

cial functions.

A sequela of recognizing a wrongful life suit against the consultant is to authorize an action by a child against its own parents for having made the decision not to abort. *Curlender* in fact suggests this startling result.⁷ Quite clearly such a claim runs counter to the mother's freedom of choice expressed in *Roe v. Wade*. Moreover, the probability of such claims was found so abhorrent by the California Legislature that it quickly acted to establish a public policy to the contrary by outlawing such claims.⁸

The fact is that the courts are neither authorized nor equipped to adequately deal with this evolving area of great public concern. A willingness to make the attempt obviously derives from an understandable concern for the plight of the defective and handicapped. Compassion and emotion, however, lead to result-oriented jurisprudence and the usurpation of value judgments in the area of public policy that are clearly within the ken of the legislative branch. Judicial effort to correct a perceived evil without regard to constitutional principle, judicial precedent, or adequate conceptual analysis, or without consideration of the proper division of authority between the judicial and legislative branches leads to bad law. After all is said and done, good law — not bad law — should be the primary objective and concern of all of us.

Wrongful Life: A Misconceived Tort

Recent advances in prenatal genetic counseling have expanded the scope of malpractice liability. Parents and children have both brought tort actions for negligent prenatal genetic counseling. The child's "wrongful life" claim is a unique and difficult moral

⁷ *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (2d Dist. 1980).

⁸ See Ch. 331, § 43.6, 1981 Cal. Stats. 169.

and legal issue. This comment examines wrongful life and the parents' "wrongful birth" action, and suggests a model of recovery for wrongful birth that avoids the insoluble problems inherent in a wrongful life claim while providing for the needs of the disabled child.

INTRODUCTION

Scientific advances in genetic testing now enable genetic counselors¹ to detect and predict certain physical disabilities² of unborn children. When deciding whether to bear children, prospective parents increasingly rely on these counselors.³ Negligent prenatal counseling places heavy economic and emotional burdens upon parents who are unprepared to raise a handicapped child.⁴ This comment examines judicial treatment of tort claims

¹ Genetic counseling has been defined as:

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

Ad Hoc Committee on Genetic Counseling, *Genetic Counseling*, 27 AM. J. HUMAN GENETICS 240-41 (1975). See Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 620-25 (1979) [hereinafter cited as Capron] (an extensive discussion of genetic counseling).

² Less than 10% of all genetic disorders are currently detectable. Shaw, *Genetically Defective Children: Emerging Legal Consideration*, 3 AM. J.L. & MED. 333, 334-35 (1977) [hereinafter cited as Shaw].

³ The proliferation of genetic counseling centers attests to this increased reliance. From 1960 to 1974, the number of these centers increased from 13 to 350. H. HAMMONDS, *HEREDITARY COUNSELING—AMERICAN GENETIC SOCIETY* (1977).

⁴ In *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981), the court recognized the economic burden placed upon parents by a handicapped child and affirmed the following damages award to plaintiff-parents in a successful wrongful birth action:

Residential education and care until age 21 \$229,800

for negligent prenatal counseling and the public policies that underlie these decisions.

The comment first defines "wrongful birth" and "wrongful life," the claims respectively raised by the mother and child. It next reviews both judicial analysis and the constitutional dimensions of these tort claims. The comment then examines pertinent public policies that require rejection of the wrongful life claim. Finally, it proposes a proper measure of "wrongful birth" damages that will protect the interests of the disabled child and deter negligent prenatal counseling.

I. DEFINITION OF "WRONGFUL BIRTH" AND "WRONGFUL LIFE"

The gravamen of the torts of wrongful birth and wrongful life is the counselor's failure to adequately inform prospective parents of their unborn child's detectable disabilities.⁵ The claims of father, mother, and child arise out of the same negligent conduct.⁶ Under these causes of action, the plaintiffs do not claim that the counselor caused the child's disabilities.⁷ Rather, they argue that the counselor's negligent⁸ failure to inform the

Salary of a skilled companion for the remainder of the disabled child's life	\$515,000
Maintenance for remainder of adult life	\$200,000
Total	<u>\$944,800</u>

⁵ This comment focuses upon claims based on negligent counseling. It does not address wrongful pregnancy claims where the child is also born disabled. See, e.g., *Lapoint v. Shirley*, 409 F. Supp. 118 (W.D. Tex. 1976); *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976); *Speck v. Finegold*, 268 Pa. Super. 342, 408 A.2d 496 (1979).

⁶ The injury is the negligent interference with a woman's procreative choice. The father suffers financial damage through his duty to support the child. See H. CLARK, *LAW OF DOMESTIC RELATIONS* § 6.3 (1968). Throughout this comment wrongful birth will denote the mother's cause of action, since the father's claim is derivative.

⁷ See, e.g., Comment, "Wrongful Life": *The Right Not to be Born*, 54 *TULANE L. REV.* 480 (1980) [hereinafter cited as *Right Not to Be Born*]. Although some earlier courts held that the physician did not proximately cause the child's injury because he did not cause the genetic defect, more recent cases have recognized that the crux of the injury is the failure to disclose the fetus's probable disability. See, e.g., *Phillips v. United States*, 508 F. Supp. 537 (D.S.C. 1981).

⁸ The overwhelming number of wrongful birth and wrongful life claims stem from a genetic counselor's negligent prenatal counseling. *A fortiori* a counselor would also be liable for intentionally withholding relevant information because of his attitude towards abortion.

mother of the risk of her child's disability prevented the mother's meaningful exercise of procreative choice.⁹

The mother's cause of action is called "wrongful birth."¹⁰ Her injury is the deprivation of her right to make an informed decision to bear to term or to abort the fetus.¹¹ The mother's damages include the cost of raising her disabled child and compensation for the emotional injury of bearing an unexpectedly handicapped child.¹² By comparison, the child claims his very life is a wrong — hence the label "wrongful life."¹³ This unique

⁹ For a definition of wrongful birth, see Comment, *Berman v. Allan*, 8 *HORSTRA L. REV.* 257, 257-58 (1979).

¹⁰ See text accompanying notes 8-9 *supra*. The wrongful birth suits to date are: *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981); *Phillips v. United States*, 508 F. Supp. 537 (D.S.C. 1980); *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978); *Eisbrenner v. Stanley*, 308 N.W.2d 209 (Mich. App. 1981); *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981); *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979), *overruled in part*, *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967), *overruled in part*, *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Becker v. Schwartz*, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub. nom.* *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Howard v. Lechner*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977); *Stewart v. Long Island College Hosp.*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972); *Karlsons v. Guerinot*, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

¹¹ See, e.g., *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). Although to recover for wrongful life the child must prove that his parents would have aborted him, the parents' cause of action for wrongful birth requires neither allegation nor proof that they would have aborted. To this extent wrongful birth is a misnomer and is more aptly called "negligent deprivation of the right to competent genetic counseling." For the sake of simplicity and consistency with the emerging consensus of terminology, this comment uses the term "wrongful birth." See, e.g., *Phillips v. United States*, 508 F. Supp. 537 (D.S.C. 1980) (defining "wrongful birth").

¹² See notes 119-136 and accompanying text *infra*.

