnosed with rubella.<sup>66</sup> Despite medical evidence that contracting rubella during pregnancy could result in infant birth defects, the doctor told the mother that the illness would have no effect on her unborn child.<sup>67</sup> Although the couple's child seemed healthy at birth, a few weeks later he began to display signs of significant disability, including sight, hearing, and speech defects.<sup>68</sup> Because of his disabilities, the child underwent several operations, but even after the operations, his health remained "seriously impaired."<sup>69</sup>

The parents sued the physician arguing that his failure to inform the mother of the possible effects of rubella on her pregnancy denied them the opportunity to choose to abort their pregnancy.<sup>70</sup> Although the court expressed sympathy for the parents' difficult situation, the court ultimately dismissed their wrongful birth claim, as well as a wrongful life claim brought on their son's behalf, explaining that the child's right to live "is greater than and precludes [the parents'] right not to endure emotional and financial injury."<sup>71</sup>

While this unsuccessful claim was brought before *Roe*, both the *Roe* decision and the increased availability of genetic and prenatal testing in the late twentieth century led to a growing acceptance of wrongful birth claims.<sup>72</sup> In

lence of wrongful birth claims is due in part to the *Roe* Court's recognition of the legal right to abortion and calling *Gleitman* the "'fountainhead' for debate" in wrongful birth cases); *Gleitman*, 227 A.2d at 689.

<sup>65</sup> *Gleitman*, 227 A.2d at 689–90. Interestingly, the three counts of the parents' complaint were divided among the three family members. *See id.* at 690. The first count of the complaint was a wrongful life claim brought on behalf of the child, seeking damages for his birth defects. *See id.* The mother brought the second count for her emotional damages resulting from her son's condition, and the third count was brought by the child's father, who sought damages for the costs he incurred in caring for the child. *Id.*

<sup>66</sup> *Id.* at 690.

<sup>67</sup> *Id.* (noting that the plaintiffs' expert medical witness testified that maternal cases of rubella during the first trimester of pregnancy can result in infant birth defects twenty to fifty percent of the time).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 691. The doctor acknowledged that he had a duty as a physician to inform the mother about the possibility of birth defects stemming from her illness. *Id.* at 690. He claimed, however, that he had informed her that there was a twenty percent possibility of her child being born with birth defects and that while some doctors would perform an abortion for this reason, the doctor did not think it was appropriate. *Id.* at 690–91.

<sup>71</sup> *See id.* at 692–93 (explaining that claims for wrongful birth are "precluded by the countervailing public policy supporting the preciousness of human life").

<sup>72</sup> *See Roe*, 410 U.S. at 114; *Robak*, 658 F.2d at 471; *Gleitman*, 227 A.2d at 689. In *Smith v. Cote*, the court explained that both the development of tests for genetic diseases and fetal defects and the increased availability of legal abortions after *Roe* account for the increase in successful wrongful birth cases in the final quarter of the twentieth century. 513 A.2d at 345–46. Important scientific develop-

*Robak v. United States*, for example, the Seventh Circuit Court of Appeals rejected two common arguments against wrongful birth, showing the court's willingness to apply existing negligence law to these new claims.<sup>73</sup> After he was sued for failing to inform the plaintiff-mother that she had rubella, a condition that caused her daughter to be born deaf and blind, the defendant-doctor argued that the plaintiff had not established proximate causation for two reasons.<sup>74</sup> First, the defendant argued that there was no proximate causation because the injury to the fetus occurred when the mother contracted rubella, not when the defendants failed to diagnose the fetus's condition.<sup>75</sup> The court disagreed with the defendants' argument, finding that "[a] negligent act need not be the sole cause of the injury complained of in order to be a proximate cause of that injury."<sup>76</sup> The cause of action itself was not based on the fetus's condition, but rather the defendants' failure to diagnose the condition.<sup>77</sup> The defendant also attacked the plaintiff's causation argument, arguing that the plaintiff could not have obtained a legal abortion in Alabama at the time she became pregnant.<sup>78</sup> The court rejected this argument, finding that the plaintiff could have easily obtained a legal abortion in a neighboring state.<sup>79</sup> Thus, the court found that the defendants breached their duty to the child's parents by denying them the chance to have an abortion, and were, therefore, a proximate cause of the plaintiffs' injuries.<sup>80</sup>

*Provenzano v. Integrated Genetics*, a more recent case from 1998, further demonstrates courts' application of medical malpractice concepts to wrongful birth claims.<sup>81</sup> When their eight-month-old daughter died of an undiagnosed

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ments include the creation of "sophisticated biochemical and cytogenic tests for assaying amniotic fluid and maternal and fetal blood." *Id.* at 345 (quoting Alexander Morgan Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 626 (1979)). For example, amniocentesis, which allows doctors to remove fluid from a fetus and perform tests for a number of conditions, was once considered experimental, but by the 1970s became a routine method of testing for fetal defects. *Id.* at 346.

<sup>73</sup> *Robak*, 658 F.2d at 471.

<sup>74</sup> *Id.* at 471, 473. In the early stages of her pregnancy, the mother tested positive for rubella, but her physicians never informed her that she was sick or that the illness could adversely affect her fetus. *Id.* at 473. The couple sued the mother's doctor for wrongful birth. *Id.* at 471.

<sup>75</sup> *Id.* at 471, 473.

<sup>76</sup> *Id.* at 477.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> See *id.* at 476–77 (explaining that abortion was legal in a number of states at the time the plaintiff became pregnant and it would have been perfectly legal for the mother to "take advantage of more lenient laws in another state") The court granted the plaintiff-parents damages for the birth of the unhealthy child, "and all expenses resulting therefrom, were thus the proximate result of defendant's negligence." *Id.* at 479.

<sup>80</sup> *Id.* at 479.

<sup>81</sup> See *Provenzano*, 22 F. Supp. 2d at 409–10.

genetic disease, the plaintiff-parents sued the mother's doctors and the company that performed their prenatal testing for failing to inform them about the fetus's condition and that they could have aborted the fetus.<sup>82</sup> The court allowed the parents to bring their claim, determining that they need not show conclusively that, had they known it was an option, they would have aborted the unhealthy fetus.<sup>83</sup> Instead, the plaintiff need only shown that they were deprived of the option to make that choice.<sup>84</sup>

## II. THE DANGER OF STATUTORY PROHIBITIONS ON WRONGFUL BIRTH CLAIMS

Although many courts after *Gleitman v. Cosgrove* came to accept the wrongful birth cause of action as a type of medical malpractice claim, some states' statutes prohibit wrongful birth claims.<sup>85</sup> While these statutes prohibit an entire cause of action, they focus on barring plaintiffs from making the essential causation argument that, but for the negligence of the defendant, the plaintiff would have chosen to terminate the pregnancy.<sup>86</sup> Although these prohibitions have faced criticism and legal challenges, they are becoming increasingly popular, and a number of states now statutorily prohibit wrongful birth claims.<sup>87</sup>

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<sup>82</sup> See *id.* The plaintiff-mother was pregnant with twin girls, one of whom, Tiffany, was shown via prenatal testing and ultrasounds to have abnormalities. *Id.* at 409. Tiffany was born with trisomy 14 mosaicism, and died eight months later. *Id.* The plaintiff-parents sued the mother's doctors, contending that they never told her she could have aborted the unhealthy fetus without affecting the other fetus. *Id.* at 409-10.

<sup>83</sup> *Id.* at 416, 419. The court further explained that the issue of whether the parents would have aborted the unhealthy fetus is a question of fact for the jury, and conflicting evidence regarding whether the plaintiffs would have actually decided to abort the fetus, had they known about its health condition, was not fatal to the plaintiffs' claim. *Id.* at 417.

<sup>84</sup> *Id.*

<sup>85</sup> See ARIZ. REV. STAT. ANN. § 12-719 (2012); MINN. STAT. § 145.424 (2010); MO. REV. STAT. § 188.130 (2000); OKLA. STAT. tit. 63, § 1-741.12 (2013); S.D. CODIFIED LAWS § 21-55-2 (2004); *Provenzano v. Integrated Genetics*, 22 F. Supp. 2d 406, 416 (C.D.N.J. 1998); *Greco v. United States*, 893 P.2d 345 (Nev. 1995); *Geler v. Akawie*, 818 A.2d 402, 408 (N.J. Super. Ct. App. Div. 2003).

<sup>86</sup> See *Gleitman v. Cosgrove*, 227 A.2d 689, 689 (N.J. 1967), *abrogated by Berman v. Allan*, 404 A.2d 8 (N.J. 1979); Georgia Dullea, *Courts Weigh Value of Unwanted Lives*, N.Y. TIMES, Apr. 12, 1982, at B6; Jonathan V. Last, *From Blessing to Curse: The Evolution of 'Wrongful Birth' Lawsuits*, WKLY. STANDARD (Apr. 30, 2012), [http://www.weeklystandard.com/articles/blessing-curse\\_640524.html](http://www.weeklystandard.com/articles/blessing-curse_640524.html). States that have prohibited the wrongful birth cause of action include Arizona, Minnesota, Missouri, Oklahoma, and South Dakota. See ARIZ. REV. STAT. ANN. § 12-719; MINN. STAT. § 145.424; MO. REV. STAT. § 188.130; OKLA. STAT. tit. 63, § 1-741.12; S.D. CODIFIED LAWS § 21-55-2.

