

WRONGFUL BIRTH ACTIONS: THE CASE AGAINST LEGISLATIVE CURTAILMENT

In 1973, the United States Supreme Court held in *Roe v. Wade*¹ that a woman has a constitutionally protected right to decide, free from governmental intrusion, whether to terminate her pregnancy.² Since then, anti-abortion groups have fought to restrict that right through various legislative means.³ Recently, anti-abortion attacks have included legislative efforts to abolish tort actions brought by parents who allege that a health-care professional negligently or intentionally interfered with their right to decide whether to have an abortion. Such malpractice claims are known as wrongful birth actions.⁴ Virtually every court since *Roe* that has

¹ 410 U.S. 113 (1973).

² See *id.* The right recognized in *Roe*, however, is not unqualified. See *id.* at 154; *infra* p. 2027.

³ For example, the Missouri Catholic Council and Missouri Citizens for Life successfully lobbied the state legislature to add twenty new "pro-life" sections to the state code. See, e.g., MO. ANN. STAT. § 188.010 (Vernon 1987) (stating that "[i]t is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes").

⁴ In a wrongful birth action, the parents of a child suffering from birth defects sue a health care provider (most often a physician, but possibly a genetic counselor, cytogenic laboratory or hospital) for (1) failing to impart adequate information about their risk of producing a child who has a serious defect or (2) failing to perform prenatal diagnostic procedures with due care or (3) failing to report accurately the results of tests already performed. The parents claim that such failures deprived them of the opportunity to make a meaningful decision whether to conceive or bear a handicapped child. Damages for wrongful birth typically include the extraordinary medical, educational, and other expenses reasonably related to the care associated with the child's impairment, as well as damages for parental emotional distress. See, e.g., *Phillips v. United States*, 575 F. Supp. 1309 (D.S.C. 1983). But see *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981) (awarding coverage for all normal as well as extraordinary expenses associated with the care of the child).

Wrongful birth has often been confused with other pregnancy-related causes of action such as fetal injury, wrongful life, and wrongful pregnancy. Claims for fetal injury allege that the physician's negligence caused an otherwise normal child to be born in a defective condition, or increased the chances that the child would be born with defects. See, e.g., *Seattle-First Nat'l Bank v. Rankin*, 59 Wash. 2d 288, 367 P.2d 835 (1962); RESTATEMENT (SECOND) OF TORTS § 869 (1965 & App. 1982).

Wrongful life is a claim brought by or on behalf of a child with birth defects. The child alleges that but for the defendant's negligent advice to or treatment of the child's parents, the child would not have been conceived, or, once conceived, would not have been born to experience the pain and suffering attributable to deformity. Most jurisdictions have refused to recognize a cause of action for wrongful life on the ground that in order to restore the infant to the position he or she would have occupied were it not for the defendant's negligence, the court must perform "a calculation of damages dependent upon a comparison between the

considered the validity of a wrongful birth cause of action has upheld it.⁵

At the urging of opponents of abortion,⁶ twenty-one states have

Hobson's choice of life in an impaired state and nonexistence." *Becker v. Schwartz*, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 901 (1978); *accord* *Bruggeman v. Schimke*, 239 Kan. 245, 718 P.2d 635 (1986) (listing courts that have refused to recognize a wrongful life cause of action). Four states have recognized an action for wrongful life: California, *see* *Turpin v. Sortini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); Colorado, *see* *Continental Casualty Co. v. Empire Casualty Co.*, 713 P.2d 384 (Colo. App. 1986); New Jersey, *see* *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); Washington, *see* *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983), *aff'd*, 746 F.2d 517 (9th Cir. 1984).

Wrongful pregnancy, or as it is sometimes called, wrongful conception, alleges that negligence in the performance of a sterilization operation or abortion, or in the provision of contraceptives, led to the birth of an unwanted child. *See, e.g., Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971); *Miller v. Johnson*, 231 Va. 177, 343 S.E.2d 301 (1986). Wrongful pregnancy typically involves the birth of a healthy, though unplanned, baby. There are, however, a few cases involving the birth of unplanned and congenitally defective children. *See, e.g., LaPoint v. Shirley*, 409 F. Supp. 118 (W.D. Tex. 1976); *Speck v. Finegold*, 497 Pa. 76, 439 A.2d 110 (1981) (*per curiam*).

⁵ Courts interpreting the laws of 17 states have recognized wrongful birth actions as defined in this Note: Alabama, *see* *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981); California, *see* *Andalon v. Superior Court*, 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984); Florida, *see* *Moores v. Lucas*, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981); Idaho, *see* *Blake v. Cruz*, 108 Idaho 253, 698 P.2d 315 (1984) (legislatively overridden by IDAHO CODE § 5-334 (Supp. 1986)); Illinois, *see* *Goldberg v. Ruskin*, 128 Ill. App. 3d 1029, 471 N.E.2d 530 (1984), *aff'd*, 113 Ill. 2d 482, 499 N.E.2d 406 (1986); Michigan, *see* *Eisbrenner v. Stanley*, 106 Mich. App. 351, 308 N.W.2d 209 (1981); New Hampshire, *see* *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986); New Jersey, *see* *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979); New York, *see* *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 815 (1978); North Carolina, *see* *Gallagher v. Duke Univ.*, 638 F. Supp. 979 (M.D.N.C. 1986); Pennsylvania, *see* *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978); South Carolina, *see* *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981); Texas, *see* *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); Virginia, *see* *Naccash v. Burger*, 223 Va. 406, 290 S.E.2d 825 (1982); Washington, *see* *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983), *aff'd*, 746 F.2d 517 (9th Cir. 1984); West Virginia, *see* *Jennifer S. v. Kirdnual*, 332 S.E.2d 872 (W. Va. 1985); and Wisconsin, *see* *Dumer v. St. Michael's Hosp.*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975). Only one court has found the action invalid in a case decided after *Roe*. *See* *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (1985). *But see* *Gallagher*, 638 F. Supp. 979 (limiting the holding in *Azzolino* to wrongful birth claims involving postconception misconduct).

One state, Maine, has legislatively recognized a cause of action for wrongful birth. *See* ME. REV. STAT. ANN. tit. 24, § 2931(2) (1986).