¹³ A wrongful life claim is brought on behalf of a severely defective infant against a physician for the physician's negligent failure to inform the child's parents of the potential disabilities of their child, thereby preventing a choice to avoid the child's birth. See Cohen, *Park v. Chessin: The Continuing Judicial Development of the Theory of "Wrongful Life,"* 4 *AM. J.L. & MED.* 211 (1979). The wrongful life cases to date are: *Robak v. United States*, 503 F. Supp. 982 (N.D. Ill. 1980), *modified*, 658 F.2d 471 (7th Cir. 1981); *Phillips v.*

allegation — that his life is an injury — sets the child's claim apart from his mother's and all other negligence claims.

II. JUDICIAL DEVELOPMENT OF THE TORTS

A child has had the right to sue for prenatal injuries since 1946.¹⁴ Courts allow claims for direct injury of a fetus that survives to suffer the injury.¹⁵ Several states extend this right to include preconception negligence where the child's injury was foreseeable.¹⁶ Wrongful birth and wrongful life claims are distinct from other prenatal injury claims in that the genetic counselor does not disable an otherwise normal child.¹⁷

United States, 508 F. Supp. 537 (D.S.C. 1981); *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978); *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975); *Elliott v. Brown*, 361 So. 2d 546 (Ala. 1978); *Turpin v. Sortini*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (5th Dist. 1981), *hearing granted*, No. 24319 (Aug. 6, 1981); *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (2d Dist. 1980); *Eisbrenner v. Stanley*, 308 N.W.2d 209 (Mich. App. 1981); *Schroeder v. Perkell*, 87 N.J. 53, 432 A.2d 834 (1981); *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979), *overruled in part*, *Schroeder v. Perkell*, 87 N.J. 53, 432 A.2d 834 (1981); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967), *overruled in part*, *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Becker v. Schwartz*, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 87, 413 N.Y.S.2d 895 (1978); *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub nom.* *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Johnson v. Yeshiva Univ.*, 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977); *Stewart v. Long Island College Hosp.*, 58 Misc. 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), *modified*, 35 A.D.2d 695, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972); *Karlsons v. Guerinot*, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977); *Greenberg v. Kliot*, 47 A.D.2d 765, 367 N.Y.S.2d 966 (1975); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

¹⁴ *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946) (child injured during delivery by doctor's negligence had standing to sue). *See also Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951) (allegations of prenatal injuries, tortiously inflicted on nine month old fetus that was viable at the time and actually born later, stated a valid cause of action). *See generally* Annot., 40 A.L.R.3d 1222 (1971).

¹⁵ *See, e.g., Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951).

¹⁶ *See, e.g., Jorgenson v. Meade Johnson Labs., Inc.*, 483 F.2d 237 (10th Cir. 1973) (action by father of mongoloid children against manufacturer of mother's birth control pills upheld); *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (action by child injured because of negligent blood transfusion to mother several years before child's conception upheld).

¹⁷ *See* note 7 and accompanying text *supra*.

A. Wrongful Birth

The New Jersey Supreme Court was the first court to consider true wrongful birth and wrongful life claims. In *Gleitman v. Cosgrove*,¹⁸ the plaintiff-mother informed Dr. Cosgrove that she had contracted German measles during the first trimester of her pregnancy. Dr. Cosgrove assured her that the disease would not affect the child.¹⁹ The child, however, was born with serious sight, speech, and hearing defects.²⁰ The court denied the mother's cause of action for two reasons. First, it could not balance the joys of parenthood against emotional and pecuniary injuries.²¹ Second, New Jersey had a public policy against abortion,²² as expressed in its criminal abortion statutes.

The watershed in the development of the tort of wrongful birth was the United States Supreme Court's decision in *Roe v. Wade*.²³ *Roe v. Wade* establishes that a state may not restrict a woman's right to abort in the first trimester of pregnancy.²⁴ This decision swept away the criminal abortion statutes, which anchored the *Gleitman* policy argument against abortion.²⁵

After *Roe v. Wade*, the immeasurability of the mother's damages remained the only barrier to recovery. Several courts, however, have rejected the argument that the mother's damages are

¹⁸ 49 N.J. 22, 227 A.2d 689 (1967).

¹⁹ *Id.* at 25, 227 A.2d at 690.

²⁰ *Id.*

²¹ *Id.* at 29, 227 A.2d at 693.

²² *Id.*

²³ 410 U.S. 113 (1973).

²⁴ *Id.* at 163.

²⁵ The court in *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979) stated:

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

Id. at 431, 404 A.2d at 14.

For a discussion of the impact of *Roe v. Wade* on state legislation, see B. SARVID & H. RODMAN, *THE ABORTION CONTROVERSY* 64-68 (1974). For a thorough historical treatment of abortion legislation, see J. MOHR, *ABORTION IN AMERICA* (1978).

immeasurable.²⁶ These courts reason that to deny redress for injuries merely because damages are not precisely measurable would be a perversion of justice.²⁷ In short, the "immeasurability of damages" argument masks judicial repugnance for weighing the benefits and burdens of being the parent of a disabled child.²⁸ The basis of the "immeasurability" argument is a judicial presumption that the birth of a child is always a "blessed event."²⁹ This presumption has been largely rejected.³⁰ Accordingly, since *Roe v. Wade*, almost all courts considering wrongful birth claims have recognized the legitimacy of the mother's action.³¹

B. Wrongful Life

The *Gleitman* court also denied the child's cause of action. The court reasoned that measurement of the child's damages would involve the logically impossible comparison of a disabled life against no existence at all.³² With two exceptions,³³ courts

²⁶ See *Phillips v. United States*, 508 F.Supp. 544, 550 (D.S.C. 1981); *Berman v. Allan*, 80 N.J. 421, 428, 404 A.2d 8, 12 (1979); *Becker v. Schwartz*, 46 N.Y.2d 401, 415, 386 N.E.2d 807, 814, 413 N.Y.S.2d 895, 903 (1978); *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975).

²⁷ See *Berman v. Allan*, 80 N.J. 421, 428, 404 A.2d 8, 12 (1979) (citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931)). The Court in *Story Parchment* held that it would be a "perversion of fundamental principles of justice to deny all relief to the injured [party] and thereby relieve the wrongdoer from making any amend for his acts," where the wrong itself is of such a nature as to preclude the computation of damages with precise exactitude. 282 U.S. at 563.

²⁸ See *Phillips v. United States*, 508 F. Supp. 544, 549 (D.S.C. 1981) (the court recognized that this ascertainment of damages was, in reality, a thinly disguised policy argument borrowed from earlier wrongful pregnancy cases).

²⁹ See, e.g., *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934); *Shaheen v. Knight*, 6 Lycoming Rep. 19, 11 Pa. D. & C.2d 41 (1957).

³⁰ See, e.g., *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Speck v. Finegold*, 408 A.2d 496 (Pa. Super. Ct. 1979).

³¹ See, e.g., *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981); *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981); *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978); *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 66, 233 N.W.2d 372 (1975).

³² *Gleitman v. Cosgrove*, 49 N.J. 22, 28, 227 A.2d 689, 690 (1967), *overruled in part*, *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979).