<sup>87</sup> See ARIZ. REV. STAT. ANN. § 12-719; MINN. STAT. § 145.424; MO. REV. STAT. § 188.130; OKLA. STAT. tit. 63, § 1-741.12; S.D. CODIFIED LAWS § 21-55-2; *Dansby v. Thomas Jefferson Univ. Hosp.*, 623 A.2d 816, 816 (Pa. Super. Ct. 1993); *Hoerock*, *supra* note 16.

### A. The Oklahoma Statute

In 2010, the Oklahoma legislature enacted House Bill 2656, (“the Oklahoma statute”) which prohibits wrongful birth claims.<sup>88</sup> The legislature explicitly stated that its intent in enacting the prohibition on wrongful life and wrongful birth claims was to acknowledge that it is against public policy to recognize injury and award damages for the birth of a child.<sup>89</sup>

The Oklahoma statute defines a wrongful birth action as:

[A] cause of action that is brought by a parent or other person who is legally required to provide for the support of a child, which seeks economic or noneconomic damages because of a condition of the child that existed at the time of the child’s birth, and which is based on a claim that a person’s act or omission contributed to the mother’s not having obtained an abortion.<sup>90</sup>

The statute goes on to prohibit wrongful birth claims by immunizing defendants from damages based on “any condition that existed at the time of a child’s birth if the claim is that the defendant’s act or omission contributed to the mother’s not having obtained an abortion.”<sup>91</sup> Thus, the causation element of the wrongful birth claim is impossible for plaintiffs to establish.<sup>92</sup>

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<sup>88</sup> OKLA. STAT. tit. 63, § 1-741.12. The statute was enacted in response to *Liddington v. Burns*, the case in which the U.S. District Court, applying Oklahoma law, found that the state would recognize wrongful birth actions and that the plaintiffs could recover “the extraordinary medical expenses and other pecuniary losses proximately caused by the [defendant’s] negligence.” 916 F. Supp. 1127, 1133 (W.D. Okla. 1995); see *Shull v. Reid*, 258 P.3d 521, 524 (Okla. 2011). The *Liddington* court, however, denied the plaintiffs damages for the costs of raising a normal, healthy child, finding that those expenses are “[j]ust as certainly . . . not recoverable.” See 916 F. Supp. at 1133.

<sup>89</sup> See OKLA. STAT. tit. 63, § 1-741.12; *Shull*, 258 P.3d at 524.

<sup>90</sup> OKLA. STAT. tit. 63, § 1-741.12(B)(3).

<sup>91</sup> *Id.* § 1-741.12(C). The law does not prohibit claims focused on the health of the mother:

[t]his 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, or disability 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.* § 1-741.12(D). In addition, the statute also prohibits wrongful life actions, defining those claims as:

a cause of action that is brought by or on behalf of a child, which seeks economic or noneconomic damages for the child because of a condition of the child that existed at the time of the child’s birth, and which is based on a claim that a person’s act or omission contributed to the mother’s not having obtained an abortion.

See *id.* § 1-741.12(B)(2), (C).

<sup>92</sup> See *id.* § 1-741.12(B)(3).

Oklahoma State Representative Daniel Sullivan introduced the Oklahoma statute to the state's House of Representatives as House Bill 2656, describing the bill as "a simple, noncontroversial" piece of legislation that makes "it illegal to sue a doctor claiming 'wrongful birth' because the doctor failed to convince the mother to abort a child."<sup>93</sup> Sullivan further explained his reasons for authoring the bill by stating, "[t]o argue that a child would be better off dead than given a chance at life is a gross perversion of our justice system and should never be a legitimate basis for suing a doctor."<sup>94</sup> Sullivan's bill eventually passed the Oklahoma House of Representatives and Senate in 2010 with a number of other abortion-related pieces of legislation.<sup>95</sup> However, Oklahoma Governor Brad Henry vetoed the bill, describing the legislation as "potentially detrimental to all pregnant women and their families" because it prevents women from seeking legal recourse when a physician knowingly or negligently withholds information about the pregnancy.<sup>96</sup> The Oklahoma legislature overrode the Governor's veto and the bill became law on April 27, 2010.<sup>97</sup>

Oklahoma's law was met with praise from anti-abortion groups, as well as the Oklahoma State Medical Association, which stated that the Oklahoma statute would "give physicians the most freedom to practice without fear of malpractice lawsuits."<sup>98</sup> As Tony Lauinger, chairman of Oklahomans for Life

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<sup>93</sup> See Press Release, Okla. House of Representatives, Lawmakers Vow to Continue Pro-Life Fight (Apr. 23, 2010), available at [http://www.okhouse.gov/Media/News\\_Story.aspx?NewsID=3588](http://www.okhouse.gov/Media/News_Story.aspx?NewsID=3588). Oklahoma State Senator Brian Crain was the principal author of the bill in the Senate. Press Release, Okla. State Senate, Senate Republicans Advance Pro-Life Measures (Apr. 20, 2010), available at [http://www.oksenate.gov/news/press\\_releases/press\\_releases\\_2010/pr20100420a.html](http://www.oksenate.gov/news/press_releases/press_releases_2010/pr20100420a.html).

<sup>94</sup> See Press Release, Lawmakers Vow to Continue Pro-Life Fight, *supra* note 93.

<sup>95</sup> See *id.*; Press Release, Senate Republicans Advance Pro-Life Measures, *supra* note 93. House Bill 2656 overwhelmingly passed the Oklahoma House of Representatives and the Oklahoma Senate by a vote of 94 to 4 and 35 to 11 respectively. See Press Release, Lawmakers Vow to Continue Pro-Life Fight, *supra* note 93; Press Release, Senate Republicans Advance Pro-Life Measures, *supra* note 93.

<sup>96</sup> See OKLA. S. JOURNAL, 52-49, 2nd Sess. 1454 (2010); *Oklahoma Governor Brad Henry Vetoes Abortion Bills*, NEWS ON 6 (Apr. 24, 2010), <http://www.news6.com/story/12364814/oklahoma-governor-brad-henry-vetoes-abortion-bills?clienttype=printable>.

<sup>97</sup> See OKLA. S. JOURNAL, 52-47, 2nd Sess. 1370 (2010). The gubernatorial veto was overridden using the bill's emergency clause, which required a three-fourths majority vote from each chamber of the Oklahoma State legislature. Michael McNutt, *Henry Vetoes Anti-Abortion Bills*, NEWS OK (Apr. 24, 2010), <http://newsok.com/henry-vetoes-anti-abortion-bills/article/3456575>. During the subsequent veto override, the bill was first passed by the House of Representatives with an 84 to 12 vote, and was then passed by the Senate with a 36 to 12 vote. See OKLA. S. JOURNAL, 52-48, 2nd Sess. 1377 (2010); OKLA. S. JOURNAL, 52-47, 2nd Sess. 1370 (2010).

<sup>98</sup> See Hoberock, *supra* note 16; Liz Townsend, *Legislators Easily Override Governor's Veto: Oklahoma Adds to Recent Pro-Life Successes with Latest Omnibus Bill*, NAT'L RIGHT TO LIFE NEWS (May 2008), available at <http://www.nrlc.org/archive/news/2008/NRL05/Oklahoma.html>. Other support for the bill came from the Oklahoma State Medical Association, which tried to minimize con-



put it, “[t]he pressure in our culture for ‘quality control’ carries over for some to their attitude about babies, and has had a corrosive effect on our society’s respect for the sanctity of human life.”<sup>99</sup> Other groups, however, sharply criticized the statute, arguing that the Oklahoma law would interfere with doctor-patient relationships, allowing doctors to withhold information from their patients.<sup>100</sup>

### B. *The Pennsylvania Statute & Legal Challenges*

In 2010, Pennsylvania also enacted a statute (“the Pennsylvania statute”) prohibiting wrongful birth claims.<sup>101</sup> As with the Oklahoma statute, the Pennsylvania statute prohibited wrongful birth claims by barring the plaintiff from making the argument that, but for the negligence of the defendant, the plaintiff would have chosen to abort the pregnancy.<sup>102</sup>

After the Pennsylvania statute was enacted, two sets of parents separately challenged the validity of the statute.<sup>103</sup> In *Dansby v. Thomas Jefferson University Hospital*, the parents of a child born with spina bifida challenged the constitutionality of the Pennsylvania statute under the Pennsylvania and United States Constitutions.<sup>104</sup> The Pennsylvania Superior Court dismissed the plain-

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cerns about the statute, calling them “overblown.” Hoberock, *supra* note 16. Representative Sullivan explained that the concerns were unfounded because,

[p]hysicians are still required under their standard of care to provide all the relevant information they have to the patient . . . All this really says is that on the backside, someone can’t come out and say you should have advised me to have an abortion. That is a completely different issue than giving the mother the relevant information . . . Even if a physician was pro-life and was aware of abnormalities, it is still their obligation to advise the patient of what they know of and the patient has the ultimate decision . . . [i]t is not the physician’s decision at that point.

