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Wrongful Birth: False Representations of Women's Reproductive Lives*

Shelley A. Ryan**

Despite tremendous medical advances in recent years, many children are born with birth defects. In some cases, physicians or other medical professionals can help parents, if they so choose, avoid the birth of an impaired child. When medical professionals fail to help parents make that choice, tort law now provides a remedy. Nearly half of the states recognize a cause of action for "wrongful birth."1

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** Visiting Associate Professor of Law, University of Oklahoma Law Center. LL.M. 1993, Harvard Law School; J.D. 1987, Washburn University School of Law. This Article was made possible in part by a grant from the American Association of University Women Education Foundation.

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The road toward full recognition of the claim has been rocky, however. Several courts have refused to recognize a cause of action for wrongful birth; they reason that the claim does not satisfy traditional tort requirements.\(^2\) Even among jurisdictions that recognize the cause of action, courts have not reached agreement on the appropriate measure of damages.\(^3\)

This Article demonstrates that much of the trouble plaguing the wrongful birth claim stems from reliance by courts and legislatures on male norms under particularly inappropriate circumstances. Courts have judged pregnancy, motherhood, and abortion by male standards,\(^4\) even though each of these experiences is a uniquely female one. The result has been confusion, distortion, and misrepresentation of women’s experiences.\(^5\) Part I of the Article explains the tort of wrongful birth and clarifies the feminist method this Article utilizes to reveal the male norms underlying the law of wrongful birth. Part II explains how courts have decided whether parents in wrongful birth cases should recover for their own emotional harm and illustrates that courts have applied male norms to answer this question. Part III demonstrates how courts and legislatures have

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One federal court, in the absence of a decision of the state’s highest court, has recognized the cause of action. See Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981) (applying South Carolina law). Two other state courts seem to have recognized the cause of action, but have not addressed the issue directly. See Walker v. Mart, 790 P.2d 735 (Ariz. 1990) (en banc); Andalon v. Superior Court, 208 Cal. Rptr. 899 (Cal. Ct. App. 1984).


5. See infra notes 132-169, 203-236 and accompanying text.
dealt with the issue of causation in wrongful birth cases and shows that a resort to male norms again has infected the law. The Article concludes that by resorting to female norms which more accurately represent the circumstances of the wrongful birth case, courts and legislatures can overcome the difficulties they have had reaching consensus on the issues of emotional harm damages and causation in wrongful birth cases.

I. INTRODUCTION TO THE LAW OF WRONGFUL BIRTH

A. EVOLUTION OF THE WRONGFUL BIRTH CLAIM

A "wrongful birth" claim is a medical malpractice action in which the parents of an impaired child allege their physician negligently failed to provide them with information that would have helped them avoid the birth of that child. Usually, the negligence takes one of two forms. One type of case arises when, in violation of established medical practices, the physician fails to recommend tests for determining whether a couple is at risk for conceiving a child with birth defects. Because the couple does not know they are at risk, they conceive a child who is born with impairments. They claim that had the physician exercised due care, they would not have conceived the child in question. In the second type of claim, a physician fails, despite established medical practices, to recommend prenatal testing for a couple that already has conceived a child. The parents allege that had the physician exercised due care, they would have learned that their fetus was carrying a birth defect and they would have terminated the pregnancy.

Before the Supreme Court decided Roe v. Wade, no state or federal court in the United States recognized the tort of

6. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 370-73 (5th ed. 1984). The reader should distinguish a wrongful birth claim from two other types of tort claims with which it is often confused. A "wrongful life" claim is similar to a wrongful birth claim, but is brought by the child born with impairments; wrongful birth claims are those of the parents of the impaired child. Id. Wrongful life claims have found little support among the courts that have addressed the tort. Id. "Wrongful pregnancy" or "wrongful conception" claims are those brought by parents who, because of a physician's negligence, have given birth to a healthy but unwanted child. Id. The claims usually arise when a physician has been negligent in performing a sterilization procedure. These claims have received more support in the courts. Id.

7. Id. § 55, at 370-71.
8. Id.
9. Id.
10. Id.
wrongful birth. In a typical pre-Roe decision, the New Jersey Supreme Court, in Gleitman v. Cosgrove,\(^\text{12}\) refused to recognize the tort, in part because "substantial public policy reasons" precluded the court from awarding damages "for the denial of the opportunity to take an embryonic life."\(^\text{13}\) After Roe, some courts began to address the delicate question of whether tort law should provide compensation to a woman denied the opportunity to abort a fetus. Tremendous advances in the detection of birth defects made more women aware of the risks, and Roe allowed them to take action against those risks.