³³ *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (2d Dist. 1980); *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modi-*

continue to reject the child's cause of action³⁴ for either of two reasons. First, since humanity knows nothing of nonexistence, comparison of nonexistence with the child's disabled life is logically impossible. Thus, the child-plaintiff cannot establish an injury.³⁵ Second, courts have balked at characterizing the child's life as an injury because that characterization runs counter to society's fundamental respect for human life.³⁶

In evaluating wrongful birth and wrongful life claims, some courts have looked beyond the boundaries of tort law. Apart from noting the catalytic impact of *Roe v. Wade* upon those claims,³⁷ few courts have attempted to explore the constitutional dimensions of wrongful birth and wrongful life.³⁸ This examination is necessary to determine precisely which legal interests require judicial protection.

III. THE CONSTITUTION AND PRENATAL COUNSELING

Courts have cited *Roe v. Wade* as authority for recognition of the parent's claim³⁹ as well as that of the disabled child.⁴⁰ Indeed, some courts have suggested that the failure to recognize wrongful birth claims may impermissibly burden a person's right

fied sub nom. *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

³⁴ See, e.g., *Phillips v. United States*, 588 F. Supp. 544, 549 (D.S.C. 1981); *Elliott v. Brown*, 361 So. 2d 546 (Ala. 1978).

³⁵ *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). There can be no tort "except in the case of some individual whose interests have suffered' and in cases such as these there is no way of showing that the 'interests' of the infants have suffered at all (Prosser, *Torts* [4th ed.] § 30)." 46 N.Y.2d at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 903.

³⁶ See *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979). "One of the most deeply held beliefs of our society is that life — whether experienced with or without a major physical handicap — is more precious than non-life." *Id.* at 429, 404 A.2d at 12.

³⁷ *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979) (the court noted that after *Roe v. Wade*, public policy supported rather than militated against denial of a meaningful opportunity to decide whether to abort in the first trimester of pregnancy).

³⁸ See, e.g., *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

³⁹ See note 37 *supra*.

⁴⁰ *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 820, 165 Cal. Rptr. 477, 483 (2d Dist. 1980).

to make procreative decisions.⁴¹ No court, however, has carefully examined the *Roe v. Wade* decision and the "abortion funding cases,"⁴² which limited the scope of *Roe v. Wade*, to determine their effect upon wrongful birth and wrongful life.

A. Wrongful Birth

Although the development of tort law is primarily the states' responsibility,⁴³ the United States Constitution mandates recognition of wrongful birth. State courts may not burden or penalize the exercise of constitutional rights.⁴⁴ A state court that invidiously discriminates against tort plaintiffs whose claims are based on negligent deprivation of a woman's constitutionally protected procreative autonomy creates such a burden.⁴⁵ A state

⁴¹ See note 38 *supra*.

⁴² *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

⁴³ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (in diversity jurisdiction cases federal courts must apply state substantive law).

⁴⁴ Penalties imposed by the government on a constitutionally protected choice and direct burdens on constitutionally protected activity are prohibited. See *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Memorial Hosp. v. Mariposa County*, 415 U.S. 250 (1974). Justice Powell, writing the majority opinion in *Maher v. Roe*, 432 U.S. 464 (1976), stated that if a state denied welfare benefits to all women who had obtained abortions and who were otherwise entitled to benefits, a close analogy to *Shapiro* would exist, and strict scrutiny would be appropriate. *Id.* at 474 n.8. See also *Harris v. McRae*, 448 U.S. 297 (1980) (Stewart, J., concurring). Justice Stewart concurred in Justice Powell's analysis and cited *Sherbert v. Verner*, 374 U.S. 398 (1963), for the proposition that, if otherwise eligible, a person could not be deprived of all employment benefits for working on her Sabbath. 448 U.S. at 317 n.19. Denying a claim of wrongful birth, which otherwise meets the traditional requirement of a tort action (for an example of a case acknowledging that a wrongful birth claim "readily" falls within the traditional boundaries of a negligence action, see *Phillips v. United States*, 508 F. Supp. 544, 550 (D.S.C. 1981)), because it is based on the exercise of a woman's constitutional right to make a procreative choice, is analogous to those cases cited by Justices Powell and Stewart as calling for strict scrutiny. Thus, to deny a claim of wrongful birth, the state would have to show a compelling state interest and a means closely related to protecting that interest.

⁴⁵ One commentator has argued that a state's discrimination between ordinary torts and wrongful birth does not directly interfere with a woman's constitutional right to choose contraception or abortion. Consequently, he reasoned that the analysis of *Maher v. Roe*, 432 U.S. 464 (1977), see note 54 *infra*, applies, and a rational relationship to any legitimate state purpose will justify discrimination against wrongful birth cases. Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law*, 1979 WASH. U.L.Q. 919. This argument fails

court that deliberately carved out an exception to the standard principles of recovery under its common law of negligence for cases of wrongful birth would encourage private violations of constitutional rights.⁴⁶ It would do so by immunizing genetic counselors from liability for professional malpractice.⁴⁷ This immunization would constitute state action.⁴⁸

Judicial denial of wrongful birth claims would severely hinder a woman's exercise of procreative choice in the first trimester of pregnancy.⁴⁹ Exercise of the right requires competent medical counseling.⁵⁰ Proper judicial concern for the protection of a wo-

because state discrimination against wrongful birth directly increases the probability that other women will be negligently deprived of their procreative autonomy. The argument is that, because all women who bring wrongful birth claims have already lost the opportunity to abort, the state cannot be accused of interference with that right. This ignores the fact that recognition of a particular wrongful birth claim directly affects the standard of care given to all women.

⁴⁶ In a wrongful conception case, *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976), the Ohio Supreme Court expressed its concern in these words: "For this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations *except* those involving sterilization would constitute an impermissible infringement of a fundamental right." *Id.* at 46, 356 N.E.2d at 499 (emphasis in original).

The judiciary can enforce neutral principles of state law that allow a private party to commit actions which, if commanded by a court, would be unconstitutional. See *Evans v. Abney*, 396 U.S. 435 (1970) (where a park created by will for the exclusive use of white people was invalidated, the Georgia Supreme Court then held that, since the purpose of the trust was impossible under settled principles of Georgia law, the property reverted to the grantor's heirs). However, to except wrongful birth claims from the ordinary standards governing medical malpractice would constitute state collusion in the private violations of constitutional rights. The impetus for forbidden discrimination need not originate with the state if it is the state action that makes private discrimination feasible. *Moose Lodge No. 107 v. Iris*, 407 U.S. 103, 172 (1972).

⁴⁷ The defendant must bear the burden for injuries resulting from his own negligence. "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. . . ." *Berman v. Allan*, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979).

⁴⁸ See note 46 *supra*.

⁴⁹ See *Roe v. Wade*, 410 U.S. 113, 164 (1972) (disallowing state interference with mother's choice to abort in first trimester of pregnancy).

⁵⁰ "[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and infra-professional, are available."

man's constitutional rights would call for higher, not lower, professional standards in the field of prenatal counseling.