*Id.*

<sup>99</sup> Townsend, *supra* note 98. Lauinger also noted that wrongful birth claims “severely undermine society’s respect for persons with disabilities, and promote the specter of eugenic abortions.” *Id.*

<sup>100</sup> See *id.* Mary Alice Carr from the National Institute for Reproductive Health called the statute “shocking” and “egregious.” Hoberock, *supra* note 16. Carr said it is the first time that she was aware of that “the state has interceded in a doctor-patient relationship that would allow the withholding of information from a patient.” *Id.*

<sup>101</sup> See 42 PA. CONS. STAT. ANN. § 8305(a) (2010).

<sup>102</sup> See OKLA. STAT. tit. 63, § 1-741.12 (2013); 42 PA. CONS. STAT. ANN. § 8305(a). The Pennsylvania statute provides, in pertinent part, that “[t]here 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.” 42 PA. CONS. STAT. ANN. § 8305(a).

<sup>103</sup> See *Flickinger v. Wanczyk*, 843 F. Supp. 32, 32–33 (E.D. Pa. 1994); *Dansby*, 623 A.2d at 816.

<sup>104</sup> *Dansby*, 623 A.2d at 818. In *Dansby*, the mother’s physician mistakenly tested amniotic fluid from another woman and the mother was incorrectly told she was carrying a healthy fetus. *Id.* A lower court dismissed the *Dansbys*’ wrongful birth claim, finding that the Pennsylvania wrongful birth stat-

tiffs' constitutional arguments, however, finding that the Pennsylvania statute did not constrain a woman's right to choose to terminate her pregnancy.<sup>105</sup>

In *Flickinger v. Wanczyk*, the parents of another child born with spina bifida sued their healthcare providers for wrongful birth and, like the plaintiffs in *Dansby*, claimed that the Pennsylvania statute prohibiting wrongful birth claims violated 42 U.S.C. § 1983, the Civil Rights Act.<sup>106</sup> In their § 1983 claim, the Flickingers argued that the Pennsylvania statute deprived them of "their right to make a timely and informed decision as to whether to terminate the pregnancy at issue in this case."<sup>107</sup> Citing *Dansby*, the federal district court determined that the Pennsylvania statute did not violate the Civil Rights Act.<sup>108</sup> Despite the failure of these constitutional arguments, the Pennsylvania statute was recently invalidated on a technical issue and, therefore, is not currently in effect.<sup>109</sup>

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ute barred the claim. *Id.* at 817–18. On appeal, the Dansbys argued that the Pennsylvania statute was an unconstitutional violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution because it limited the fundamental right to choose to terminate a pregnancy. *Id.* at 818–19. Additionally, they argued that the Pennsylvania statute violated both Article I, section 1 and Article III, section 32 of the Pennsylvania Constitution because the statute limited "the exercise of a woman's fundamental right to choose an abortion over childbirth" and also treated medical malpractice victims unequally. *Id.* at 818–20.

<sup>105</sup> *Id.* at 819. The court explained that a woman's "freedom to decide [to have an abortion] is not impaired by a statute which denies her the right to bring an action against the physician who has negligently failed to advise her correctly regarding the health of the fetus." *Id.*

<sup>106</sup> *Flickinger*, 843 F. Supp. at 33–34. While she was pregnant, Deborah Flickinger underwent a prenatal test to determine if the fetus she was carrying had spina bifida, but because of a testing error, she was told that her child would be born healthy. *See id.* at 34. The Flickingers only learned that their daughter would be born with spina bifida when Deborah was 37 or 38 weeks pregnant, at which point she could not legally obtain an abortion in Pennsylvania. *Id.*

<sup>107</sup> *Id.* at 35. In order to make a successful claim under the Civil Rights Act, the plaintiff must show "that a person acting under the color of state law violated the claimant's constitutional rights." *Id.*; see 42 U.S.C. § 1983 (2012).

<sup>108</sup> See *Flickinger*, 843 F. Supp. at 33, 37.

<sup>109</sup> See 42 PA. CONS. STAT. ANN. § 8305(a) (2010); *Sernovitz v. Dershaw*, 57 A.3d 1254, 1266 (Pa. Super. Ct. 2012). In *Sernovitz v. Dershaw*, the Pennsylvania Superior Court held that the Pennsylvania statute was unconstitutional because it violated the state's "single-subject" rule. 57 A.3d at 1266. The Pennsylvania Constitution provides that "[n]o bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof." PA. CONST. art. III, § 3; *Sernovitz*, 57 A.3d at 1258. The court noted that the Pennsylvania statute violated this constitutional provision because it contained "a veritable potpourri of legislation" including legislation on magisterial district judges, DNA testing, and criminal and civil law. *Sernovitz*, 57 A.3d at 1263–64. The defendant and the Pennsylvania General Assembly, as an intervenor, have appealed the Superior Court's ruling to Pennsylvania's highest court. See *Sernovitz*, 57 A.3d at 1266, *appeal docketed*, 140 MAL 2014 (Pa. Feb. 26, 2013).

### C. The Arizona Statute

The Arizona legislature followed Oklahoma and Pennsylvania's lead and in 2012 passed its own statute prohibiting wrongful birth claims ("the Arizona statute").<sup>110</sup> Similar to the Oklahoma and Pennsylvania statutes, the Arizona statute prohibits wrongful birth claims by immunizing physicians from damages "in any civil action for wrongful birth based on a claim that, but for an act or omission of the defendant, a child or children would not or should not have been born."<sup>111</sup> In a departure from the Oklahoma statute, however, the Arizona statute explicitly states that its provisions do not apply to cases in which the physician's actions constitute "an intentional or grossly negligent act or omission."<sup>112</sup> In praising the passage of the Arizona statute, its sponsor, Senator Nancy Barto of Phoenix said that the language of the statute would "still allow 'true malpractice suits' to proceed."<sup>113</sup>

Although the Arizona statute is more narrowly tailored than the Oklahoma statute, members of the Arizona House of Representatives still expressed doubts about the constitutionality of the law.<sup>114</sup> During debate on the passage of the statute, Tim Fleming, the attorney for the Arizona House of Representatives Rules Committee, opined that the section of the statute that bars wrongful birth claims is unconstitutional.<sup>115</sup> Fleming explained that he believed that previous cases in Arizona had established a common law claim for both wrongful conception and wrongful birth.<sup>116</sup> In support of his contention, Fleming cited

<sup>110</sup> See ARIZ. REV. STAT. ANN. § 12-719 (2012).

<sup>111</sup> See *id.* § 12-719(A); OKLA. STAT. tit. 63, § 1-741.12 (2013); 42 PA. CONS. STAT. ANN. § 8305(a).

<sup>112</sup> See ARIZ. REV. STAT. ANN. § 12-719(D); OKLA. STAT. tit. 63, § 1-741.12.

<sup>113</sup> *Senate Approves Bill on 'Wrongful Births,'* ARIZ. CAPITOL TIMES (Mar. 6, 2012), <http://azcapitoltimes.com/news/2012/03/06/senate-approves-bill-on-wrongful-births/>. In contrast, critics of the Oklahoma statute have argued that the broader Oklahoma statute could also bar claims against physicians even when the physician acted intentionally in denying the woman information about the health of the fetus. See OKLA. STAT. ANN. tit. 63, § 1-741.12; Hoberock, *supra* note 16.

<sup>114</sup> See ARIZ. REV. STAT. ANN. § 12-719(A); OKLA. STAT. ANN. tit. 63, § 1-741.12; 42 PA. CONS. STAT. ANN. § 8305(a); Audio tape: Arizona House of Representatives Rules Committee (Mar. 22, 2012, 0:59–5:55), available at [http://azleg.granicus.com/ViewPublisher.php?view\\_id=13](http://azleg.granicus.com/ViewPublisher.php?view_id=13).

<sup>115</sup> See Arizona House of Representatives Rules Committee, *supra* note 114.