The Texas Supreme Court was the first court in the country to allow a cause of action for wrongful birth. In Jacobs v. Theimer,\(^\text{14}\) the plaintiff mother became ill early in her pregnancy and she claimed her physician was negligent in failing to properly diagnose her illness as rubella.\(^\text{15}\) After her child was born with a heart defect,\(^\text{16}\) she and her husband sued her physician.\(^\text{17}\) The court agreed to recognize a cause of action for wrongful birth\(^\text{18}\) despite the fact that at the time of the plaintiff's pregnancy, 1968, she could not have obtained a legal abortion in the state.\(^\text{19}\) The court acknowledged that the plaintiff could have obtained a legal abortion elsewhere,\(^\text{20}\) and so concluded, as the Roe court had two years earlier,\(^\text{21}\) that the decision was one to be made by the parents alone.\(^\text{22}\)

Twelve years after deciding Gleitman,\(^\text{23}\) the New Jersey Supreme Court cited Roe in support of its conclusion that public policy had changed and courts should recognize the tort of

\(\text{\footnotesize{\cite{12}} 227\ A.2d\ 689\ (N.J.\ 1967),\ overruled\ by\ Berman\ v.\ Allan,\ 404\ A.2d\ 8\ (N.J.\ 1979).}\)

\(\text{\footnotesize{\cite{13}} \text{Id.}\ at\ 693.}\)

\(\text{\footnotesize{\cite{14}} 519\ S.W.2d\ 846\ (Tex.\ 1975).}\)

\(\text{\footnotesize{\cite{15}} \text{Id.}\ at\ 847.}\)

\(\text{\footnotesize{\cite{16}} \text{Children}\ whose\ mothers\ contract\ rubella\ early\ in\ their\ pregnancies\ commonly\ suffer\ from\ "congenital\ rubella syndrome,"\ which\ is\ characterized\ by\ severe\ birth\ defects,\ including\ congenital\ heart\ disease,\ mental\ handicap,\ eye\ cataracts,\ and\ deafness.\ \textit{The Oxford Companion to Medicine}\ 1284\ (1986)\ [hereinafter\ Oxford's].}\)

\(\text{\footnotesize{\cite{17}} Jacobs,\ 519\ S.W.2d\ at\ 847.}\)

\(\text{\footnotesize{\cite{18}} \text{Id.}\ at\ 850.}\)

\(\text{\footnotesize{\cite{19}} \text{Id.}\ at\ 847.}\)

\(\text{\footnotesize{\cite{20}} \text{Id.}\ at\ 848.}\)

\(\text{\footnotesize{\cite{21}} Roe\ v.\ Wade,\ 410\ U.S.\ 113,\ 153\ (1973).}\)

\(\text{\footnotesize{\cite{22}} Jacobs,\ 519\ S.W.2d\ at\ 848.}\)

\(\text{\footnotesize{\cite{23}} Gleitman\ v.\ Cosgrove,\ 227\ A.2d\ 689\ (N.J.\ 1967),\ overruled\ by\ Berman\ v.\ Allan,\ 404\ A.2d\ 8\ (N.J.\ 1979).}\)
wrongful birth. In *Berman v. Allan,* the court explained its shift:

In light of changes in the law which have occurred in the 12 years since *Gleitman* was decided, the 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.

The court emphasized that any other result would immunize negligent doctors "providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses which, if born, would suffer from genetic defects."

At least twenty states now recognize a cause of action for wrongful birth. Despite this growing acceptance of the cause of action, courts have not reached agreement on two important issues surrounding the claim. The first disputed issue is whether plaintiffs should recover damages for emotional harm they suffer because of the physician's negligence and the resulting impairment of their child. Courts do not agree whether to allow recovery for emotional harm damages, nor do they apply a consistent rationale to justify their conclusions.