B. Wrongful Life

Roe v. Wade should have no impact on wrongful life claims.⁵¹ Recognition of the mother's right to choose abortion precludes the inference that an unborn child has a right to be born or aborted. A woman's right to choose to abort is predicated on judicial nonrecognition of the fetus as a person.⁵² Until birth, the fetus is not a "person" and therefore has no rights. Only the state's interest in "potential life" limits the abortion choice after the first trimester.⁵³

The abortion funding cases decided in the wake of *Roe v. Wade* demonstrate that the states may deny a wrongful life action pursuant to a permissible policy preference for childbirth.⁵⁴ These cases upheld legislative and executive withdrawal of funding for elective abortions. A court could therefore base its rejection of the wrongful life claim on a judicially formulated policy against abortion.⁵⁵ This would entail further judicial intrusion into a highly sensitive issue.⁵⁶ Judicial focus on whether the

Id. at 166.

⁵¹ See *Turpin v. Sortini*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (5th Dist. 1981), *hearing granted*, No. 24319 (Aug. 6, 1981), in which the court stated, "Neither this cause of action [wrongful life] nor the one at issue in *Curlender* is a necessary or even logical extension of *Roe v. Wade* (1973) 410 U.S. 113 . . . (legalizing abortions under certain restricted circumstances), upon which *Curlender* relies." 119 Cal. App. 3d at 697-98, 174 Cal. Rptr. at 133.

⁵² See *Roe v. Wade*, 410 U.S. 113, 156-58 (1973).

⁵³ *Id.* at 166.

⁵⁴ The Supreme Court has allowed the states a great deal of latitude in formulating policy for or against abortion. In *Maher v. Roe*, 432 U.S. 464 (1977), the Supreme Court stated that *Roe v. Wade* does not inhibit the democratic adoption of policies favoring childbirth over abortion as a response to pregnancy. 432 U.S. at 480. Only a compelling state interest justifies an absolute or unduly burdensome interference with the right to abort. *Roe v. Wade*, 410 U.S. 113, 155 (1973). On the other hand, an official value judgment, *e.g.*, 432 U.S. at 474 (state encouragement); *id.* at 477 (policy choice favoring childbirth over abortion), need only be justified under the "rational basis" test. *Id.* at 478.

⁵⁵ *But see Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975). "We do not regard the issue before us as requiring our decision of the public policy either for or against abortion. This is a matter of very different but very deep feeling." *Id.* at 848.

⁵⁶ *Roe v. Wade*, 410 U.S. 113 (1973). "We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the

child has suffered an injury in wrongful life cases is thus preferable to a judicial pronouncement for or against abortion. Using the traditional policies underlying tort law, courts can determine if wrongful life is an injury for which the child should be compensated.

IV. PUBLIC POLICY AND WRONGFUL LIFE

In evaluating wrongful life claims, courts focus upon whether the disabled child has suffered an injury cognizable at law.⁵⁷ The majority of courts refuses to recognize an injury.⁵⁸ While various public policies provide the rationale for these decisions, the arguments fall under two major heads of policy. First is the notion that human life, no matter how disabled, cannot be an injury. The second concerns the compensatory and deterrent functions of tort law and their adaptability to a changing society.

vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires." *Id.* at 116.

⁵⁷ See *Turpin v. Sortini*, 119 Cal. App. 3d 690, 695, 174 Cal. Rptr. 128, 131 (5th Dist. 1981), *hearing granted*, No. 24319 (Aug. 6, 1981); *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (2d Dist. 1980); *Berman v. Allan*, 80 N.J. 421, 428, 404 A.2d 8, 13 (1979); *Gleitman v. Cosgrove*, 49 N.J. 22, 29, 227 A.2d 689, 692 (1967), *overruled in part*, *Berman v. Allan*, 80 N.J. 421, 428, 404 A.2d 8, 13 (1979); *Becker v. Schwartz*, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 412-14, 386 N.E.2d 807, 813, 413 N.Y.S.2d 895, 901-02 (1978).

⁵⁸ *Robak v. United States*, 503 F. Supp. 982 (N.D. Ill. 1980), *modified*, 658 F.2d 471 (7th Cir. 1981); *Phillips v. United States*, 508 F. Supp. 537 (D.S.C. 1980); *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978); *Smith v. United States*, 392 F. Supp. 654 (N.D. Ohio 1975); *Elliott v. Brown*, 361 So. 2d 546 (Ala. 1978); *Turpin v. Sortini*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (5th Dist. 1981), *hearing granted*, No. 24319 (Aug. 6, 1981); *Eisbrenner v. Stanley*, 308 N.W.2d 209 (Mich. App. 1981); *Schroeder v. Perkell*, 87 N.J. 53, 432 A.2d 834 (1981); *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979), *overruled in part*, *Schroeder v. Perkell*, 87 N.J. 53, 432 A.2d 834 (1981); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967), *overruled in part*, *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); *Becker v. Schwartz*, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Johnson v. Yeshiva Univ.*, 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977); *Stewart v. Long Island College Hosp.*, 58 Misc. 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), *modified*, 35 A.D.2d 695, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972); *Karlsons v. Guerinot*, 57 A.D.2d 73, 394 N.Y.S.2d 933 (1977); *Greenberg v. Kliot*, 47 A.D.2d 765, 367 N.Y.S.2d 966 (1975); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

A. *Human Life as Injury*

The only life that the plaintiff child can have is a disabled one.⁵⁹ Such a plaintiff does not allege that the defendant disabled an otherwise normal child. Rather, the alleged injury is the very life of the child. This unique and unsettling assertion has barred judicial recognition of the wrongful life claim. Traditionally, our society has highly valued human life.⁶⁰ Laws that protect our lives from many physical and other harms embody this value.⁶¹ Logically, to declare human life itself an injury would contradict this basic legal and cultural principle.⁶²

Pragmatically, legal recognition that a disabled life is an injury would harm the interests of those most directly concerned, the handicapped. Disabled persons face obvious physical difficulties in conducting their lives. They also face subtle yet equally devastating handicaps in the attitudes and behavior of society, the law, and their own families and friends.⁶³ Further-

⁵⁹ See text accompanying note 7 *supra*.

⁶⁰ In *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979), the court stated:

One of the most deeply held beliefs of our society is that life — whether experienced with or without a major physical handicap — is more precious than non-life. . . . Concrete manifestations of this belief are not difficult to discover. The documents which set forth the principles upon which our society is founded are replete with references to the sanctity of life. The federal constitution characterized life as one of the three fundamental rights of which no man can be deprived without due process of law. *U.S. Const.* Amends. V and XIV. . . . The Declaration of Independence states the primacy of man's "unalienable" right to life is a "self-evident truth". Nowhere in these documents is there to be found an indication that the lives of persons suffering from physical handicaps are to be less cherished than those of non-handicapped human beings.

Id. at 429, 404 A.2d at 12-13.

⁶¹ "The right of personal security . . . [is an absolute right. It consists of] . . . a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." J. DEVERAUX, *BLACKSTONE'S COMMENTARIES* 18 (1877).