<sup>116</sup> See *Walker ex rel. Pizano v. Mart*, 790 P.2d 735, 738 (Ariz. 1990); *Univ. of Ariz. Health Sci. Ctr. v. Super. Ct. of State ex rel. Maricopa Cnty.*, 667 P.2d 1294, 1297 (Ariz. 1983); Arizona House of Representatives Rules Committee, *supra* note 114. Fleming also explained, however, that the portion of the statute that prohibits wrongful life claims is likely not unconstitutional, as *Walker* also held that Arizona did not recognize a cause of action for wrongful life. See ARIZ. REV. STAT. ANN. § 12-719(D) (2012); *Walker*, 790 P.2d at 741; Arizona House of Representatives Rules Committee, *supra* note 114. Therefore, if the Arizona statute were challenged, Fleming predicted that while a court would likely find the portion of the statute prohibiting wrongful birth claims to be unconstitutional, the court would also apply the doctrine of severability, allowing the remaining sections to remain

two earlier Arizona cases.<sup>117</sup> First, in *University of Arizona Health Center v. Superior Court of Arizona*, the state's highest court held that Arizona would recognize wrongful conception claims brought by parents alleging that the conception of a child was caused by the defendant's negligence.<sup>118</sup> Later, in *Walker ex rel. Pizano v. Mart*, the same court extended its prior analysis to hold that parents may bring wrongful birth claims if they establish that a doctor's negligence prevented them from choosing to terminate a pregnancy.<sup>119</sup> Based on these cases, Fleming said that he believed that Arizona courts do indeed recognize a claim for wrongful birth, and, therefore, the statute prohibiting the cause of action would likely be unconstitutional under the anti-abrogation clause of the Arizona constitution.<sup>120</sup>

Despite Fleming's misgivings, however, the Rules Committee agreed to a motion, stating that the bill was constitutional, and the Senate passed the bill.<sup>121</sup> The bill became law in April of 2012 and Arizona became the tenth state in the United States to enact a statute prohibiting the wrongful birth cause of action.<sup>122</sup>

### III. WRONGFUL BIRTH CLAIMS SHOULD BE PERMITTED TO PROCEED THROUGH THE JUDICIAL SYSTEM

Wrongful birth claims brought by the parents of children who are born with undiagnosed disabilities or other health conditions are valuable and necessary methods for parents to recover the medical costs and emotional damage of giving birth to a child with a severe disability or terminal disease.<sup>123</sup> Addi-

valid. See ARIZ. REV. STAT. ANN. § 12-719; *Walker*, 790 P.2d at 738, 741; Arizona House of Representatives Rules Committee, *supra* note 114.

<sup>117</sup> See *Univ. of Ariz.*, 667 P.2d at 1297; Arizona House of Representatives Rules Committee, *supra* note 114.

<sup>118</sup> *Univ. of Ariz.*, 667 P.2d at 1297; see Arizona House of Representatives Rules Committee, *supra* note 114.

<sup>119</sup> 790 P.2d at 738; see Arizona House of Representatives Rules Committee, *supra* note 114.

<sup>120</sup> See ARIZ. CONST. art. IX, § 6; ARIZ. REV. STAT. ANN. § 12-719(A); *Walker*, 790 P.2d at 738; *Univ. of Ariz.*, 667 P.2d at 1297; Arizona House of Representatives Rules Committee, *supra* note 114.

<sup>121</sup> See Arizona House of Representatives Rules Committee, *supra* note 114; *Senate Approves Bill on 'Wrongful Births'*, *supra* note 113. Senate Bill 1359 passed the Arizona state Senate 20 to 9. *Senate Approves Bill on 'Wrongful Births'*, *supra* note 113. Senator Barto, the sponsor of the bill, explained that she advocated prohibiting wrongful birth claims because the claims promote the idea that someone must be blamed when a child is born with a disability. See *id.*

<sup>122</sup> See ARIZ. REV. STAT. ANN. § 12-719 (2012); *Senate Approves Bill on 'Wrongful Births'*, *supra* note 113 (noting that "[i]f the bill becomes law, Arizona would join nine states barring both 'wrongful life' and 'wrongful birth' lawsuits").

<sup>123</sup> See *Robak v. United States*, 658 F.2d 471, 479 (7th Cir. 1981); *Greco v. United States*, 893 P.2d 345, 348-49 (Nev. 1995); *Berman v. Allan*, 404 A.2d 8, 14 (N.J. 1979); ANDREW SOLOMON, FAR FROM THE TREE: PARENTS, CHILDREN, AND THE SEARCH FOR IDENTITY 39-40 (2012); Hoberock, *supra* note 16; Green, *supra* note 51.

tionally, the availability of these claims also ensures that physicians are pressured to provide women with thorough and accurate information about their pregnancies.<sup>124</sup> State prohibitions on wrongful birth claims are dangerous because they leave parents with no recourse to recover the extraordinary costs and damages of giving birth to and raising a severely disabled child.<sup>125</sup> Additionally, statutes prohibiting wrongful birth claims infringe on the right of women to make an informed decision as to whether they will obtain an abortion.<sup>126</sup> Because statutes that bar wrongful birth claims deprive parents of the opportunity to recover damages and infringe on the rights of women, wrongful birth claims should not be prohibited and instead be allowed to proceed through the court system.<sup>127</sup>

### A. *The Dangers of Statutes that Prohibit Wrongful Birth Claims*

The current state laws that prohibit wrongful birth claims statutorily prohibit parents from recovering damages under claims in which they allege that, but for the negligence of the defendant, they would have exercised their choice to terminate a pregnancy.<sup>128</sup> Thus, in such cases, the entire emotional and financial burden of caring for the child is placed on the parents, even if they

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<sup>124</sup> See *Berman*, 404 A.2d at 14. In finding that the parents of a child born with Down syndrome could bring a claim for wrongful birth, the court in *Berman v. Allan* explained,

As in all other cases of tortious injury, a physician whose negligence has deprived a mother of this opportunity should be required to make amends for the damage which he has proximately caused. Any 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.

404 A.2d at 8–9, 14.

<sup>125</sup> See *Robak*, 658 F.2d at 479 (explaining that the birth of the unhealthy child, “and all expenses resulting therefrom, were thus the proximate result of defendant’s negligence” in failing to inform the plaintiffs of the fetus’s condition); *Greco*, 893 P.2d at 348–49 (explaining that the birth of an unhealthy child “is necessarily an unpleasant and aversive event and the cause of inordinate financial burden that would not attend the birth of a normal child”); Hoberock, *supra* note 16 (detailing the criticism surrounding the Oklahoma statute). The *Robak v. United States* court further explained that “[b]ut for the defendants’ breach of duty to properly treat and advise the plaintiff-parents, they would not have been required to undergo the expenditures alleged.” 658 F.2d at 479 (quoting *Speck v. Finnegold*, 408 A.2d 496, 508 (Pa. Super. Ct. 1979)).

<sup>126</sup> See *Roe v. Wade*, 410 U.S. 113, 114 (1973), *holding modified by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>127</sup> See *Robak*, 658 F.2d at 479; *Greco*, 893 P.2d at 348–49; Hoberock, *supra* note 16.

<sup>128</sup> See ARIZ. REV. STAT. ANN. § 12-719 (2012); MINN. STAT. § 145.424 (2010); MO. REV. STAT. § 188.130 (2000); OKLA. STAT. tit. 63, § 1-741.12 (2013); S.D. CODIFIED LAWS § 21-55-2 (2004).

would have exercised their choice not to continue the pregnancy if they had known that their child would be born unhealthy or terminally ill.<sup>129</sup>

The medical costs of caring for a terminally ill or disabled child can be enormous, and many parents initiate wrongful birth suits with the hope that they will be able to recover some of those costs in order to better care for their child.<sup>130</sup> Many of the expenses sought include the costs associated with long-term care and the treatment of future medical problems during the child's lifetime.<sup>131</sup> In addition to the medical costs of caring for a disabled or sick child, many parents of disabled children also face emotional and psychological damage stemming from the difficulties of caring and grieving for an ill child.<sup>132</sup> Many

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<sup>129</sup> See *Robak*, 658 F.2d at 479; *Greco*, 893 P.2d at 348–49.

<sup>130</sup> See SOLOMON, *supra* note 123, at 39–40 (highlighting the expenses associated with raising a child with disabilities); Andrew Gregory, *NHS in £54M Payouts for Not Warning Parents of Disabled Babies About Abnormalities at Early Stage*, MIRROR (London), Nov. 23, 2012, available at <http://www.thefreeibrary.com/NHS+IN+PS54M+PAYOUTS+FOR+DISABLED+BABIES%3B+Parents+sue+for+not+being...-a0309660554> (stating that the only option for these parents is to “seek redress in order to meet the child’s needs”); Green, *supra* note 51 (explaining that parents brought a wrongful birth suit for the purpose of recovering their daughter’s medical expenses). In his discussion of wrongful birth and wrongful life claims, Solomon explained:

Although wrongful-life cases address an ontological question about what kind of life is worth living, this is hardly what prompts them. Being disabled entails colossal expense, and most parents who launch wrongful-life suits do so in an attempt to guarantee care for their children. In an ugly twist, mothers and fathers must discharge the obligations of responsible parenting by stating in legal documents that they wish their child had never been born.

SOLOMON, *supra* note 123, at 39–40.

<sup>131</sup> Green, *supra* note 51 (awarding the parents of a child born with Down syndrome three million dollars in damages in a wrongful birth action, meant to “cover the estimated extra lifetime costs of caring for their daughter,” including speech and physical therapy and costs to treat possible future medical ailments).