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24. *Berman v. Allan,* 404 A.2d 8 (N.J. 1979). The child in *Berman* was born with Down's Syndrome. *Id.* at 10. The plaintiffs claimed that accepted medical practice dictated that the mother's physician recommend an amniocentesis during the pregnancy, and that the amniocentesis would have revealed that the fetus was afflicted with Down's Syndrome. *Id.*

Amniocentesis is the percutaneous transabdominal puncture of the uterus to obtain amniotic fluid in order to test for genetic defects. *Oxford's,* supra note 16, at 41. Down's Syndrome is defined as follows:

[A] chromosome disorder characterized by a small, anteroposteriorly flattened skull, short, flat-bridge nose, epicanthal fold, short phalanges, widened spaces between the first and second digits of hands and feet, and moderate to severe mental retardation, with Alzheimer's disease developing in the fourth or fifth decade. The chromosomal aberration is trisomy of chromosome 21 associated with late maternal age.

*Id.* at 325.


26. *Id.* at 14.

27. *Id.* (citations omitted).

28. See supra note 1 (listing jurisdictions that recognize the wrongful birth cause of action).

29. See supra note 3 (noting disagreement among courts over recovery of emotional harm damages).

30. Courts have used at least three different tort theories to disallow damages for emotional harm. *See,* e.g., *Moores v. Lucas,* 405 So. 2d 1022 (Fla. Dist.
The second issue plaguing the area of wrongful birth law is the issue of causation. So far, courts have held that in order to prove causation, plaintiffs must show that in the absence of the defendants' negligence, they would not have suffered the damages for which they seek recovery.31 When plaintiffs claim the defendant failed to diagnose an impairment during pregnancy, courts have required them to demonstrate that if the defendant had not been negligent, they would have chosen to undergo testing, learned of the child's impairment, and terminated the pregnancy.32 The causation requirement has disturbed state legislatures; several states have addressed the causation requirement by passing legislation restricting certain actions for wrongful birth.33

B. EXPOSING THE FALSE REPRESENTATIONS OF WOMEN'S REPRODUCTIVE LIVES

This Article incorporates the method of inquiry proposed by legal scholars who suggest we must look behind the supposedly "neutral" rules of the law to discover the gender-based assumptions that underlie these rules. These scholars suggest that too often, courts develop "objective" rules from a collection of male


31. See, e.g., Haymon v. Wilkerson, 535 A.2d 880, 882 (D.C. 1987) (holding that plaintiff must establish, as an element of her claim, that had she learned of the impairment during her pregnancy, she would have terminated the pregnancy); Proffitt v. Bartolo, 412 N.W.2d 232, 237 (Mich. Ct. App. 1987) (holding that plaintiff satisfies the causation element by showing that she would have obtained an abortion in the absence of defendant's negligence); Smith v. Cote, 513 A.2d 341, 345, 347 (N.H. 1986) (holding that the chain of causation is not too remote where plaintiffs claim they would have aborted the fetus had they learned of the impairment).

32. See supra note 31.

33. See IDAHO CODE § 5-334(1) (1992) (“A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.”); MINN. STAT. § 145.424, subd. 2 (1992) (prohibiting cause of action “on the claim that but for the negligent conduct of another, a child would have been aborted”); Mo. REV. STAT. § 188.130(2) (1986) (prohibiting cause of action “on the claim that but for the negligent conduct of another, a child would have been aborted”); PA. CONS. STAT. ANN. § 8305(a) (1983) (prohibiting cause of action on the claim that “but for an act or omission of the defendant, a person once conceived would not or should not have been born”); UTAH CODE ANN. § 78-11-24 (1983) (prohibiting cause of action based on allegation “that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted”).
The goal of feminist method is to point out where the law assumes a male perspective—one which is necessarily incomplete—in formulating and applying rules which courts then present as objective and gender-neutral. Failure to attempt this process only perpetuates the male dominance of our legal system.

Feminist method has demonstrated that for too long, an obvious male perspective has infected the law in areas such as employment discrimination, rape, self-defense, and pornography. Similarly, feminist method has revealed gender-bias in those areas of the law in which it might not be as obvious. Several feminist theorists have pointed out gender-bias

35. Clare Dalton, Where We Stand: Observations on the Situation of Feminist Legal Thought, 3 BERKELEY WOMEN'S L.J. 1, 6-7 (1987-88). Dalton makes the following argument:

Women have long, if not always, held the suspicion, if not the knowledge, that what passed for point-of-view-less-ness was in fact His point of view.... Feminist epistemology starts from the premise that what has been presented as “the world” and “the truth” has obscured women’s reality, and ignored women’s perspective. It contains the explosive suggestion that what have passed as necessary, universal and ahistorical truths have never been more than partial and socio-historically situated versions of truth.