⁶² *RESTATEMENT (SECOND) OF TORTS* § 7 (1965) defines an injury as "the invasion of any legally protected interest of another." Hence an injury is inflicted upon a human life. More precisely, an injury imposes a limitation upon the exercise of enjoyment of human life. Thus, it is absurd to describe that which is injured — human life — as the injury.

⁶³ See R. DARLING, *FAMILIES AGAINST SOCIETY: A STUDY OF REACTIONS TO CHILDREN WITH BIRTH DEFECTS* (1979); H. FEATHERSTONE, *A DIFFERENCE IN THE FAMILY* (1980); D. THOMAS, *THE SOCIAL PSYCHOLOGY OF CHILDHOOD DISABILITY*

more, society often views disabled persons as burdensome misfits.⁶⁴ Recent legislation concerning employment, education, and building access reflects a slow change in these attitudes.⁶⁵ This change evidences a growing public awareness that the handicapped can be valuable and productive members of society. To characterize the life of a disabled person as an injury would denigrate both this new awareness and the handicapped themselves.

Some commentators argue that, in the context of a wrongful life suit, human life can and should be characterized as an injury.⁶⁶ These writers compare nonexistence to the plaintiff's dis-

(1980) [hereinafter cited as D. THOMAS]. Thomas states:

Society's attitudes place the handicapped in a subordinate status in some ways like that of ethnic minority groups . . . Tenny develops a common theme in rehabilitation literature that the attitudes of the majority are added encumbrances to the objective limitations of disability. The disabled person has the latter limitations, the ones imposed on him by society and the self-imposed ones that arise from accepting the status conferred by society.

Id. at 44.

⁶⁴ One commentator notes:

Until recently the thought that society has any responsibility toward those who struggle under physical impairment was not generally accepted. The handicapped were to be shut away in institutions or cared for privately by their families, but the public was not to be embarrassed by being exposed to their plight.

Note From the Chair, 9 HUMAN RIGHTS 11 (Spring 1980).

⁶⁵ Thomas states:

Evolving attitudes toward the disabled and other stigmatized groups have been monitored . . ., and historians and social scientists provide evidence that public and professional attitudes have changed and are changing. . . . Legal changes and new concepts of help, care and support reinforce the conclusion that during this period [of the last thirty years] a more tolerant and understanding attitude toward various kinds of disability has developed. However, despite these positive gains, there is still a residue of uncertainty, mistrust and downright discrimination against which the disabled have to contend.

D. THOMAS, *supra* note 63, at 44-45. A significant legislative example of this change in attitude is 29 U.S.C. §§ 701-794 (1975), entitled "Vocational Rehabilitation and other Rehabilitation Services." See generally WHITE HOUSE CONFERENCE ON CHILD HEALTH AND PROTECTION, CHILDREN AND YOUTH: SOCIAL PROBLEMS AND SOCIAL POLICY (1974).

⁶⁶ See, e.g., *Right Not to Be Born*, *supra* note 7; *Note, Wrongful Life—A Tort Whose Time Has Come*, 2 AM. J. TRIAL ADVOCACY 107 (1978) [hereinafter cited as *Time Has Come*]; *Note, A Cause of Action for "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58 (1970).

abled life and find the former preferable.⁶⁷ Significantly, courts recognizing wrongful life claims have not adopted this theory.⁶⁸ Determining which disabilities render life worse than nonexistence is difficult. Such an evaluation involves a necessarily imprecise weighing of subjective factors, that vary widely between individuals.⁶⁹

Such an idiosyncratic evaluation is similarly ill-suited to the decision-making procedures of judge and jury. Whether a particular life is less valuable than nonexistence, and is thus an injury, is a question of fact.⁷⁰ The fact-finder employs an objective or "reasonable person" standard to determine the existence of an injury.⁷¹ An objective standard derived from community values does not rationally inform such an intensely personal evaluation.⁷²

As an alternative to an objective standard, a subjective standard might be used. The subjective judgment of the disabled child's mother that her child's life is less valuable than nonexistence would suffice. Hence any medically detectable disability that the mother finds unacceptable would render the child's life actionable. A negligent counselor could thus be liable for the cost of raising a child if the child's mother in good faith claims that a cleft palate or a clubfoot renders her child's life less valuable than nonexistence. Resort to a subjective standard in these cases would be an unwarranted departure from traditional tort

⁶⁷ See Capron, *supra* note 1, at 650-54; Comment, *Wrongful Life and Wrongful Birth Causes of Action—Suggestions for a Consistent Analysis*, 63 MARQ. L. REV. 611, 618 (1980).

⁶⁸ *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (2d Dist. 1980); *Park v. Chessin*, 60 A.D.2d 80, 88, 400 N.Y.S.2d 110, 114 (1977), *modified sub nom.* *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

⁶⁹ In *Roe v. Wade*, 410 U.S. 113 (1973), Justice Blackmun stated, "One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, all are likely to influence and to color one's thinking and conclusions about abortion." *Id.* at 116.

⁷⁰ See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 45 (4th ed. 1971) [hereinafter cited as W. PROSSER]; L. GREEN, *RATIONALE OF PROXIMATE CAUSE*, 122-27 (1927).

⁷¹ See W. PROSSER, *supra* note 70, § 45.

⁷² See *Right Not to be Born*, *supra* note 7, at 491-92. *But see* Capron, *supra* note 1, at 648-49.

law⁷³ and would improvidently expand the liability of genetic counselors.⁷⁴

B. *The Fundamental Right to Be Born Whole*

Those courts recognizing the wrongful life claim have avoided the assertion that the child's life is an injury.⁷⁵ Instead, these courts claim that the plaintiff has a fundamental right to be born "a whole, functional human being."⁷⁶ Under this rationale, any person who proximately causes the birth of any child who is not a whole, functional human being is liable for the child's disabilities.⁷⁷

The recognition and enforcement of this right involves serious difficulties. First, there is no precedent creating a right to be born whole.⁷⁸ In fact, the creation of this right would contradict the holding in *Roe v. Wade* that the fetus is not a right-bearing entity.⁷⁹ Second, there is no adequate legal standard to determine which disabilities render a child less than a whole, functional human being. One possible test is that the disability must be detectable with reasonable medical certainty, and that, had the parents known of the disability, they would have prevented the conception of or aborted the plaintiff.⁸⁰ Under this test, however, recovery would depend upon the subjective judgment of

⁷³ Prosser states that "The whole theory of negligence presupposes some uniform standard of behavior. The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment . . . and it must be, so far as possible, the same for all persons . . ." W. PROSSER, *supra* note 70, § 32, at 149-50.

⁷⁴ See *Right Not to be Born*, *supra* note 7, at 491-92.

⁷⁵ *Id.*

⁷⁶ See note 68 *supra*.

⁷⁷ See note 84 *infra*.

⁷⁸ See, e.g., *Park v. Chessin*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub nom.* *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). "There is no precedent for recognition at the Appellate Division of 'the fundamental right of a child to be born as a whole, functional human being.'" *Becker v. Schwartz*, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978) (referring to *Park v. Chessin*, 60 A.D.2d 80, 88, 400 N.Y.S.2d 110, 114 (1977)).