<sup>132</sup> See Rose Steele, *Navigating Uncharted Territory: Experiences of Families When a Child Is Dying*, 21 J. PALLIATIVE CARE 35, 35 (2005), available at 2005 WLNR 6575873; Emily Rapp, *Notes from a Dragon Mom*, N.Y. TIMES, Oct. 16, 2011, at SR12. Emily Rapp, the mother of a son born with Tay-Sachs disease, described the emotional challenges of raising a child with a terminal illness, explaining that when her son, Ronan, was diagnosed with Tay-Sachs disease after he was born, “it was almost as if he died that day.” Rapp, *supra*; *Channeling Dragons to Parent Terminally-Ill Kids*, NAT’L PUB. RADIO (Nov. 17, 2011), <http://www.npr.org/2011/11/17/142466013/channeling-dragons-to-parent-terminally-ill-kids>. Because there is no treatment for Tay-Sachs disease, Ronan will likely die before the age of three, after “regressing into a vegetative state,” becoming paralyzed, experiencing seizures, and losing all of his senses. Rapp, *supra*. Although she noted that caring for a terminally ill child provides parents with a unique perspective on the fleeting nature of life, she also described the inherent frustrations of parenting a child, knowing, “[n]o matter what we do for Ronan . . . he will die.” See *id.* As Rapp put it, the goals of the parents of terminally ill children “are simple and terrible: to help our children live with minimal discomfort and maximum dignity. We will not launch our children into a bright and promising future, but see them into early graves. We will prepare to lose them and then, impossibly, to live on after that gutting loss.” *Id.*

women who had the opportunity to make the informed decision to terminate their pregnancy have expressed relief that they received an accurate diagnosis of the fetus's health condition and were able to choose to terminate the pregnancy without having to give birth to a child who would be ill and suffer.<sup>133</sup>

Further illustrating the emotional and financial costs of parenting a disabled child, these parents also reported loss of income and marital problems.<sup>134</sup> Families caring for children with terminal illnesses report adverse psychological effects associated with caring for the ill child, mainly that, “[s]trong emotions of fear, uncertainty, and grief [that] were always present, but changed in intensity over time and gave momentum to the process.”<sup>135</sup> Despite these extraordinary

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<sup>133</sup> See Brief for the National Women's Law Center et al. as Amici Curiae Supporting Respondent at 12–13, *Gonzales v. Carhart*, 550 U.S. 124 (2006) (No. 05-1382) [hereinafter Brief Amici Curiae]; Rebouché & Rothenberg, *supra* note 29, at 983–84. Tammy Watts obtained an abortion when her doctor and an additional specialist performed prenatal genetic testing and informed her that her child would be born with the terminal disease trisomy-13. Brief Amici Curiae, *supra*, at 12–13. Watts explained her decision to terminate the pregnancy, saying,

I had a choice. I could have carried this pregnancy to term, knowing that everything was wrong. I could have gone on for 2 more months doing everything that an expectant mother does, but knowing my baby was going to die, and would probably suffer a great deal before dying. My husband and I would have to endure that knowledge and watch that suffering. We could never have survived that, and so we made the choice together, my husband and I, to terminate this pregnancy.

*Id.* (quoting *Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong., 1st Sess. 72 (1995) (statement of Tammy Watts)). Similarly, Viki Wilson chose to undergo an abortion when she learned that the fetus she was carrying had developed with severe defects. *Id.* at 11–12. She and her husband concluded that aborting the pregnancy was “a humane solution for the fetus” and they categorized the procedure as their “salvation.” *Id.* (quoting *The Partial Birth Abortion Ban Act of 1995: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 161–62 (1995) (statement of Vicki Wilson)).

<sup>134</sup> See Steele, *supra* note 132, at 35. In a study of families of children with progressive, life-threatening illnesses, the researcher found that the majority of parents studied remained married, yet many had marriage problems. *Id.* In addition, all of the families studied “reported a substantial drop in actual or anticipated income due to the child’s illness.” *Id.*

<sup>135</sup> *Id.* The study noted that families experienced “intense” grieving, particularly during the first year following the child’s diagnosis. *Id.* The “many losses” that the families faced after the child’s diagnosis added to these feelings of grief:

[The families] lost their dreams for the child, and whatever they had planned for their lives was destroyed. They also lost the children and the family they had expected. Many of the [terminal illnesses] were genetic, so parents often chose to have no more children once they received the child’s diagnosis. Families accumulated many “smaller” losses as well. They watched as the child lost motor and verbal skills, or required increasingly complex equipment. Parents had to adjust to each loss. Yet, there was seldom time to adjust to one loss before another loss occurred. The magnitude of the distress caused by what might seem, on the surface, small or insignificant losses was not apparent to all health professionals.

medical and emotional costs, parents in states that prohibit wrongful birth claims are completely precluded from recovering the costs of giving birth to and raising an unhealthy or terminally ill child.<sup>136</sup> Had they been given all of the essential information about the pregnancy, these parents may have chosen to prevent these emotional and financial costs by terminating the pregnancy.<sup>137</sup>

In addition to leaving the burden of financial costs solely on parents, statutes prohibiting wrongful birth claims eliminate the essential pressure of malpractice lawsuits, which help to ensure that doctors perform their duties to their patients.<sup>138</sup> Wrongful birth claims are essentially an extension of existing negligence law, applied to new genetic and prenatal testing technology and the fundamental right to obtain an abortion.<sup>139</sup> Without this subset of negligence claims, doctors are essentially “immunize[d] from liability” even when they fail to provide their patients with the thorough and accurate information they need in order to make an informed choice about whether or not to terminate their pregnancy.<sup>140</sup> Wrongful birth claims also ensure the continued availability of accurate prenatal and genetic testing.<sup>141</sup> There is great value in the existence of genetic testing and prenatal diagnoses, as these are integral aspects of informed family planning and are also the only methods of preventing children from being born only to suffer from terminal disease.<sup>142</sup>

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*Id.* Additional adverse psychological effects also stem from the uncertainty associated with a terminal diagnosis. *Id.* Despite a terminal diagnosis, “families remained uncertain about how the child would respond to medical treatments, the length of time that the child could be expected to live, and how their ability to manage would be altered as the child’s disease progressed.” *Id.* This uncertainty surrounding the illness can result in extreme stress. *Id.*

<sup>136</sup> See ARIZ. REV. STAT. ANN. § 12-719 (2012); MINN. STAT. § 145.424 (2010); MO. REV. STAT. § 188.130 (2000); OKLA. STAT. tit. 63, § 1-741.12 (2013); S.D. CODIFIED LAWS § 21-55-2 (2004); *Robak*, 658 F.2d at 479; *Greco*, 893 P.2d at 348–49. The *Robak* court found in favor of the plaintiff-parents, holding that the defendants’ negligence prevented the Robaks from making “an informed decision” regarding the continuation of the plaintiff’s pregnancy. 658 F.2d at 476. Furthermore, the court noted that as a result of this negligence, the Robaks incurred “large expenses for [their daughter’s] care and special treatment.” *Id.*

<sup>137</sup> See *Robak*, 658 F.2d at 479; *Greco*, 893 P.2d at 348–49.

<sup>138</sup> See Hoberock, *supra* note 16.

<sup>139</sup> See *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 696 (E.D. Pa. 1978).

<sup>140</sup> *Robak*, 658 F.2d at 476 (quoting *Berman*, 404 A.2d at 14).

<sup>141</sup> See *Roe*, 410 U.S. at 114; *Robak*, 658 F.2d at 476; *Smith v. Cote*, 513 A.2d 341, 343–44 (N.H. 1986).

<sup>142</sup> See *Gildiner*, 451 F. Supp. at 696 (explaining that “Tay-Sachs disease can be prevented only by accurate genetic testing combined with the right of parents to abort afflicted fetuses within appropriate time limitations”); *Molloy v. Meier*, 660 N.W.2d 444, 452 (Minn. Ct. App. 2003) (explaining that genetic “testing is important because genetic-disease-carrier status and the likelihood of future genetic defects are important factors in family-planning decisions”). In *Gildiner v. Thomas Jefferson University Hospital*, the court further explained that, “[s]ociety has an interest in ensuring that genetic testing is properly performed and interpreted. The failure to properly perform or interpret an amnio-



The Oklahoma wrongful birth prohibition is particularly worrisome because it purports to prohibit all medical malpractice claims based on the wrongful birth theory, even in situations where the physician's misrepresentation of the fetus's condition was intentional.<sup>143</sup> As a result, physicians in Oklahoma could legally deceive patients about the results of tests, forcing women to rely on inaccurate information about their pregnancy.<sup>144</sup> As the Oklahoma governor noted in vetoing the bill, preventing the recovery of damages in wrongful life or birth actions "would allow unscrupulous, reckless or negligent physicians to knowingly withhold information or negligently provide inaccurate information to pregnant women without facing the potential of legal consequences."<sup>145</sup>

Statutes that prohibit wrongful birth claims also limit the right of women to choose to terminate their pregnancies.<sup>146</sup> In *Roe v. Wade*, the Supreme Court recognized that women have a constitutional right to choose to end a pregnancy.<sup>147</sup> Following *Roe*, wrongful birth claims increased largely because a successful wrongful birth claim requires the plaintiffs to show that, but for the negligence of the defendant, they would have exercised their constitutional right to terminate the pregnancy.<sup>148</sup> When a healthcare provider's negligence results in an incorrect diagnosis of a fetus's health or the diagnosis information is not disclosed, the pregnant woman cannot make a fully informed choice to terminate or to continue with the pregnancy.<sup>149</sup>

Exploiting the moral and political controversy surrounding abortion, opponents of the wrongful birth cause of action argue that any legal claim that is

centesis could cause either the abortion of a healthy fetus, or the unwanted birth of a child afflicted with Tay-Sachs disease." *Gildiner*, 451 F. Supp. at 696.