⁶ For example, the Pennsylvania Catholic Conference has lobbied for legislation prohibiting wrongful birth actions in Pennsylvania, *see, e.g.,* Pennsylvania Catholic Conference, *Why the Senate Should Concur in the Wrongful Birth/Wrongful Life Amendments to Senate Bill 750* (June 25, 1984) (unpublished) (available in Harvard Law School Library), and Tennessee Volunteers for Life, Inc. has done so in Tennessee, *see, e.g.,* J. Hubbard, *Memorandum to Members of the House Judiciary Subcomm. on Civil Practice, re: Wrongful Life/Wrongful Birth HB 409* (March 23, 1984) (unpublished) (available in Harvard Law School Library). At the national level, four anti-abortion organizations expressed their interest in promoting such legislation by filing amicus briefs in *Hickman v. Group Health, Inc.*, 396 N.W.2d 10 (Minn. 1986), the first case to test a wrongful birth statute: Americans United for Life Legal Defense Fund, The Catholic Health Association of the United States, The Catholic League for Religious and Civil Rights, and The National Right to Life Committee, Inc.

introduced⁷ and five have enacted⁸ legislation prohibiting wrongful birth actions. The language of the enacted statutes varies, but all of the laws embody a form of the basic prohibition contained in model legislation now being circulated by one anti-abortion group:

There shall be no cause of action on behalf of any person based on the claim that but for an act or omission, a person would not have been permitted to have been born alive but would have been aborted.⁹

In at least one state, parents of a handicapped child have sought to invalidate wrongful birth legislation on the ground that it interferes with the right to decide to have an abortion as defined in *Roe*. Their efforts proved unsuccessful: in *Hickman v. Group Health Plan, Inc.*,¹⁰ the Minnesota Supreme Court held that Minnesota's wrongful birth statute was constitutional.¹¹

This Note argues that the *Hickman* decision was wrong and that prohibitions of wrongful birth actions are unconstitutional. Part I

⁷ Alabama, Idaho, Illinois, Indiana, Kansas, Louisiana, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin have introduced such legislation. See Donovan, *Wrongful Birth and Wrongful Conception: The Legal and Moral Issues*, 16 FAM. PLAN. PERSP. 64 (1984); N. Hunter, Memorandum to All ACLU Affiliates and Other Interested Organizations 1 (April 15, 1983) (unpublished) (available in Harvard Law School Library).

⁸ See IDAHO CODE § 5-334 (Supp. 1986); MINN. STAT. § 145.424 (1987 Supp.); MO. ANN. STAT. § 188.130 (Vernon Supp. 1987); S. D. CODIFIED LAWS ANN. § 21-55-2 (Supp. 1986); UTAH CODE ANN. § 78-11-24 (1986 Supp.).

⁹ Americans United for Life Legal Defense Fund, Model Legislation (unpublished) (available in Harvard Law School Library). Enacted wrongful birth statutes differ from the model in a couple of ways. Two statutes prohibit actions based on "negligent conduct" rather than on any "act or omission," thus allowing actions based on intentional conduct. See MINN. STAT. § 145.424 subd. 2 (Supp. 1987); MO. ANN. STAT. § 188.130 (Vernon Supp. 1987). Two statutes also contain explicit disclaimers not included in the model but implicit in its meaning. Both the Minnesota and Idaho statutes state that actions for wrongful conception and fetal injury are not precluded by the wrongful birth provision. See MINN. STAT. § 145.424 subd. 3 (1987 Supp.); IDAHO CODE § 5-334(2) (1986 Supp.). Neither of these actions includes the claim that but for the conduct of another a fetus would have been aborted, see *supra* note 4, and thus they are implicitly excluded from the model's prohibition.

¹⁰ 396 N.W.2d 10 (Minn. 1986).

¹¹ After Mrs. Hickman gave birth to a baby girl afflicted with Down's Syndrome, she and her husband sued their obstetrician, Dr. Sharpe, for wrongful birth. Mrs. Hickman claimed that despite her advanced age and the associated risk of Down's syndrome, Dr. Sharpe negligently told her that amniocentesis (a medical procedure in which a sample of the amniotic fluid surrounding a fetus is removed and analyzed to detect the presence of chromosomal abnormalities such as Down's syndrome) was unnecessary. The Hickmans claimed that they would have elected to terminate the pregnancy, following amniocentesis, had they been properly informed of the fetus' condition. See Brief for Appellant, app. at A-6, *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986) (No. 85-2013). In defense, Dr. Sharpe contended that the Hickmans' claim was barred by Minnesota's newly enacted wrongful birth statute. See *id.* at A-15. The trial court ruled that the statute prohibiting the Hickmans' claim was unconstitutional because it significantly interfered with a woman's right to decide to terminate pregnancy. See *id.* at A-38. The state supreme court reversed. See 396 N.W.2d 10.

describes the development of the wrongful birth cause of action. Part II argues that statutes prohibiting wrongful birth actions violate the due process clause because they infringe parental rights to make autonomous, informed procreative decisions and do not further a compelling state interest. Part III asserts that wrongful birth statutes also violate the equal protection clause because they draw classifications that burden a fundamental interest and cannot withstand strict scrutiny. Part III then argues that even absent implication of a fundamental interest, wrongful birth statutes cannot withstand equal protection scrutiny because the classifications they employ are not rationally related to a legitimate state interest.

I. THE WRONGFUL BIRTH CAUSE OF ACTION

Prior to *Roe v. Wade*, only one court had ruled on a wrongful birth claim in a reported decision. In that case, *Gleitman v. Cosgrove*,¹² the New Jersey Supreme Court affirmed the trial court's dismissal of a wrongful birth action for failure to state a claim. When diagnosed as two months pregnant, Sandra Gleitman informed her doctor that one month earlier she had contracted rubella. Dr. Cosgrove and his associate, Dr. Dolan, incorrectly and repeatedly informed Mrs. Gleitman that the disease would have no effect on her unborn child.¹³ In fact, Jeffrey Gleitman was born with rubella syndrome: he suffered serious impairment of his sight, hearing, and speech ability. Mrs. Gleitman and her husband sued, alleging that had they known of the true risk to their unborn son, they would have "obtained other medical advice with a view to the obtaining of an abortion."¹⁴

The New Jersey Supreme Court dismissed the Gleitmans' wrongful birth claim for two reasons. First, the court found it "impossible . . . to measure [the Gleitmans'] damages in being the mother and father of a defective child."¹⁵ The court found itself unable "to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries."¹⁶ Second, even if it could calculate such damages, the court reasoned that "countervailing public policy supporting the preciousness of human life"¹⁷ would require invalidation of the action. The court asserted that "the right of the[]

¹² 49 N.J. 22, 227 A.2d 689 (1967).

¹³ See *id.* at 24, 227 A.2d at 690.

¹⁴ *Id.* at 26, 227 A.2d at 691.