⁷⁹ See text accompanying notes 51-53 *supra*.

⁸⁰ The *Park v. Chessin* court proposed this test. *Park v. Chessin*, 60 A.D.2d 80, 88, 400 N.Y.S.2d 110, 114 (1977), *modified sub nom.* *Becker v. Schwartz*, 46 N.Y.2d 401, 486 N.E.2d 807, 413 N.Y.S.2d 845 (1978).

the parents.⁸¹

Finally, recognition of the right to be born whole allows the plaintiff child to sue whomever proximately causes his birth. Parents who knowingly allow the birth of a disabled child could therefore be sued by the child.⁸² Though some jurists and scholars have approved this possibility,⁸³ most have rejected it.⁸⁴

The United States Supreme Court requires states to refrain from interfering with the mother's freedom to choose abortion or

⁸¹ *But see* text accompanying notes 70-74 *supra*.

⁸² *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (2d Dist. 1980).

⁸³ *Id.*; Shaw, *supra* note 2, at 340; *Time Has Come*, *supra* note 66, at 131-32.

⁸⁴ For an excellent discussion, see Capron, *supra* note 1, at 661-66. The court in *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477 (2d Dist. 1980) approved such a cause of action against the parents in *obiter dictum*:

One of the fears expressed in the decisional law is that, once it is determined that such infants have rights cognizable at law, nothing would prevent such a plaintiff from bringing suit against its own parents for allowing plaintiff to be born. In our view, the fear is groundless. The "wrongful life" cause of action with which we are concerned is based upon negligently caused failure by someone under a duty to do so to inform the prospective parents of facts needed by them to make a conscious choice *not* to become parents. If a case arose where, despite due care by the medical profession in transmitting the necessary warnings, parents made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice would provide an intervening act of proximate cause to preclude liability insofar as defendants other than the parents were concerned. Under those circumstances, *we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring.*

Id. at 829, 165 Cal. Rptr. at 488 (emphasis added).

The California legislature had no difficulty discovering a contrary public policy. The legislature quickly overturned *Curlender's* proclamation:

43.6 (a) No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive.

(b) The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action.

(c) As used in this section, "conceived" means the fertilization of a human ovum by a human sperm.

Ch. 331, § 43.6, 1981 Cal. Stats. 169.

childbirth.⁸⁵ This freedom of choice inferentially includes the right to give birth to a potentially disabled child for whatever reasons the mother deems fit. The chilling effect of a wrongful life recovery against the plaintiff's parents would impermissibly burden the mother's freedom to choose childbirth.⁸⁶

C. Compensation and Deterrence

A successful tort action results in a court's ordering the defendant to pay a certain sum of money to the victim of his negligent or intentionally wrongful conduct. This pecuniary award both compensates the plaintiff for his damages and deters the defendant and others from engaging in tortious behavior.⁸⁷ These fundamental goals of compensation and deterrence guide courts in adapting tort law to a constantly changing society.⁸⁸ As harm has befallen plaintiffs from such engines of progress as railroads,⁸⁹ automobiles,⁹⁰ and pharmaceuticals,⁹¹ courts have recognized duties and created causes of action unknown to earlier common law.⁹²

In keeping with this traditional sensitivity to social change, a growing majority of courts recognize the wrongful birth claim⁹³

⁸⁵ *Maier v. Roe*, 432 U.S. 464, 472 n.7 (1977) (a woman has at least an equal right to choose childbirth as to choose abortion).

⁸⁶ In *Turpin v. Sortini*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (5th Dist. 1981), *hearing granted*, No. 24319 (Aug. 6, 1981), the court stated:

[r]ecognition . . . of a cause of action in minors to sue their parents for genetic defects has complications involving transcendent public policy questions impinging upon intimate and sensitive family relationships into which the court should not intrude. The right of parents to make a decision to take the risk of having offspring with a defect rather than to live childless, for example, should not be hampered with by judicial intermeddling.

119 Cal. App. 3d at 697, 174 Cal. Rptr. at 133.

⁸⁷ See W. PROSSER, *supra* note 70, at § 4.

⁸⁸ *Id.* See also L. GREEN, *THE LITIGATION PROCESS* 125-27 (2d ed. 1977).

⁸⁹ See, e.g., *Stubley v. London & N.W. Ry.* (1865) L.R. 1 Ex. 13 (railroad held liable for injury caused by open crossing gate, though plaintiff could and probably should have seen oncoming train).

⁹⁰ See, e.g., *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (manufacturer held liable despite lack of contractual privity).

⁹¹ See, e.g., *Sindell v. Abbott Labs.*, 26 Cal. 3d 566, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980) (holding DES manufacturers to "market share liability").

⁹² For a partial listing, see W. PROSSER, *supra* note 70, § 1.

⁹³ See cases cited note 29 *supra*.

while rejecting a wrongful life cause of action.⁹⁴ Some writers, however, suggest that the policy of compensation also mandates recognition of the child's claim.⁹⁵ Some argue that courts reject wrongful life because they are trapped in a time lag and are falling behind the fleet advance of science and technology.⁹⁶ This is an inaccurate portrayal of the judicial treatment of wrongful life. Courts reject the claim because of the absence of injury to any legally recognizable interest of the plaintiff child.⁹⁷ Actually, courts have admirably responded to the advance of technology and the needs of its victims by recognizing the wrongful birth claim.⁹⁸

One writer argues that a mother chooses to abort on behalf of her unborn child.⁹⁹ Thus the counselor's inadequate advice injures the fetus who exercises procreative choice vicariously through its mother.¹⁰⁰ This view runs counter to law and common sense. Since procreative control is expressly reserved to the mother,¹⁰¹ there is no right for the child to exercise.¹⁰² Further, to suggest that a court should impute the desire to be aborted to the fetus is at most absurd and at least an undesirable legal fiction.¹⁰³

The effectiveness of deterrence against medical negligence is questionable.¹⁰⁴ Courts, however, continue to invoke this policy

⁹⁴ See cases cited note 58 *supra*.

⁹⁵ See, e.g., Capron, *supra* note 1; Peters & Peters, *Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action*, 18 DUQ. L. REV. 859 (1980); *Right Not to Be Born*, *supra* note 7; *Time Has Come*, *supra* note 66.

⁹⁶ Peters & Peters, *supra* note 95, at 871.

⁹⁷ See text accompanying notes 59-73 *supra*.

⁹⁸ See note 31 *supra*.

⁹⁹ Capron, *supra* note 1, at 652-53.

¹⁰⁰ *Id.*

¹⁰¹ *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-72 (1976) (state abortion statute requiring husband's consent struck down).

¹⁰² See text accompanying notes 49-50 *supra*.

¹⁰³ Jeremy Bentham most aptly describes the character and operation of legal fictions. "A fiction of law may be defined a wilful falsehood, having for its object the stealing of legislative power, by and for hands which durst not, or could not, openly claim it; and, but for the delusion thus produced, could not exercise it." *Quoted in* C. OGDEN, *BENTHAM'S THEORY OF FICTIONS* xviii (1959).