<sup>143</sup> See OKLA. STAT. tit. 63, § 1-741.12 (2013); Hoberock, *supra* note 16.

<sup>144</sup> See OKLA. STAT. tit. 63, § 1-741.12 (2013); Hoberock, *supra* note 16.

<sup>145</sup> See OKLA. S. JOURNAL, 52-49, 2nd Sess. 1454 (2010). Governor Henry further stated, "It is unconscionable to grant a physician legal protection to mislead or misinform a pregnant woman in an effort to impose his or her personal beliefs on his patient." *Id.*

<sup>146</sup> See *Roe*, 410 U.S. at 114 (holding that state laws criminalizing abortion "violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy"); *Robak*, 658 F.2d at 476. In *Robak*, the defendant argued that the plaintiffs' wrongful birth claim should be dismissed in part because it raised political and moral questions surrounding abortions. 658 F.2d at 476. The court rejected this argument, explaining that the "Supreme Court has already settled that issue . . . [when it held in *Roe*] . . . that it was the mother's constitutional right to decide during the first trimester of pregnancy whether to obtain an abortion." *Id.*

<sup>147</sup> See *Roe*, 410 U.S. at 114.

<sup>148</sup> *Geler v. Akawie*, 818 A.2d 402, 409 (N.J. Super. Ct. App. Div. 2003); *Greco*, 893 P.2d at 346; *Sernovitz v. Dershaw*, 57 A.3d 1254, 1256 (Pa. Super. Ct. 2012); see *Roe*, 410 U.S. at 114; *Smith*, 513 A.2d at 345-46 (explaining that advances in genetic testing technology, coupled with the increased availability of legal abortions after *Roe* account for the increase in wrongful birth cases in the late twentieth century).

<sup>149</sup> See *Geler*, 818 A.2d at 409; *Greco*, 893 P.2d at 346; *Sernovitz*, 57 A.3d at 1256.

based on abortion rights is an affront to the child's right to life.<sup>150</sup> This argument was first introduced by the court in *Gleitman v. Cosgrove*, the seminal wrongful birth case.<sup>151</sup> The *Gleitman* court rejected the parents' wrongful birth claim, in part because the "countervailing public policy supporting the preciousness of human life" outweighed the parents' wrongful birth claim.<sup>152</sup>

As wrongful birth claims increased after *Gleitman*, opponents also argued that the claims could cause individuals to selectively abort undesired fetuses, leading to eugenic practices.<sup>153</sup> Additionally, proponents of wrongful birth prohibitions contend that recognizing the wrongful birth cause of action "could induce physicians to recommend the abortion of all marginally defective fetuses," perhaps to avoid potential liability in a subsequent wrongful birth action.<sup>154</sup>

Despite these moral arguments, *Roe* established a woman's constitutional right to terminate her pregnancy.<sup>155</sup> Therefore, women may seek and physicians should provide any information that would inform a woman's choice to obtain an abortion.<sup>156</sup> Prohibiting the wrongful birth cause of action, however, permits physicians to withhold information from their patients without legal repercussions, thereby threatening the constitutional rights of American women to choose to terminate their pregnancies.<sup>157</sup>

Finally, some argue that state legislatures should be permitted to prohibit wrongful birth claims if such claims contradict the state's public policy against

<sup>150</sup> See *Smith*, 513 A.2d at 345; *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (N.J. 1967). In *Gleitman v. Cosgrove*, the court further explained that to allow a wrongful birth claim would be to deny "the sanctity of the single human life," and that the child's right to live exceeded and precluded the parents' right not to endure financial and emotional injury. 227 A.2d at 693.

<sup>151</sup> See *Smith*, 513 A.2d at 345; *Gleitman*, 227 A.2d at 693.

<sup>152</sup> *Smith*, 513 A.2d at 345; *Gleitman*, 227 A.2d at 693.

<sup>153</sup> See *Gildiner*, 451 F. Supp. at 695 (rejecting the defendants' argument that "recognition of a cause of action for damages arising from the denial of an opportunity to obtain an abortion could encourage a 'Fascist-Orwellian societal attitude of genetic purity'"); Gregory, *supra* note 130; Townsend, *supra* note 98, at 1 (citing arguments that wrongful birth suits "severely undermine society's respect for persons with disabilities and promote [eugenics]," the belief that the genetic quality of the human race can be selectively improved).

<sup>154</sup> *Gildiner*, 451 F. Supp. at 695.

<sup>155</sup> See *Roe*, 410 U.S. at 114 (holding that state laws criminalizing abortion "violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy"); *Robak*, 658 F.2d at 476 (stating that the issue of a woman's right to an abortion was settled in *Roe* and, therefore, applies to wrongful birth claims); *Smith*, 513 A.2d at 343–44 (noting that, "[i]t follows from *Roe* that the plaintiff . . . may seek, and the defendants may provide, information and advice that may affect the exercise of that right" to obtain an abortion).

<sup>156</sup> *Smith*, 513 A.2d at 343–44.

<sup>157</sup> See *Roe*, 410 U.S. at 114; *Robak*, 658 F.2d at 476; *Smith*, 513 A.2d at 343–44.

abortion.<sup>158</sup> Additionally, opponents have argued that these claims should not be allowed at common law, as they go against the public policy of the state.<sup>159</sup> In exploring this argument, courts have noted that it is the duty of the state legislature, not the judiciary, to establish these public policies.<sup>160</sup> Thus, those opponents of the wrongful birth cause of action argue that any cause of action that possibly goes against that state's public policy should be created by the state, rather than by the courts.<sup>161</sup>

These arguments fail.<sup>162</sup> First, abortion is legal in all states in the United States, so there is no existing public policy in any state that runs completely against the recognition of abortion rights.<sup>163</sup> Second, the wrongful birth cause of action simply applies new genetic and prenatal testing technology, along with the constitutional right to obtain an abortion, to the existing common law negligence cause of action.<sup>164</sup> Thus, "[t]he determination of the scope of the common law doctrine of negligence is within the province of the judiciary."<sup>165</sup>

<sup>158</sup> See *Gildiner*, 451 F. Supp. at 695 (finding that "a cause of action for damages arising from the denial of an opportunity to obtain an abortion is contrary to the public policy of the Commonwealth of Pennsylvania"); *Reed v. Campagnolo (Reed I)*, 630 A.2d 1145, 1151 (Md. 1993) (explaining that although "the public policy of Maryland may foster the development and preservation of the family relationship[, it] does not . . . compel the adoption of a per se rule denying recovery by parents of child rearing costs from the physician whose negligence has caused their expenditure") (quoting *Jones v. Malinowski*, 473 A.2d 429, 435 (Md. 1984)).

<sup>159</sup> See *Reed v. Campagnolo (Reed II)*, 810 F. Supp. 167, 170 (D. Md. 1993); *Gaver v. Harrant*, 557 A.2d 210, 211, 216 (Md. 1989) (declining to recognize a new cause of action for plaintiff-children's loss of parental society and affection, in part because the judicial creation of "a new cause of action involves serious public policy concerns" and it is typically the function of the Maryland legislature to declare the public policy of the state).

<sup>160</sup> See *Reed II*, 810 F. Supp. at 170; *Gaver*, 557 A.2d at 216.

<sup>161</sup> See *Reed II*, 810 F. Supp. at 170; *Gaver*, 557 A.2d at 216.

<sup>162</sup> See *Roe*, 410 U.S. at 114 (recognizing that states cannot override "a woman's qualified right to terminate her pregnancy"); *Reed II*, 810 F. Supp. at 170 (noting that the recognition of the wrongful birth cause of action "would not necessarily conflict with any existing public policy defined by the [Maryland] Legislature" because "abortion is and was at all relevant times legal in Maryland"); *Gildiner*, 451 F. Supp. at 695–96 (finding a link between a woman's "constitutionally-protected right to obtain an abortion" and society's "interest in insuring that genetic testing is properly performed and interpreted"); *Smith*, 513 A.2d at 343–44 (concluding that since *Roe* held that a woman has a "constitutionally secured right to terminate a pregnancy," a woman "may seek" and her doctors "may provide, information and advice that may affect the exercise of that right").

<sup>163</sup> See *Roe*, 410 U.S. at 114; *Gildiner*, 451 F. Supp. at 695–96; *Smith*, 513 A.2d at 343–44.

<sup>164</sup> *Gildiner*, 451 F. Supp. at 696.