¹⁵ *Id.* at 29-30, 227 A.2d at 693.

¹⁶ *Id.* at 29, 227 A.2d at 693.

¹⁷ *Id.* at 31, 227 A.2d at 693.

child to live is greater than and precludes [the parents'] right not to endure emotional and financial injury."¹⁸

Roe shifted the balance of rights perceived by the *Gleitman* court by establishing that a woman such as Mrs. Gleitman has a right to decide to have an abortion. Since *Roe*, courts have acknowledged that "[p]ublic policy now supports, rather than militates against, the proposition that [a woman] not be impermissibly denied a meaningful opportunity to make that decision."¹⁹ Today, courts view the argument that damages cannot be measured in wrongful birth actions as "in reality, a thinly-disguised policy argument"²⁰ against reproductive autonomy that has "lost [its] potency."²¹

Since *Roe*, medical science's ability to predict or detect defects in the unborn has expanded significantly. Advances in the fields of prenatal screening²² and diagnosis²³ have led courts to interpret the applicable standard of care²⁴ as requiring appropriate tests and counseling for women at risk of bearing children with birth defects.²⁵ Thus, courts have held that general principles of tort law require that

¹⁸ *Id.*

¹⁹ *Berman v. Allan*, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979) (overruling *Gleitman* in part).

²⁰ *Phillips v. United States*, 508 F. Supp. 544, 549 (D.S.C. 1981).

²¹ *Blake v. Cruz*, 108 Idaho 253, 256, 698 P.2d 315, 318 (1984). Courts now view the calculation of extraordinary economic expenses for care and treatment of the child's defect as "certain and readily ascertainable." *Goldberg v. Ruskin*, 128 Ill. App. 3d 1029, 1038-39, 471 N.E.2d 530, 535 (1984).

²² Prenatal screening attempts to identify, either before or after conception, women who have a high risk of bearing an abnormal child. See Brock, *Prenatal Diagnosis and Screening: Present and Future*, in PREVENTION OF PHYSICAL AND MENTAL CONGENITAL DEFECTS 122 (M. Marois ed. 1985). Such women can be identified through the taking of a medical history during their initial visit to the doctor. Signs of increased risk include, for example, advanced maternal age, previous offspring with a chromosomal aberration, family history of birth defects, and exposure to teratogenic agents during pregnancy. See THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES 18-19 (6th ed. 1985); Young & Moore, *A Questionnaire for Identifying the Pregnant Patient in Need of Prenatal Diagnosis*, 81 TEX. MED. 30 (1985). Mothers identified as being at increased risk may then be offered the option of monitored pregnancies.

²³ Prenatal diagnosis refers to a variety of medical techniques used to detect "the presence or absence of a possible disease or defect in the fetus." Powledge & Fletcher, *Guidelines for the Ethical, Social and Legal Issues in Prenatal Diagnosis*, 300 N. ENG. J. MED. 168, 170 (1979). Specific techniques of prenatal diagnosis include: amniocentesis, ultrasonography, fetoscopy, chorion villus biopsy, and maternal serum alpha-fetoprotein screening. See PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, SCREENING AND COUNSELING FOR GENETIC CONDITIONS 23-31 (1983) [hereinafter PRESIDENT'S COMMISSION]; Milunsky, *Prenatal Diagnosis: New Tools, New Problems*, in GENETICS AND THE LAW III 336-44 (A. Milunsky, G. Annas eds. 1984).

²⁴ A physician "must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing." PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 187 (W. Keeton, D. Dobbs, R. Keeton & D. Owen eds. 5th ed. 1984).

²⁵ See, e.g., *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 466, 656 P.2d 483, 488 (1983), *aff'd*, 746 F.2d 517 (9th Cir. 1984).

the physician who negligently deprives a mother of the choice whether to continue pregnancy when fetal defects are present "make amends for the damages 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."²⁶ Far from viewing public policy as an obstacle to wrongful birth actions, courts have found it "impossible . . . to justify a policy which at once deprives the parents of information by which they could elect to terminate the pregnancy likely to produce a child with defective body . . . and which policy then denies recovery from the tortfeasor of costs of treating and caring for the defects of the child."²⁷ As now viewed, "wrongful birth claims [are] a logical and necessary development"²⁸ in tort law designed to protect the constitutional rights of parents.²⁹

In addition to safeguarding the constitutional rights of individuals, wrongful birth actions protect societal interests in promoting quality prenatal health care. Society has a recognized interest in ensuring that prenatal screening and diagnosis are performed safely and accurately.³⁰ Prenatal counseling and diagnosis are "strewn with opportunities for missteps"³¹ that have serious ramifications, including the abortion of healthy fetuses and the unwanted births of severely debilitated infants. Because "[i]naccurate results have even heavier moral and legal consequences in prenatal diagnosis than in many screening procedures or other routine medical tests,"³² medical professionals "have a strong need to keep up their proficiency, be aware of their shortcomings, and carry out their work in a setting with an optimal standard of quality control."³³ The recognition and availability of a wrongful birth cause of action ensures that doctors will exercise due care in prenatal counseling and provide parents with the information necessary to make informed procreative decisions.³⁴

²⁶ *Berman v. Allan*, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979).

²⁷ *Jacobs v. Theimer*, 519 S.W.2d 846, 849 (Tex. 1975).

²⁸ *Harbeson*, 98 Wash.2d at 467, 656 P.2d at 488.

²⁹ One court stated that "as a result of *Roe* and the advances in science, . . . physicians who perform testing and provide advice relevant to the constitutionally guaranteed procreative choice, or whose actions could reasonably be said to give rise to a duty to provide such testing or advice, have an obligation to adhere to reasonable standards of professional performance." *Smith v. Cote*, 128 N.H. 231, , 513 A.2d 341, 346 (1986).

³⁰ See, e.g., *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 696 (E.D. Pa. 1978).

³¹ Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 626 (1979).

³² Powledge & Fletcher, *supra* note 23, at 169.

³³ Fletcher, Berg & Tranoy, *Ethical Aspects of Medical Genetics*, 27 CLINICAL GENETICS 199, 200 (1985).

³⁴ As a supporter of reproductive rights has stated:

There should be no mistake that the rights of patients to sue physicians and other health care providers, in wrongful birth cases and others, has been a major reason for increased

Thus, wrongful birth has emerged as a tort action designed to protect the parental right to make informed procreative choices as well as society's interest in ensuring that standards of good medical practice govern the performance of prenatal counseling and diagnosis.