¹⁰⁴ G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970). A fine synopsis of the work of Prof. Calabresi is found in F. HARPER & F. JAMES, *THE LAW OF TORTS* § 11.5 (Supp. 1968); Brook, Brutco & Williams, *The Relationship Between Medical Malpractice and Quality of Care*, 1975 DUKE L.J. 1197, 1221; Havighurst, "Medical Adversity Insurance" — *Has Its Time Come?* 1975 DUKE L.J.

in shaping tort law because without the threat of civil liability, the negligence of physicians could go unchecked.¹⁰⁵ This effort at deterrence is particularly appropriate when the injury to the parents for wrongful birth can be so crushing.¹⁰⁶

One writer claims that since the counselor's negligence has such an overwhelming effect on the child, granting recovery to the child as well as to the parent will better deter professional negligence.¹⁰⁷ The potential recovery from a wrongful birth action alone, however, is staggering.¹⁰⁸ Moreover, the only element of damages lacking in a mother's wrongful birth recovery is the child's pain and suffering, but this element is inextricably bound to the child's life, which is not cognizable as an injury.¹⁰⁹ Thus, the doubtful deterrent effect of tort recovery is an insufficient basis for recognizing the wrongful life claim.

Some writers and one court would also focus the policy of deterrence upon the parents of wrongful life claimants.¹¹⁰ They argue that parents who allow genetically disabled children to enter the population and pollute the gene pool threaten our genetic future.¹¹¹ Thus, holding parents liable for wrongful life would enforce their duty to keep pure our genetic stock.¹¹² It would also impose a duty upon parents to spare their potentially disabled children from pain-filled lives.

There is little wisdom in recognizing either duty.¹¹³ Judicial imposition of either duty would blatantly and unconstitutionally chill the autonomy of procreative choice that *Roe v. Wade* guar-

1233, 1235-36.

¹⁰⁵ The court in *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (2d Dist. 1980) stated, "The law indeed has an appropriate function in encouraging adequate and careful medical practice in the field of genetic counseling. . . ." *Id.* at 826, 165 Cal. Rptr. at 486.

¹⁰⁶ See note 4 *supra*.

¹⁰⁷ Capron, *supra* note 1, at 658.

¹⁰⁸ In *Robak v. United States*, 503 F. Supp. 982 (N.D. Ill. 1980), *modified*, 658 F.2d 471 (7th Cir. 1981), the successful parent plaintiffs recovered over \$900,000 in special damages.

¹⁰⁹ See text accompanying notes 59-74 *supra*.

¹¹⁰ *Curlender v. Bio-Science Labs.*, 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (2d Dist. 1980); see *Shaw, supra* note 2, at 340; *Time Has Come, supra* note 66, at 131-32; note 84 *supra*.

¹¹¹ *Shaw, supra* note 2, at 340.

¹¹² *Id.*

¹¹³ Capron, *supra* note 1, at 661-66.

anted to the individual mother.¹¹⁴ If this constitutionally granted autonomy is to be overruled by a "compelling state interest,"¹¹⁵ the legislature should make this choice. No court should enunciate such an unprecedented and fundamental public policy.¹¹⁶

Careful weighing of the policies underlying wrongful birth and wrongful life require recognition of the former and rejection of the latter.¹¹⁷ Most courts have concurred with this conclusion.¹¹⁸ Complete analysis, however, requires determination of the proper measure of damages in a wrongful birth action.

V. A PROPOSAL FOR MEASURING DAMAGES

The elements of pecuniary damage in a wrongful birth action are the expenses of childbirth, the special costs attributable to the child's disability, and the ordinary costs incident to raising a child. Emotional damages include the deprivation of the right to make an informed procreative choice, the pain and suffering of childbirth, the shock of initially learning of the child's disability, and the continuing anguish of raising a disabled child.¹¹⁹ The complex legal, moral, and social issues raised by wrongful birth claims result in widely divergent judicial treatment of damages.

¹¹⁴ See note 44 *supra*.

¹¹⁵ See *Beal v. Doe*, 432 U.S. 438, 475-76 (1977) (the state may not interfere with a woman's right to terminate her pregnancy absent a compelling state interest).

¹¹⁶ As the court stated in *Turpin v. Sortini*, 119 Cal. App. 3d, 690, 174 Cal. Rptr. 128 (5th Dist. 1981), *hearing granted*, No. 24319 (Aug. 6, 1981), "If any decision requires the wise deliberation and painstaking investigation that only the Legislature can give, the determination that impaired but living children should be enabled to sue for the injury of birth is such a decision." 119 Cal. App. 3d at 698, 174 Cal. Rptr. at 133.

¹¹⁷ See text accompanying notes 42-116 *supra*.

¹¹⁸ For courts recognizing wrongful birth, see note 31 *supra*. For courts rejecting wrongful life, see note 58 *supra*.

¹¹⁹ Not all courts have considered each of these elements. As the court in *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981) recently acknowledged when it explained the scope of recovery for wrongful birth, "In the changing landscape of family torts our decision merely advances the frontier a little farther." *Id.* at 71, 432 A.2d at 842. *Curlender v. Bio-Sciences Labs.*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (2d Dist. 1980) allowed punitive damages where "[t]he defendant has been guilty of oppression, fraud, or malice, express or implied." *Id.* at 831, 165 Cal. Rptr. at 490.

*Berman v. Allan*¹²⁰ and *Becker v. Schwartz*¹²¹ illustrate the extent of this confusion.

A critical issue in wrongful birth litigation has been the treatment of the parents' emotional suffering. *Berman* allowed recovery for emotional injury, but limited it to the initial shock that parents suffer upon realization that their child is disabled.¹²² *Becker* denied recovery on the grounds that the pleasure of parenting mitigated the emotional suffering of the parents. The *Becker* court reasoned that balancing the pluses and minuses of parenthood would be too speculative.¹²³

A fair solution requires that courts evaluate the circumstances of each particular case. Disabilities range from mild retardation, where the child can enjoy life and loving relationships, to Tay-Sachs disease, where a severely incapacitated infant dies after a few years of suffering.¹²⁴ In the latter case, compensation for emotional suffering is not prohibitively speculative.¹²⁵

The measure of recovery for the expenses of raising the child has also been controversial. *Becker* recognized a claim for the expenses of caring for the disabled child until her death.¹²⁶

¹²⁰ 80 N.J. 421, 404 A.2d 8 (1979), *overruled in part*, *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981).

¹²¹ 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

¹²² *Berman v. Allan*, 80 N.J. 421, 431, 404 A.2d 8, 14 (1979).

¹²³ *Becker v. Schwartz*, 46 N.Y.2d 401, 414, 386 N.E.2d 807, 814, 413 N.Y.S.2d 895, 900 (1978).

¹²⁴ The wrongful life plaintiff in *Curlender v. Bio-Sciences Labs.*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (2d Dist. 1980), who was afflicted with Tay-Sachs disease, was described as suffering from:

mental retardation, susceptibility to other diseases, convulsions, sluggishness, apathy, failure to fix objects with her eyes, inability to take an interest in her surroundings, loss of motor reactions, inability to sit up or hold her head up, loss of weight, muscle atrophy, blindness, pseudobulver palsy, inability to feed orally, decerebrate rigidity and gross physical deformity.