Id. at 6 (footnote omitted).
36. Heather Ruth Wishik best articulates the point: “To fail to make inquiries about law that are inclusive of the point of view of women’s experiences is to support patriarchy.” Heather Ruth Wishik, To Question Everything: The Inquiries of Feminist Jurisprudence, 1 BERKELEY WOMEN’S L.J. 64, 68 (1985).
40. See, e.g., ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1989) (arguing that pornography victimizes women).
41. See, e.g., Hilary Charlesworth et al., Feminist Approaches to International Law, 85 AM. J. INT’L L. 613 (1991) (illustrating that international law is not objective or gender neutral); Marion Crain, Images of Power in Labor Law: A Feminist Deconstruction, 33 B.C. L. REV. 481 (1992) (criticizing the patriarchal vision of power embodied in labor law); Mary Joe Frug, Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law, 140 U. PA. L. REV. 1029 (1992) (exploring the consequences of male bias in contract law); Kit Kinports, Evidence Engendered, 1991 U. ILL. L. REV. 413 (arguing that the current rules of evidence are grounded in male norms of formality, abstraction, and complexity); Deborah Maranville, Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm, 43 HAS-
in the seemingly innocuous law of tort.\textsuperscript{42} It is especially from their work that this Article takes its cue.

Heather Ruth Wishik has set out a multi-step process by which one can analyze and critique the presence of the male perspective in the law.\textsuperscript{43} Her seven-step inquiry incorporates the following questions:\textsuperscript{44}

1) What are women's experiences regarding the "life situation" addressed by the law in question?
2) What assumptions or descriptions does the law make in this area?
3) How do these assumptions or descriptions distort or deny women's experiences?
4) What patriarchal interests are served by the distortion or denial of women's experiences?
5) How can the law be reformed, and how will these reforms affect the lives of women?
6) Ideally, what would women's experiences be?
7) How do we get there from here?\textsuperscript{45}


\textsuperscript{42} See, e.g., Leslie Bender, \textit{Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities}, 1990 DUKE L.J. 848; Leslie Bender, \textit{A Lawyer's Primer on Feminist Theory and Tort}, 38 J. LEGAL EDUC. 3 (1988) [hereinafter Bender, Lawyer's Primer]; Finley, supra note 34. For a thorough listing of writings by feminist theorists in tort law, see Leslie Bender, \textit{An Overview of Feminist Torts Scholarship}, 78 CORNELL L. REV. 575 (1993). The gendered nature of wrongful birth law may be more apparent at first glance than other issues within tort law.

\textsuperscript{43} \textit{See} Wishik, supra note 36, at 72-77.

\textsuperscript{44} The indented questions paraphrase the elements of Wishik's seven-step inquiry. They are not direct quotations from Wishik's article.

\textsuperscript{45} \textit{Wishik}, supra note 36, at 72-77. Some feminist theorists assert that a simple attempt to "clean up" existing legal doctrines so that they include women's perspective, without more, will simply perpetuate and legitimate the patriarchy. \textit{See}, e.g., Diane Polan, \textit{Toward a Theory of Law and Patriarchy, in The Politics of Law} 294 (D. Kalrys ed., 1982). While efforts at law reform may be incomplete, they are nonetheless valuable. \textit{See} Christine A. Littleton, \textit{In Search of a Feminist Jurisprudence}, 10 HARV. WOMEN'S L.J. 1, 4-5 (1987).

Law reform can immediately affect the lives of real women in a profound way. For instance, the reforms I suggest would enable more women to provide adequate care to their impaired children and would legitimate women's emotional suffering in these circumstances. \textit{See infra} text accompanying notes 173-180 & 241-253. In addition, even if courts and legislatures do not adopt them, reform suggestions can effectively point out the "hypocrisy" of the legal system. \textit{See infra} text accompanying notes 174-177. This Article's critique regarding recovery of damages for emotional harm demonstrates the law's inconsistencies in this area and its tendency to devalue emotional harm.
This Article's critique of wrongful birth law will follow Wishik's suggestions and address each of her inquiries.46