II. WRONGFUL BIRTH STATUTES VIOLATE THE DUE PROCESS CLAUSE

Although state legislatures enjoy wide latitude in regulating tort actions, in doing so they may not impermissibly interfere with rights implicitly or explicitly protected by the Constitution.³⁵ This Part argues that wrongful birth statutes violate the due process clause of the fourteenth amendment because they impermissibly burden a constitutionally protected privacy right and are not justified by a compelling state interest.

Implicit in the due process clause of the fourteenth amendment is the right to freedom of personal choice in matters of family life.³⁶ This right includes the decision whether to beget children as well as the decision whether to terminate pregnancy.³⁷ The Supreme Court also has recognized that a woman is "entitled to rely [on her doctor] for advice in connection with her decision [whether to have an abortion]."³⁸ By licensing doctors to withhold information regarding a woman's risk of bearing a child with birth defects, wrongful birth

caution, sensitivity, and the provision of high quality medical services on the part of hospitals, clinics and medical staffs across this country.

M. Sorrentino, Statement to [Rhode Island] House Committee on Health, Education and Welfare re: 83-H5054, at 1 (1983) (available in Harvard Law School Library).

³⁵ See *Munn v. Illinois*, 94 U.S. 113, 134 (1877); *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 13 (Minn. 1986). In addition, state constitutional provisions may prohibit the legislature from removing a recognized common law cause of action without providing a reasonable substitute. Thirty-six state constitutions contain a remedies clause that guarantees every person a remedy for any legally recognized wrong. See Note, *A Remedy for all Injuries?* 25 CHI.-KENT L. REV. 90, 94 nn.29, 30 (1947). Remedies clauses may bar the state from withdrawing a cause of action once the underlying right has been recognized by the courts. Thus, in states where wrongful birth is already a recognized injury, state constitutions, as well as the federal Constitution, may bar legislative elimination of the cause of action.

³⁶ *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (explaining that "among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education'" (quoting *Roe v. Wade*, 410 U.S. 113, 152-53 (1973)) (citations omitted)).

³⁷ See *Carey*, 431 U.S. at 685 ("The decision whether or not to beget or bear a child is at the very heart of [the] cluster of constitutionally protected choices."); *Roe*, 410 U.S. at 153 (the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

³⁸ *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 445 (1983); see Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 337-39 (1985) (asserting that the decisional right recognized in *Roe* is "relational," one that "require[s] the affirmative help of others for [its] exercise").

statutes intrude impermissibly into the physician-patient consultation and undermine the essential reliance a woman places in her doctor. Wrongful birth statutes thus interfere directly with the procreative decisionmaking process protected by the Constitution.

On two occasions the Court has struck down regulations infringing the right to choose to have an abortion on the ground that the government may not interfere with the doctor-patient consultation necessary for the meaningful exercise of a woman's decision whether or not to terminate pregnancy. In *City of Akron v. Akron Center for Reproductive Health, Inc.*,³⁹ the Court invalidated an Ohio ordinance that "specifie[d] a litany of information that the physician must recite to each woman"⁴⁰ seeking an abortion. The Court found that the ordinance unconstitutionally interfered with the normal functioning of the doctor-patient relationship by requiring the doctor to provide information to a woman regardless of whether it was medically indicated or relevant to her decision.⁴¹ In *Thornburgh v. American College of Obstetricians*,⁴² the Court struck down a similar provision of a Pennsylvania ordinance because it "place[d] the physician in an awkward position and infringe[d] upon his or her professional responsibilities."⁴³ Legislation prohibiting wrongful birth actions similarly interferes with the normal functioning of the doctor-patient consultation and infringes the physician's professional responsibilities.

Wrongful birth statutes significantly limit the physician's legal duty to ensure that information regarding pregnancy is conveyed to a woman in accordance with accepted standards of medical practice.⁴⁴

³⁹ 462 U.S. 416 (1983).

⁴⁰ *Id.* at 445. The information that the physician was required to recite included the status of the pregnancy, the development of the fetus, the date of viability, the complications that could result from abortion and the availability of agencies willing to provide assistance with birth control, adoption, and childbirth. *See id.* at 442. The Court viewed the forced recitation of such information as an obstacle placed in the path of a physician and stated that even "minor regulations on the abortion procedure during the first trimester may not interfere with physician-patient consultation or with the woman's choice between abortion and childbirth." *Id.* at 430.

⁴¹ *See id.* at 445.

⁴² 106 S. Ct. 2169 (1986).

⁴³ *Id.* at 2180. The ordinance invalidated in *Thornburgh* required, for example, that all women seeking an abortion, even victims of rape and incest, be informed of the "fact that the father is liable to assist in the child's support, even in instances where the father has offered to pay for the abortion." *Id.* at 2179. The Court stated that this and other requirements revealed "the anti-abortion character of the statute and its real purpose" of providing "discouragement for the abortion decision." *Id.* at 2180.

⁴⁴ Wrongful birth statutes do not preclude actions alleging that parents were wrongfully denied information that they would have used to treat, cure or prevent fetal defect because such actions do not include the claim that the fetus would have been aborted. Thus, physicians are not wholly immune from suit for intentional or negligent failure to conduct appropriate prenatal screening and diagnosis. Given the current state of medical knowledge, however, it is unlikely that prenatal testing will reveal a preventable or treatable fetal defect. The detection of severe fetal defect currently leads, in the vast majority of cases, to termination of the pregnancy. *See*

In recognizing a woman's constitutional right to decide whether to abort, the *Roe* Court asserted that "[i]f an individual practitioner abuse[d] the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, [would be] available."⁴⁵ Prohibition of the malpractice remedy strips the physician's duty to inform of meaning. In the presence of such statutes, many doctors will of course continue to exercise proper medical judgment in accordance with accepted standards of care; but others, relieved of the threat of malpractice suits, will not.⁴⁶ Granting a physician immunity for failure to impart information that is medically indicated interferes even more with the abortion right than does a requirement that he impart information that is not medically indicated. The latter may be confusing and detrimental to a woman's well-being; the former directly prevents a woman from making an informed choice.