<sup>165</sup> *Id.*

### B. *Wrongful Birth Claims Should Be Permitted to Proceed as Common Law Causes of Action*

It is not the role of state legislatures to interfere with parents' rights by prohibiting the wrongful birth cause of action.<sup>166</sup> Instead, wrongful birth claims should be decided by the judicial system.<sup>167</sup> Examples of successful wrongful birth claims in states that do allow such claims, as well as the prevalence of similar causes of action, demonstrate that states should not prohibit wrongful birth claims.<sup>168</sup>

Although the policy behind wrongful birth claims is politically and morally controversial, the essential tenets of the claim are the same as those for medical malpractice, based on the common law negligence cause of action.<sup>169</sup> In an apt description, some courts have grounded wrongful birth claims in the context of other medical malpractice actions, such as those in which a physician fails to diagnose cancer in a patient.<sup>170</sup> The court in *Greco v. United States* explained, “[e]ven though the physician did not *cause* the cancer, the physician can be held liable for damages resulting from the patient’s decreased opportunity to fight the cancer, and for the more extensive pain, suffering, and medical treatment the patient must undergo by reason of the negligent diagnosis.”<sup>171</sup>

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<sup>166</sup> See *Smith*, 513 A.2d at 343–44 (finding that the right to bring a wrongful birth claim follows from the constitutionally-protected right to obtain an abortion); *Berman*, 404 A.2d at 14 (recognizing the plaintiff’s claim for wrongful birth and explaining that to do otherwise “would in effect immunize from liability those in the medical field providing inadequate guidance”); Hoberock, *supra* note 16 (explaining that the Oklahoma statute may intercede in the doctor-patient relationship).

<sup>167</sup> See *Berman*, 404 A.2d at 14 (explaining that “a physician whose negligence has deprived a mother of [the opportunity to decide whether her fetus should be aborted] should be required to make amends for the damage which he has proximately caused” and that this determination should be made in a court of law).

<sup>168</sup> See *Walker ex rel. Pizano v. Mart*, 790 P.2d 735, 738 (Ariz. 1990) (recognizing wrongful birth as a cause of action in Arizona); *Williams v. Univ. of Chi. Hosps.*, 688 N.E.2d 130, 132–33 (Ill. 1997) (describing similar causes of action, such as wrongful conception and wrongful life, that allow parents and children to recover damages for a doctor’s negligence related to prenatal testing and birth); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 483 (Wash. 1983) (recognizing wrongful birth as a cause of action in Washington); *Evans v. Livingston Healthcare*, No. DV-11-990B, slip op. at 33–34 (Mont. 18th J. Dist. Ct. June 18, 2012), available at <http://lawyersusaonline.com/wp-files/pdfs-4/evans-v-livingston-healthcare.pdf> (recognizing wrongful birth as a cause of action in Montana).

<sup>169</sup> See *Robak*, 658 F.2d at 476 (explaining that a wrongful birth claim “is little different from an ordinary medical malpractice action”); *Conner v. Stelly*, 830 So. 2d 1102, 1107 (La. Ct. App. 2002) (characterizing wrongful birth as a medical malpractice claim); *Molloy*, 660 N.W.2d at 444–45, 450 (classifying the plaintiffs’ wrongful birth action simply as a medical malpractice action).

<sup>170</sup> See *Conner*, 830 So. 2d at 1107; *Molloy*, 660 N.W.2d at 450; *Greco*, 893 P.2d at 349.

<sup>171</sup> *Greco*, 893 P.2d at 349. The *Greco* court applied the cancer analogy to a mother’s wrongful birth action, explaining,

[t]he “chance” lost here, was [the plaintiff’s] legally protected right to choose whether to abort a severely deformed fetus. If we were to deny [the plaintiff’s] claim, we would,

Thus, wrongful birth suits simply extend the existing common law of negligence and the established constitutional right to abortion to apply to scientific advances in genetic and prenatal testing.<sup>172</sup> Wrongful birth claims should, therefore, be allowed to proceed at common law, as failing to do so would “leave ‘a void in the area of recovery for medical malpractice’ and dilute the standard of professional conduct in the area of family planning.”<sup>173</sup>

Wrongful birth claims are also very similar to wrongful conception or wrongful pregnancy claims that many states allow at common law, including some states that have statutorily prohibited wrongful birth claims.<sup>174</sup> A wrongful conception claim is brought by the parents of a child born after a contraceptive failure or a negligently performed sterilization procedure.<sup>175</sup> The claim is brought to recover damages for the expenses of the unwanted pregnancy, and parents are typically able to recover damages for the costs of giving birth to and caring for the unwanted child.<sup>176</sup>

Two Arizona cases that allowed common law claims for wrongful conception and wrongful birth demonstrate the legal similarities between the two claims.<sup>177</sup> In *University of Arizona Health Sciences Center v. Superior Court of State in & for Maricopa County*, the Arizona Supreme Court held that the state would recognize a common law wrongful conception claim and that the plaintiff-parents in those cases could recover damages resulting from giving birth to and caring for the healthy child.<sup>178</sup> The court also explained that wrongful con-

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in effect, be groundlessly excepting one type of medical malpractice from negligence liability. We see no reason to treat this case any differently from any other medical malpractice case.

*Id.*

<sup>172</sup> *Evans*, No. DV-11-990B at 28–29.

<sup>173</sup> See *Smith*, 513 A.2d at 344, 347 (quoting *Kingsbury v. Smith*, 442 A.2d 1003, 1005 (N.H. 1982)); *Berman*, 404 A.2d at 14.

<sup>174</sup> See *Walker*, 790 P.2d at 738 (holding that Arizona would recognize a common law claim for wrongful birth); *Williams*, 688 N.E.2d at 132–33 (noting that wrongful birth claims are similar to wrongful conception claims); *Hatter v. Landsberg*, 563 A.2d 146, 146, 150 (Pa. Super. Ct. 1989) (holding that plaintiffs were entitled to “recover medical expenses, wage loss, and pain and suffering resulting from pregnancy”). Despite legislative attempts to prohibit wrongful birth claims, both Pennsylvania and Arizona continue to recognize wrongful conception claims. *Univ. of Ariz. Health Sci. Ctr. v. Super. Ct. of State In & For Maricopa Cnty.*, 667 P.2d 1294, 1294 (Ariz. 1983); *Landsberg*, 563, A.2d at 146.

<sup>175</sup> *Williams*, 688 N.E.2d at 132–33.

<sup>176</sup> See *id.*; *Cockrum v. Baumgartner*, 447 N.E.2d 385, 387 (Ill. 1983).

<sup>177</sup> See *Walker*, 790 P.2d at 738; *Univ. of Ariz.*, 667 P.2d at 1296.

<sup>178</sup> 667 P.2d at 1294, 1300. Patrick and Jeanne Heimann sued Patrick’s doctor after his vasectomy operation failed and Jeanne became pregnant with the couple’s fourth child. *Id.* at 1296. Although the child was born healthy, the Heimanns sued for wrongful conception, arguing that because of the doctor’s negligence, they were financially unable to provide for themselves, their three older children and the newest child, whose birth was neither planned nor desired. *Id.* The court held that the plaintiffs

ception actions could be decided by a jury and that damages should not be treated differently in wrongful conception than in other tort cases.<sup>179</sup> Seven years later, demonstrating the legal similarities between the two causes of action, the Arizona court, in *Walker ex rel. Pizano v. Mart*, extrapolated from the principles established in *University of Arizona* to determine that the state would allow wrongful birth claims at common law.<sup>180</sup> The court held, with little discussion, that the principles established in *University of Arizona* required that the state allow parents to make wrongful birth claims.<sup>181</sup>

Although Arizona went on to statutorily prohibit wrongful birth claims, the legal similarities between the wrongful birth and wrongful conception causes of action show that both can be successfully addressed as common law torts.<sup>182</sup> While Oklahoma, Arizona, and Pennsylvania all chose to prohibit wrongful birth claims together with wrongful life claims, wrongful birth claims are actually more similar to wrongful conception claims because they are brought by the parents, not the child.<sup>183</sup> Additionally, wrongful birth claims are even more valuable to parents than wrongful conception claims, as the emotional and medical costs of caring for a disabled or unhealthy child can be enormous compared to the costs of raising a healthy child.<sup>184</sup>

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could bring their wrongful conception action and that the trier of fact should weigh and consider a number of financial and nonfinancial factors associated with the birth of the unplanned child, including family size, family income, age of the parents, and marital status. *Id.* at 1294, 1300.

<sup>179</sup> *Id.* at 1300–01. The court explained, “[o]ne of the basic principles of damages law is the concept that a wrongdoer may be held liable for all damages which he may have caused and all costs which the victim may sustain as a result of the wrong.” *Id.* at 1300. The court went on to state, “[b]y allowing the jury to consider the future costs, both pecuniary and non-pecuniary, of rearing and educating the child, we permit it to consider all the elements of damage on which the parents may present evidence.” *Id.* at 1301.