Id. at 816, 165 Cal. Rptr. at 480-81. The plaintiff's life expectancy was four years. *Id.*

¹²⁵ The parents of a severely disabled child, who is in constant pain, will experience few or none of the joys of parenting. As the court in *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981), stated, "There is no joy in watching a child suffer and die from cystic fibrosis." *Id.* at 69, 432 A.2d at 842. Hence, there is no need to speculate as to the pluses and minuses of parenting.

¹²⁶ *Becker v. Schwartz*, 46 N.Y.2d 401, 415, 386 N.E.2d 807, 814, 413 N.Y.S.2d 895, 900, 903 (1978).

Berman denied any recovery for the costs of caring for the disabled child. The court held that to saddle the defendants with enormous costs while the parents retained all the benefits of parenthood was inequitable.¹²⁷ Moreover, these costs were considered disproportionate to the doctor's culpability.¹²⁸

Berman's reasons for denying recovery of pecuniary damages are flawed. First, mitigation of the parents' pecuniary recovery because of the satisfaction they derive from parenting is illogical; satisfaction ought to diminish recovery for the emotional suffering of the parents.¹²⁹ *Berman's* second argument, that the damages are disproportionate to the counselor's culpability, should not be a factor in determining pecuniary damages. The only relevant consideration is what damages are proximately caused by defendant's negligence.¹³⁰

Allowing the parents to recover the full costs of raising the disabled child avoids difficult questions inherent in claims of

¹²⁷ *Berman v. Allan*, 80 N.J. 421, 431, 404 A.2d 8, 14 (1979), *overruled in part*, *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981). *Schroeder* granted in addition to the emotional damages allowed in *Berman* the expenses actually attributable to the child's affliction.

¹²⁸ *Berman v. Allan*, 80 N.J. 421, 431, 404 A.2d 8, 14 (1979), *overruled in part*, *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981).

¹²⁹ RESTATEMENT (SECOND) OF TORTS § 920 (1965) specifies that when the defendant's tortious conduct has caused harm to the plaintiff and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages to the extent that is equitable.

¹³⁰ The measure of compensatory damages for personal injuries is determined through the doctrine of proximate cause. The doctrine of proximate cause has a dual function. It determines not only the existence of liability, but also its extent. *See generally* C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES 260-74 (1935). To establish proximate cause, the plaintiff must prove cause in fact, which is a question for the jury, as well as the duty of the defendant to protect the plaintiff against the event that occurred, which is a question of law for the court. Duty to the plaintiff is determined by answering the question: Is it fair and socially useful to hold the defendant responsible for those particular consequences of his negligence? To resolve that question affirmatively is also to resolve the extent of compensatory liability. *See generally* W. PROSSER, *supra* note 70, 41-45. Thus, the degree of negligence or culpability is irrelevant in measuring the extent of liability for compensatory damages. Malicious or reckless negligence affects only the scope of defendant's duty, bringing consequences within proximate causation that are more remote and less foreseeable than would be allowed in cases of simple negligence. However, even unaggravated negligence calls for full compensation of all proximately caused injuries.

wrongful life, while insuring adequate provision for the child. Moreover, full compensation for the extraordinary expenses attributable to the child's disability can only facilitate the parents' psychological adjustment to him. Furthermore, recovery of the full cost of raising the disabled child would free the parents economically to have or adopt another child.

The most sensible measure of recovery is the full cost of rearing the child.¹³¹ A fundamental tenet of tort law is that a negligent tortfeasor is liable for all damages proximately caused by his negligence. This principle is inconsistent with deducting the cost of raising a normal child from those of raising a disabled child.¹³² But for the defendant's breach of duty the parents would not have borne the child, and therefore would not have had to make any expenditures, including those of raising a normal child.¹³³

That portion of the parents' compensation earmarked for the care of the child should be put in a reversionary trust devoted to that purpose.¹³⁴ This would protect the child from his parent's irresponsibility, and protect the defendant should the child die sooner than expected.¹³⁵ It would also prevent parents from recovering for the future care of the infant and subsequently putting the child up for adoption.¹³⁶

¹³¹ In *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981) the total costs of raising a disabled child exceeded \$900,000. The cost included \$30,000 of past expenses, \$229,800 for the cost of residential education and care to the age of 21, \$515,000 for the cost of a companion, skilled in sign language and experienced with emotionally disturbed persons, for the remainder of plaintiff's adult life or comparable institutional care, and \$200,000, the cost of maintaining her for her adult life since she will never be self-supporting.

¹³² Decisions deducting the cost of raising a normal child from that of a disabled child are: *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

¹³³ See note 130 *supra*.

¹³⁴ The terms of the trust should provide for payments of income and principal to meet the expenses of caring for the child. At the child's death, any funds remaining would revert to the defendants.

¹³⁵ See, e.g., *Robak v. United States*, 503 F. Supp. 982 (N.D. Ill. 1980), *modified*, 658 F.2d 471 (7th Cir. 1981).

¹³⁶ *Arnold and Dolores Becker*, parent-plaintiffs in *Becker v. Schwartz*, 60 A.D.2d 387, 400 N.Y.S.2d 199 (1977), *modified*, 46 N.Y.2d 401, 380 N.E.2d 807, 413 N.Y.S.2d 895 (1978), put their disabled child up for adoption. They did so after the rejection of the child's wrongful life claim, but during the course of their wrongful birth action. The Beckers were requesting damages for the cost of raising the child. *N.Y. Times*, Feb. 17, 1979, § I, at 21, col. 1.

Recovery for wrongful birth should also include compensation for the deprivation of procreative choice¹³⁷ and for the shock of unexpectedly giving birth to a disabled child. This remedy should be available whether or not the parents allege they would have aborted had they been properly informed.¹³⁸ Finally, the mother should also receive compensation for the pain and suffering of childbirth.

CONCLUSION

Most courts have differentiated between wrongful birth and wrongful life claims, although these claims arise out of the same negligent conduct of a prenatal counselor. The majority of courts has recognized the parents' claim while rejecting that of the disabled child. *Roe v. Wade* mandates recognition of the wrongful birth action. The absence of injury to any legal interest of the child and the weight of public policy require rejection of wrongful life. Courts have failed, however, to include some appropriate elements of damage in wrongful birth awards. The damages awarded to the parents through their wrongful birth claim should include: The full cost of raising the child, the pain and suffering of childbirth, and the emotional distress of unexpectedly giving birth to a disabled child. The court should place that portion of the award intended for the pecuniary needs of the child in a reversionary trust for the protection of the child and defendant.

Geoffrey Disston Minott
Vincent Phillip Zurzolo

¹³⁷ This is aptly characterized by Justice Handler in *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979) as "[d]eprivation of moral initiative and ethical choice." *Id.* at 440, 404 A.2d at 18.

¹³⁸ *Id.*, "The affront, however, is not diminished because the parents, if given the choice, would have permitted the birth of the child. The crucial moral decision, which was theirs to make, was denied them." *Id.* at 440, 404 A.2d at 18.