Supporters of wrongful birth statutes argue that the statutes do not interfere with the protected right to choose abortion, because a pregnant woman is still free to obtain an abortion; supporters argue that the regulation merely embodies the state's decision not to facilitate abortion.⁴⁷ In making this argument, proponents rely on *Maher v. Roe*⁴⁸ and *Harris v. McRae*,⁴⁹ two Supreme Court cases holding that a state's refusal to fund abortions does not infringe the exercise of a

Benn, *The Centralized Prenatal Genetics Screening Program of New York City III: The First 7000 Cases*, 20 AM. J. MED. GEN. 369 (1985); see also Golbus, *Prenatal Genetic Diagnosis in 3000 Amniocenteses*, 300 N. ENG. J. MED. 157, 160 (1979) (reporting that 93.8% of women elected to terminate pregnancy when prenatal diagnosis detected fetal chromosomal or biochemical abnormalities or when fetus was male and mother was at noteworthy risk of carrying X-linked disorder). Thus, the threat of liability for failing to identify defects that can be treated, cured, or prevented is not yet a major consideration for doctors. For this reason, wrongful birth actions are necessary to ensure that doctors exercise due care in providing prenatal testing.

Proponents of wrongful birth statutes urge, however, that if a doctor does perform tests in hopes of uncovering information beneficial to the fetus, he should withhold from the parents any information he uncovers relating to an untreatable condition. See Letter from Jane Hubbard, Tennessee Volunteers for Life, Inc., Mar. 3, 1987 (available in Harvard Law School Library). Although wrongful birth statutes would prohibit parents from suing a doctor for such conduct, purposefully withholding information that a patient wants to know, or needs to know in order to make an informed decision, is patently unethical. See, e.g., THE AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES 98-99 (6th Ed. 1985).

⁴⁵ *Roe v. Wade*, 410 U.S. 113, 166 (1973).

⁴⁶ See Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 966-68 (1984) (reporting that the threat of wrongful birth and other malpractice liability changes physician behavior and that such changes reduce the risk of patient injury).

⁴⁷ See Brief for Amicus Curiae Americans United for Life Legal Defense Fund at 4, *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986) (No. 85-2013) [hereinafter Brief for Amicus Curiae].

⁴⁸ 432 U.S. 464 (1977).

⁴⁹ 448 U.S. 297 (1980).

fundamental right because, "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."⁵⁰ But the abortion funding cases have no relevance in evaluating the constitutionality of wrongful birth legislation. State funding decisions do not directly affect physician-patient communications and do not constrain information essential to a woman's decisionmaking. Although lack of funds for abortion may influence the outcome of a woman's choice or affect her ability to implement a decision not to bear a child, lack of relevant and reliable medical information precludes informed choice altogether.

Supporters also argue that wrongful birth statutes do not violate the Constitution because any infringement a woman suffers under the laws is a private injury inflicted by her physician, not the state.⁵¹ But when state legislation undermines the doctor's legal duty to act in accordance with accepted medical practice, the injury the doctor inflicts "carries with it the imprint of the state."⁵² The state, not the physician, "upsets the balance which medical malpractice strikes between the patient as a layperson and her physician as a specialist."⁵³ Further, when a state court enforces a state wrongful birth statute by dismissing a wrongful birth claim, leaving an injured woman without remedy, the state affirmatively injects itself into the private doctor-patient relationship. Such action is state action for the purposes of fourteenth amendment analysis.⁵⁴

⁵⁰ *Id.* at 316.

⁵¹ See, e.g., Brief for Amicus Curiae, *supra* note 47, at 16. The *Hickman* court agreed with this argument and stated that Minnesota's prohibition of wrongful birth actions "does not involve state action such as would make applicable the due process and equal protection clauses of the Fourteenth Amendment." *Hickman*, 396 N.W.2d at 10.

⁵² *Hickman*, 396 N.W. 2d at 19 (Amdahl, C.J., dissenting); cf. *Truax v. Corrigan*, 257 U.S. 312, 328-30 (1921) (holding that when a state statute forbid employers from obtaining injunctions against picketing by striking workers, the state "practically sanctioned" an invasion of the employer's property rights in violation of the fourteenth amendment); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (holding that a provision of the state constitution permitting private racial discrimination in housing is considered state action violative of the fourteenth amendment).

⁵³ Brief for Appellants, app. at A-38, *Hickman* (No. 85-2013). Further, the implicit assumption of the state action doctrine is that the common law protects against private discrimination and private violation of rights. See Chemerinsky, *Rethinking State Action*, 80 Nw. U.L. REV. 503, 515 (1985). Thus, it is an abuse of the state action doctrine for a court to avoid the merits of a constitutional challenge to a statute that denies the common law the power to protect fundamental rights from private infringement. Interestingly, the *Hickman* court, after disclaiming the existence of state action, went on to entertain the merits of the Hickmans' constitutional challenge. See *Hickman*, 396 N.W.2d at 13-14.

⁵⁴ The enforcement by a state court of a state statute constitutes state action. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (dismissing the proposition that no state action was involved when the state court applied a state rule of law in a civil lawsuit between two private parties); *Shelley v. Kraemer*, 334 U.S. 1, 14 (1947) (recognizing that action of state courts in enforcing common law or statutory enactments "is to be regarded as action of the State within the meaning of the Fourteenth Amendment").

Because wrongful birth statutes infringe fundamental rights, they must be justified by a compelling state interest.⁵⁵ Courts have found only two state interests sufficiently compelling to justify interference with the right to choose whether to have an abortion: protecting the health of the mother and protecting potential life.⁵⁶ Under *Roe*, each of these interests becomes compelling at a specified point during pregnancy: the state's interest in protecting maternal health becomes compelling at approximately the end of the first trimester, and its interest in safeguarding potential life becomes compelling at viability.⁵⁷ Because no compelling interest arises until the end of the first trimester, wrongful birth statutes that affect first trimester abortions are invalid. Further, wrongful birth statutes are not and could not be justified by concerns for maternal health: by lowering the enforceable standard of care and diminishing the flow of prenatal medical information, they actually increase health risks to a pregnant woman.⁵⁸ Thus, wrongful birth statutes that affect abortions after the first trimester cannot be justified by a compelling interest in the health of the mother. Wrongful birth statutes that affect post-viability abortions might be justified as protecting potential life. Even before *Roe*, however, states traditionally exempted abortions for fetal abnormality from restrictions on abortion in general.⁵⁹ Thus, wrongful birth statutes are unconstitutional at least with regard to actions that claim an abortion would have been obtained prior to viability.

III. WRONGFUL BIRTH STATUTES DENY EQUAL PROTECTION OF THE LAW

Wrongful birth statutes violate the equal protection clause because they rely on classifications that burden a fundamental interest and are not justified by a compelling state interest. Further, even absent implication of a fundamental interest, the classifications employed by

⁵⁵ See *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

⁵⁶ See *Roe*, 410 U.S. at 162-63.

⁵⁷ See *id.* at 163.

⁵⁸ See *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 20 (Minn. 1986) (Amdahl, C.J., dissenting).