<sup>180</sup> See *Walker*, 790 P.2d at 736–38. In *Walker*, Laura Walker sued her doctor for wrongful birth after he negligently failed to diagnose her with rubella during her pregnancy. *Id.* at 736–37. Laura’s daughter was born with severe birth defects caused by rubella syndrome. *Id.* But for the doctor’s negligence, Laura would have terminated her pregnancy. See *id.* at 737. She sued the doctors, “asserting her own claim for ‘wrongful birth,’ and a claim for ‘wrongful life’ on [her daughter’s] behalf.” *Id.* at 737. The court dismissed the wrongful life claim, but acknowledged that the parents could bring a wrongful birth claim. See *id.* at 735, 738.

<sup>181</sup> *Id.* at 738.

<sup>182</sup> See ARIZ. REV. STAT. ANN. § 12-719 (2012); *Walker*, 790 P.2d at 738; *Univ. of Ariz.*, 667 P.2d at 1300.

<sup>183</sup> See ARIZ. REV. STAT. ANN. § 12-719; OKLA. STAT. tit. 63, § 1-741.12 (2013); 42 PA. CONS. STAT. ANN. § 8305(a) (2010); *Williams*, 688 N.E.2d at 132–33 (noting that wrongful conception actions and wrongful birth actions are brought by the parents, while wrongful life actions are asserted on behalf of the child). Pennsylvania and Arizona recognize wrongful conception claims. *Univ. of Ariz.*, 667 P.2d at 1294; *Landsberg*, 563, A.2d at 146.

<sup>184</sup> See *Williams*, 688 N.E.2d at 132 (stating that wrongful conception claims involve a healthy child); SOLOMON, *supra* note 123, at 39–40 (explaining that since “being disabled entails colossal expense . . . most parents who launch wrongful-life suits do so in an attempt to guarantee care for their

Examples of jury verdicts and settlements from states that do allow wrongful birth claims at common law show the enormous value of these claims to parents.<sup>185</sup> In 2012, a Montana district court judge recognized that a couple that gave birth to a child with cystic fibrosis could make a claim that their healthcare providers' negligence deprived them of the opportunity to terminate the pregnancy.<sup>186</sup> Notably, however, the court refused to characterize the claim as one for wrongful birth, stating instead that the wrongful birth label is "misleading and inflammatory."<sup>187</sup> The court instead found that the claim was an extension of existing common law principles to the technological advances of genetic prenatal testing, within the context of the law recognizing a woman's right to terminate her pregnancy.<sup>188</sup>

In Oregon, Florida, and New York, jury verdicts and settlements in wrongful birth claims also allowed parents to successfully recover for the enormous emotional and medical costs of raising their children.<sup>189</sup> For exam-

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children"); Rapp, *supra* note 132 (recognizing the emotional harm that results from caring for a terminally ill child); Gregory, *supra* note 130 (highlighting the fact that wrongful birth claims can involve children who require extensive care due to their serve disabilities).

<sup>185</sup> See *Harbeson*, 656 P.2d at 486 (holding that Washington would recognize wrongful birth and wrongful life actions); *Evans*, No. DV-11-990B at 33–34 (holding that Montana would recognize common law wrongful birth claims); Green, *supra* note 51 (discussing a wrongful birth case where the parents recovered nearly \$3 million); Lohr, *supra* note 13 (discussing a wrongful birth case where the parents recovered \$4.5 million).

<sup>186</sup> *Evans*, No. DV-11-990B at 3; Pat Murphy, *Wrongful Birth Claim Allowed for Child's Cystic Fibrosis, Says Gallatin County District Court*, LAWYERS USA (June 25, 2012), available at 2012 WLNR 13743774. Kerrie and Joe Evans opted to undergo prenatal testing of their fetus, but because of a nurse's paperwork error, they did not discover that their daughter had cystic fibrosis until she was born. *Evans*, No. DV-11-990B at 3–4, 6, 8–9. The Evans sued a group of healthcare providers, including the nurse who completed the prenatal testing paperwork, seeking recovery for the medical expenses incurred in treating their daughter, as well as "compensation for their 'mental and emotional distress,' 'loss of consortium,' 'impairment of their capacity to pursue an established course of life,' 'medical and psychological care and attention,' 'lost wages,' and 'lost earning capacity.'" *Id.* at 10, 12–13. The defendants argued that Kerrie and Joe's claim should be dismissed because Montana does not recognize wrongful birth claims. See *id.* at 13; Murphy, *supra*.

<sup>187</sup> *Evans*, No. DV-11-990B at 29 (emphasis removed).

<sup>188</sup> See *id.* at 28; Murphy, *supra* note 186. The court also rejected the defendants' arguments that allowing such claims would "open the door for a wide range of claims by parents who allege (with the benefit of hindsight) that they would have aborted their child had they known he or she would suffer from a genetic 'defect.'" *Evans*, No. DV-11-990B at 30 (internal quotation marks omitted). The court contended that such cases will continue to be rare because they require parents to acknowledge their "desire for an abortion after the child's birth." *Id.* The court noted that even if such claims were to become more prevalent, the Montana constitution guarantees that the state's courts will be "'open to every person, and speedy remedy afforded for every injury of person, property, or character.'" *Id.* at 19 (quoting MONT. CONST. art. XI, § 16).

<sup>189</sup> Green, *supra* note 51 (describing a nearly \$3 million jury verdict stemming from a wrongful birth claim in Oregon); Lohr, *supra* note 13 (detailing a \$4.5 million jury verdict in Florida and an undisclosed settlement in New York stemming from wrongful birth claims).

ple, Sharon Hoffman's doctor failed to test her for the Tay-Sachs gene, and her son was born with the disease.<sup>190</sup> Sharon and her husband, who live in New York, settled with Sharon's doctor out of court for an undisclosed amount of damages based on the costs of raising their son.<sup>191</sup> In Florida, the Santanas successfully sued Ana Santana's physician for failing to perform an ultrasound test that would have shown that their son was suffering from severe birth defects.<sup>192</sup> The Santanas' son was born with no arms and one leg.<sup>193</sup> At trial, a jury awarded the Santanas \$4.5 million, which would pay for some of the expenses of raising their son, including prostheses, wheelchairs, operations, attendants, and other healthcare needs.<sup>194</sup> Finally, in a recent Oregon wrongful birth case, a jury awarded nearly \$3 million to Deborah and Ariel Levy for the wrongful birth of their daughter, who has Down syndrome.<sup>195</sup> The Levys' attorney explained that the couple made the difficult decision to sue for wrongful birth because they wanted to recover costs in order to ensure that their daughter would have the best possible medical care.<sup>196</sup>

The success of wrongful birth suits in some states, as well as the existence of similar common law torts, demonstrate that the wrongful birth causes of action should be handled by the judicial system.<sup>197</sup> In spite of this, some states have made the decision to prohibit this cause of action, precluding parents from recovering the enormous emotional and medical costs of raising their children.<sup>198</sup>

## CONCLUSION

Wrongful birth claims, brought by the parents of children who are born with disabilities or other severe health conditions, are a controversial but valuable method wherein parents can recover the extraordinary medical and emo-

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<sup>190</sup> Lohr, *supra* note 13.

<sup>191</sup> *Id.*

<sup>192</sup> Jane Musgrave, *Jury Awards West Palm Beach Parents of Child Born with No Arms, One Leg, \$4.5 million*, PALM BEACH POST (Sept. 10, 2011), <http://www.palmbeachpost.com/news/news/jury-awards-west-palm-beach-parents-of-child-born-/nLxqN/>.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Green, *supra* note 51.

<sup>196</sup> *Id.*

<sup>197</sup> See *Harbeson*, 656 P.2d at 486; *Evans*, No. DV-11-990B at 33–34; Green, *supra* note 51.

<sup>198</sup> See ARIZ. REV. STAT. ANN. § 12-719 (2012); MINN. STAT. § 145.424 (2010); MO. REV. STAT. § 188.130 (2000); OKLA. STAT. tit. 63, § 1-741.12 (2013); S.D. CODIFIED LAWS § 21-55-2 (2004); *Robak*, 658 F.2d at 479 (explaining that the plaintiff-parents' expenses would not have existed without the physicians' negligence); *Greco*, 893 P.2d at 348–49 (noting that “the birth of a severely deformed baby . . . [causes an] inordinate financial burden” on the parents); Rapp, *supra* note 132 (describing the emotional costs of caring for a child with severe disabilities).



tional costs of raising their child. These claims are based in part on the recognized constitutional right to abortion and may become more prominent as prenatal testing technology further develops. Despite the importance and growing prevalence of this cause of action, some states have chosen to prohibit wrongful birth claims, precluding parents from recovering the damages incurred by the birth of their child. State prohibitions on wrongful birth claims diminish abortion rights and endanger the legal rights of parents to recover costs in a medical malpractice action. Instead of prohibiting wrongful birth claims, states should allow the claims to proceed at common law, permitting the judicial system to decide the merit of each claim. Allowing parents to make wrongful birth claims creates a fair and just way of preventing incidences of medical negligence and ensuring that these plaintiffs have the opportunity to recover the enormous emotional and financial damages that they have incurred due to a doctor's negligence.