⁵⁹ Prior to *Roe*, the Uniform Abortion Act permitted parents to have an abortion when their physician had reasonable cause to believe "that the child would be born with grave physical or mental defect." See Uniform Abortion Act, § 1(b)(2)(ii) (1972) quoted in *Roe v. Wade*, 410 U.S. 113, 146 n.40 (1973). Even under the no-funding standard challenged in *Maher and McRae*, a few states explicitly provided for state funding of abortions for fetal deformities. See Brief of Appellees at 16 n.14, *Harris v. McRae*, 448 U.S. 297 (1980) (No. 79-1268).

wrongful birth statutes cannot be justified as rationally related to a legitimate governmental purpose.

*A. Classifications Employed by Wrongful Birth Statutes
Burden a Fundamental Interest*

Wrongful birth statutes single out of the group of parents making procreative decisions those whose decisions involve abortion. Under the statutes, only those parents who would have chosen abortion are precluded from suing their doctor when his negligent or intentional conduct interferes with their procreative autonomy. If physician negligence in the performance of a sterilization operation interferes with a couple's choice not to conceive, that negligence is still actionable under the wrongful birth statutes.⁶⁰ And if physician negligence or intentional misconduct in the provision of information or testing *prior* to conception interferes with a couple's decision whether to conceive, that misconduct is still actionable under the statutes.⁶¹ But if negligent or intentional conduct in the provision of information or testing *after* conception interferes with a couple's decision whether to abort, wrongful birth statutes prohibit actions based on that misconduct. Although one member of the Supreme Court has explicitly recognized that the "decision on child-bearing [is no] less important the day after conception than the day before,"⁶² wrongful birth statutes allow recovery for infringement on the parental right to prevent a defective or healthy child from being conceived, but prohibit recovery for infringement on the parental right to prevent a defective child, once conceived, from coming into the world.

By creating a classification that eliminates tort actions only for parents who would have chosen abortion, wrongful birth laws burden the fundamental interest in procreative decisionmaking.⁶³ To justify burdening this fundamental interest, the statutes must withstand strict scrutiny, which requires that they further a compelling state interest.⁶⁴ As discussed in Part II above, however, wrongful birth statutes do not further any compelling state interest;⁶⁵ thus, they violate the equal protection clause as well as the due process clause.

⁶⁰ See *supra* note 9.

⁶¹ Cf. *Gallagher v. Duke University*, 638 F. Supp. 979 (M.D.N.C. 1986) (holding that a wrongful birth action exists for preconception negligence that induces a couple to conceive a defective child even when the state supreme court has denied a wrongful birth cause of action to parents who allege that physician negligence deprived them of the choice of terminating pregnancy).

⁶² *Thornburgh v. American College of Obstetricians*, 106 S. Ct. 2169, 2187 (1986) (Stevens, J., concurring) (emphasis omitted).

⁶³ See *supra* pp. 2023-25.

⁶⁴ See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

⁶⁵ See *supra* p. 2027.

B. Classifications Employed by Wrongful Birth Statutes are Not Rationally Related to a Legitimate Governmental Interest

Even if courts were to find that the classifications employed by wrongful birth statutes do not burden a fundamental interest, the statutes still could not survive equal protection analysis. Absent implication of a fundamental interest, legislative classifications must still satisfy rational basis review: they must be rationally related to a legitimate governmental interest.⁶⁶ This Section argues that wrongful birth statutes do not rationally further professed state goals and that they in fact further the illegitimate purpose of discouraging abortion.⁶⁷

The Supreme Court has recognized a legitimate state interest in encouraging childbirth.⁶⁸ Although some supporters of wrongful birth statutes argue that the laws reflect this interest,⁶⁹ wrongful birth statutes cannot be justified on the ground that they encourage childbirth. If wrongful birth statutes do encourage childbirth, they do so only by sanctioning negligence and deceit: they allow doctors to withhold information essential to parents' procreative decisionmaking. Wrongful birth statutes do not encourage the making of a decision in favor of childbirth; they prevent the making of an informed decision altogether. As the *Hickman* trial court stated: if the purpose of the statute were to encourage childbirth, "it would mean that [the state] sought to effectuate such a policy by encouraging misinformation as a basis for a woman's decision not to abort, an approach offensive to basic notions of decency."⁷⁰

Moreover, contrary to the assertions of proponents of wrongful birth statutes, the available evidence suggests that wrongful birth actions will actually encourage childbirth. The threat of wrongful birth liability encourages doctors to inform themselves about advances in medical practice and to inform their patients of medical risks and available diagnostic procedures. The availability of these procedures

⁶⁶ See *City of Cleburne v. Cleburne Living Center, Inc.*, 105 S. Ct. 3249, 3254 (1985); *Lehr v. Robertson*, 463 U.S. 248, 265 (1983); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

⁶⁷ See *Thornburgh v. American College of Obstetricians*, 106 S. Ct. 2169, 2178 (1986) (asserting that states are not free to act simply to deter women from making the decision to abort); see also *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) ("If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.'" (quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968))).

⁶⁸ See *Harris v. McRae*, 448 U.S. 297, 314 (1980); *Maher v. Roe*, 432 U.S. 464, 478 (1977); *Beal v. Doe*, 432 U.S. 438, 446 (1977).

⁶⁹ See Proposed Rhode Island House Bill 83-H5054 (stating that "it is not in the interest of the people of the state to have a declining birth rate, and wrongful birth actions encourage a decline in the birth rate"); Brief for Intervenor State of Minnesota at 13, *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986) (No. 85-2013) (arguing that Minnesota's wrongful birth statute implements the state's "value judgments which favor child birth over abortion").

⁷⁰ Brief for Appellant, app. at A-40, *Hickman* (No. 85-2013).

has been associated with an increase in the total number of live births, or a so-called "pro-life bonus."⁷¹ Due to prenatal diagnostic information, "more fetuses are saved from abortions done on unfounded genetic risk than are aborted following diagnosis of defects."⁷² Thus, to the extent that wrongful birth statutes decrease the availability of prenatal diagnostic information, the goal of encouraging childbirth is not furthered, but thwarted.⁷³

Supporters of wrongful birth statutes offer four additional justifications for the legislation: preserving the value of life; protecting the conscience of the physician; discouraging the practice of unnecessarily defensive medicine; and restricting a cause of action the grounds for which threaten to expand unacceptably. Although each of these justifications is put forth as an independent rationale for wrongful birth legislation, the critical element of each is an argument against abortion.

The most frequently stated justification for statutes prohibiting the wrongful birth action is that such suits demean the value of human life.⁷⁴ Supporters of wrongful birth legislation contend that allowing the action "encourage[s] society to devalue and ostracize the disabled,"⁷⁵ and sends "an untoward message to those already born who are disabled."⁷⁶

The availability of wrongful birth actions does not demean the value of life. The injury alleged in wrongful birth is neither the birth nor the life of the child; it is the denial of the parents' fundamental right to exercise their choice in private reproductive matters. Parents are vested both with the freedom to choose whether to conceive or bear children and the responsibility for caring for children they do bear. If the state is concerned with the value placed on a potential child and wishes to displace the parents from the role of decision-

⁷¹ Letter to the Editor, *The Pro-Life Bonus of Amniocentesis*, 302 N. ENG. J. MED. 925 (1980) (reporting that a total of 12.4% of women studied would either have chosen not to become pregnant or chosen to abort had amniocentesis not been available, while only 2% of women studied would have chosen to abort because of its availability, resulting in an increase of 10 pregnancies per 100).

⁷² Fletcher, *The Morality and Ethics of Prenatal Diagnosis*, in GENETIC DISORDERS & THE FETUS 622 (A. Milunsky ed. 1979); accord Editorial, *Prenatal Diagnosis of Down's Syndrome* 242 J. AM. MED. ASS'N 2326 (1979) (concluding that "prenatal diagnosis is ultimately a birth facilitating rather than a birth-preventing service").

⁷³ See Fletcher, *supra* note 72, at 632 ("Opponents of abortion and fetal research must be made aware that one of the consequences of their opposition is the potential restriction of discoveries in gene therapy, which [restriction] would inevitably result in more abortions.").

⁷⁴ See, e.g., Pennsylvania Catholic Conference, *supra* note 6, at 2.

⁷⁵ Brief for Amicus Curiae, *supra* note 47, at 10.

⁷⁶ *Id.*; see Kass, *Implications of Prenatal Diagnosis for the Human Right to Life*, in ETHICAL ISSUES IN HUMAN GENETICS 188-90 (B. Hilton ed. 1973) (arguing that selective abortion of genetically defective fetuses will affect society's, parents', and handicapped children's views of those born with defects).

maker, then it should also assume responsibility for the care of the child born as a result.⁷⁷ Currently it is the parents alone, not the doctor or the state, who must shoulder the significant emotional and financial burdens associated with caring for a severely handicapped child.⁷⁸ Successful wrongful birth claims enhance the dignity, comfort, and productivity of the handicapped by allowing parents to recover compensation for the extraordinary costs needed to provide support for their disabled child when intentional or negligent conduct deprives them of the choice whether to bear the child.

Statutes prohibiting wrongful birth have also been justified as "conscience laws"⁷⁹ needed to protect the conscience of the physician who is morally or religiously opposed to abortion.⁸⁰ By removing the duty to provide patients with information that may assist them in choosing abortion, supporters assert that the laws eliminate pressure on doctors to participate in decisions to which they are opposed.⁸¹

The asserted justification is spurious. The duty enforced through wrongful birth actions "does not . . . affect in any way the right of a physician to refuse on moral or religious grounds to perform an abortion."⁸² Moreover, the physician need not perform prenatal diagnostic tests nor provide genetic counseling.⁸³ A competent physician must, however, in conformity with the standard of due care, inform a

⁷⁷ See Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REF. 933, 1002-03 (1985) (stating that "the state should not conclude a medical care decision for a child while refusing to assume responsibility for the subsequent costs of the child's medical care" and that such joint responsibility "alleviates the financial and emotional burdens on the parents that may bias their decision").

⁷⁸ For a discussion of the extraordinary medical and custodial costs associated with the care of a child with Down's Syndrome, see *Phillips v. United States*, 575 F. Supp. 1309, 1316-17 (D.S.C. 1983), and for the care of a rubella syndrome child, see *Blake v. Cruz*, 108 Idaho 253, 255, 698 P.2d 315, 317 (1984).

⁷⁹ Dullea, *Courts Weigh Value of Unwanted Lives*, N.Y. Times, Apr. 12, 1982, at B6, col. 4.

⁸⁰ See, e.g., Note, *Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah's Statutory Breakwater*, 1984 UTAH L. REV. 833, 857-58 & n.153 (1984) (reporting that "one purpose of the [Utah wrongful birth] Act is to codify . . . the rights of individuals to refuse to provide, perform or undergo nontherapeutic abortion or contraceptive sterilization operations that contradict the individual's religious beliefs or moral convictions").

⁸¹ See Brief for Amicus Curiae Minnesota Conference of Catholic Health Facilities and Minnesota Catholic Conference at 13, *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986) (No. 85-2013) [hereinafter Brief for Minnesota Conference]; Brief for Amicus Curiae Catholic Health Association at 5, *Hickman* (No. 85-2013).

⁸² *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 472-73, 656 P.2d 483, 491 (1983), *aff'd*, 746 F.2d 517 (9th Cir. 1984); *accord* 42 U.S.C. § 300a-7 (1982) (Church Amendment) (providing in part that receipt of federal funds by an individual does not authorize the state to require the recipient to perform or assist in the performance of abortions where such would be contrary to the individual's religious beliefs or moral convictions).

⁸³ See *Smith v. Cote*, 128 N.H. 231, —, 513 A.2d 341, 355 (1986) (Souter, J., concurring); Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488, 1511 (1978).

woman if she is at an increased risk of bearing an abnormal child.⁸⁴ Once a physician has so informed a patient, he has the minimal duty to refer that patient, if she wishes, to another doctor for further testing or advice.⁸⁵ Such duties do not involve issues of conscience because they do not require a physician to counsel or perform abortions, or even to perform the diagnostic tests that indicate the condition of the fetus.⁸⁶ If the minimal duty to inform the patient of any increased risks and to refer her to another doctor does intrude on a physician's conscience, the duty must take precedence. A physician's role is to inform on the basis of his expert knowledge; it is for the patient to "assess the overall effects of the medical condition and possible treatments, in light of his or her own particular goals and values."⁸⁷

Proponents argue that a third goal of wrongful birth legislation is to eliminate an inappropriate incentive for physicians to practice so-called "defensive medicine."⁸⁸ They assert that wrongful birth actions will force physicians anxious to avoid malpractice liability "to offer to each obstetrical patient virtually every known test or procedure that might provide information concerning the fetus' characteristics or qualities, regardless of whether the test or procedure is medically necessary for either the fetus or mother."⁸⁹ Such increased testing is objectionable, supporters argue, because it will result in more abortions.⁹⁰

But the availability of wrongful birth actions no more encourages physicians to perform medically unnecessary tests than does the possibility of any other malpractice claim. Plaintiffs cannot prevail in wrongful birth actions absent proof that the physician failed to detect increased fetal risks foreseeable by other competent practitioners. Thus, "[i]f physicians as a group really do not believe a particular

⁸⁴ See Kelley, *Genetic Counseling and Tort Liability*, in *GENETIC COUNSELING, THE CHURCH AND THE LAW* 213-14 (G. Atkinson & A. Moraczewski eds. 1980).

⁸⁵ See Note, *supra* note 83, at 1511. A 1985 survey among fellows of the American College of Obstetricians and Gynecologists reported that of those physicians who disapproved of elective abortion, 55% were willing to make abortion referrals. At least this percentage of physicians should similarly be willing to make referrals for prenatal screening and diagnosis. See International Reference Center for Abortion Research, *Abortion/USA*, ABORTION RES. NOTES, Dec. 1985, at 1.

⁸⁶ See CATHOLIC HEALTH ASSOCIATION, IN DEFENSE OF VALUES 14 & n.47 (1984) (stating the Catholic Health Association's position that genetic screening and counseling are morally neutral).

⁸⁷ PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS 39 (1982).

⁸⁸ "The theory behind what physicians term 'defensive medicine' is that health professionals engage in certain conduct because it is dictated by the need to avoid malpractice liability, not by their professional judgment of the best course to follow." Capron, *supra* note 31, at 667.

⁸⁹ Brief for Appellants at 33, *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986) (No. 85-2013).

⁹⁰ See, e.g., Brief for Intervenor State of Minnesota at 14, *Hickman* (No. 85-2013).

technique — such as a test, like amniocentesis — is appropriate under the circumstances in question, an individual physician would have little to fear in failing to employ it.”⁹¹ Moreover, a physician can, as an alternative to engaging in defensive medicine, share with the patient his own and others’ viewpoints about a particular risk or procedure and thereby avoid liability by allowing the patient to weigh for herself the decision whether to undergo tests.⁹²

Finally, proponents of statutes prohibiting wrongful birth actions contend that the laws serve to limit a potentially far-reaching cause of action. Supporters argue that if a woman is allowed to sue a doctor for failing to disclose the risk of defect because that information is essential to her right to decide whether to bear a child, she may also sue for failing to disclose other fetal characteristics, such as sex, that might also have caused her to abort.⁹³

The wrongful birth action, however, is limited — as are all malpractice claims — to situations in which there has been a violation of the duty of a physician to provide the accepted standard of competent medical care. Thus, the assertion that misinformation as to, for example, the sex of an unborn child will prove grounds for a tort action is, at least as yet, unfounded: it is not accepted medical practice to diagnose the sex of an unborn child unless a woman may carry a sex-linked hereditary disorder or unless she requests the information.⁹⁴ Moreover, concerns that courts may not properly limit wrongful birth actions in the future do not justify elimination of the action when its present application is appropriate.⁹⁵

⁹¹ Capron, *supra* note 31, at 667.

⁹² See *id.* at 671–73. This solution, unfortunately, carries with it the potential for abuse. There is a danger that physicians opposed to prenatal screening and abortion will exert coercive influence over a patient by exaggerating the risks associated with prenatal tests. See Milunsky, *Genetic Counseling: Prelude to Prenatal Diagnosis*, in *GENETIC DISORDERS & THE FETUS* 7 (A. Milunsky ed. 1979). For the physician to insinuate prejudices into the decisionmaking process, however, “constitutes a moral affront to individual privacy and reproductive autonomy,” *id.* at 5, and should be treated, for legal purposes, in the same way as failure to inform of appropriate tests.

⁹³ See, e.g., Brief for Amicus Curiae, *supra* note 47, at 12–13.

⁹⁴ Doctors may, and commonly do, refuse to perform amniocentesis if it is intended merely to identify the sex of the fetus. See Powledge & Fletcher, *supra* note 23, at 172.

⁹⁵ Opposition to abortions performed in response to information about fetal characteristics is often voiced in terms of a fear of eugenics. See, e.g., Brief for Minnesota Conference, *supra* note 81, at 15. Eugenics “refers to efforts to improve the inborn characteristics of the human species by applying rules of heredity to human propagation.” PRESIDENT’S COMMISSION, *supra* note 23, at 10. But the right recognized in *Roe* is the right of an individual to make decisions on the basis of her own conscience. The imposition of a public test of reasons for exercising the right is inconsistent with the very freedom *Roe* embodies. See Fletcher, *Ethics and Amniocentesis for Fetal Sex Identification*, 301 N. ENG. J. MED. 550, 551 (1979). If proponents of wrongful birth statutes wish to succeed in restricting the bases upon which a woman may choose to have abortion, they will have to establish a legal framework other than the one presently embodied in *Roe*.

Thus, wrongful birth statutes do not rationally further the goals proponents of the legislation offer. The justifications offered in support of wrongful birth legislation are thin cover for an unrelenting protest against abortion. Wrongful birth statutes are motivated by private biases and moral condemnation of abortion. Such private prejudices do not constitute permissible bases for classification.⁹⁶ Because the true aim of wrongful birth statutes is to discourage women from exercising their constitutional right to make informed procreative decisions, the statutes serve an illegitimate purpose and thus violate the equal protection clause.⁹⁷

IV. CONCLUSION

Wrongful birth actions are necessary to protect important individual and societal interests in procreative autonomy, in meaningful physician-patient relationships, and in quality prenatal care. Statutory attempts to prohibit wrongful birth claims severely threaten these interests. Wrongful birth statutes are a studied effort to restrict the flow of medical information necessary to the exercise of a constitutionally protected right to decide without interference from the state whether to terminate pregnancy. Such statutes license doctors to disregard patients' rights and values and to inject their own moral convictions into patient decisionmaking. In so doing, wrongful birth statutes violate the due process and equal protection clauses of the fourteenth amendment.

⁹⁶ Cf. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985) (invalidating, under rational basis review, a zoning ordinance that required a special use permit for homes for the mentally retarded on the ground that "requiring the permit in this case appears . . . to rest on an irrational prejudice against the mentally retarded"); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

⁹⁷ For a discussion of recent cases in which the Court has struck down legislation under the rational basis test because of an illegitimate purpose, see Note, *Still Newer Equal Protection Impermissible Purpose Review in The 1984 Term*, 53 U. CHI. L. REV. 1454 (1986).