II. ASSESSING CLAIMS FOR EMOTIONAL HARM DAMAGES IN WRONGFUL BIRTH CASES

Most courts that have addressed the wrongful birth cause of action have agreed to recognize it.47 These courts, however, have not agreed on the measure of damages to be awarded in

46. I will temper my analysis with a concern that feminist method not attempt to replace one set of truths with another. Feminist theorists argue that what appears to be objective is imbued with the male perspective, and that this perspective is limiting and incomplete. See Dalton, supra note 35, at 6. Feminists must not fall into the same "trap" of asserting that our truths are "the truth." "[A] feminist narrative or theory should not imagine itself as replacing (but only as displacing) a male or masculinist one—how could feminists' situated claims to authority become absolute ones?" Id. at 7. The power of feminist method is its ability to show that the appearance of a single objective viewpoint or truth is misleading. Accordingly, I will attempt to offer an additional perspective without asserting that I have discovered a new objectivity. Nonetheless, the addition of a female norm in the wrongful birth context is a substantial improvement over the use of a male norm, because the circumstances at issue in a wrongful birth case include experiences unique to women: pregnancy and childbirth, motherhood, and abortion.

Because feminist theorists adhere to the view that all perspectives are incomplete, feminist writers also must not assume that they can represent the perspectives of all women. "[N]o single feminist narrative or theory should imagine that it can speak univocally for all women." Id. at 7; see Martha Minow, Feminist Reason: Getting It and Losing It, 38 J. LEGAL EDUC. 47 (1988) (arguing that feminist theorists risk treating their own experiences as universal without regard for differences among women which might vary on the basis of class, race, religion, ethnicity, nationality, and other situations). Catherine MacKinnon defines the feminist question as one which searches for the point of view of all women and acknowledges variations in viewpoint among women of different classes, ages, races, religions, and sexual orientations. Catherine A. MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 Signs 635 (1983). "This feminism seeks to define and pursue women's interest as the fate of all women bound together. It seeks to extract the truth of women's commonalities out of the lie that all women are the same." Id. at 639-40 n.8.

Thus, I have attempted in this Article to remain aware of differences among women. For instance, I recognize that the cause of action for wrongful birth assumes a world in which all pregnant women have access to some prenatal care, an assumption which simply does not hold true for poor women. This Article certainly will omit other important perspectives of women. The point of view of any woman, however, is currently missing from the law of wrongful birth, and this Article's observations and suggestions for a female perspective, especially those relating to damages, are not dependent on any particular racial, cultural, religious, or class perspective.

47. See supra note 1 (citing cases allowing the cause of action). But see supra note 2 (citing cases disallowing the cause of action).
wrongful birth cases.\textsuperscript{48} Most jurisdictions have concluded that plaintiffs should recover the extraordinary caretaking expenses\textsuperscript{49} of raising the child.\textsuperscript{50} Still, no clear majority rule has emerged on the question of whether courts should allow parents to recover damages for the emotional harm they suffer because of the child’s impairment.\textsuperscript{51} Many courts have denied or limited

\textsuperscript{48} See supra note 3 (demonstrating disagreement among courts over recovery of emotional harm damages).

\textsuperscript{49} Extraordinary caretaking expenses are those expenses the parents incur caring for the child above those they would incur in caring for a healthy, “normal” child. See, e.g., Schroeder v. Perkel, 432 A.2d 834, 841-42 (N.J. 1981) (recognizing that parents may recover all expenses “actually attributable to the affliction”).

\textsuperscript{50} See, e.g., id. at 840-42; Becker v. Schwartz, 386 N.E.2d 807, 813 (N.Y. 1978) (holding that plaintiffs may recover extraordinary caretaking expenses). Only the Louisiana Supreme Court has denied recovery of extraordinary caretaking expenses. See Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1162 (La. 1988). The birth of the impaired child in Pitre, however, was the result of a negligently-performed sterilization procedure. Id. at 1152. The court found that under these facts, the harm was not reasonably foreseeable. Id. at 1162.

\textsuperscript{51} Included within the general claim for “emotional distress damages” is the emotional trauma the parents suffer upon learning of the birth defect at the time of the child’s birth, the emotional strain they endure at seeing their child suffer and sometimes die from the birth defect, and the emotional harm they suffer because of the denial of the couple’s opportunity to control their reproductive life:

Without doubt, expectant parents, kept in ignorance of severe and permanent defects affecting their unborn child, suffer greatly when the awful truth dawns upon them with the birth of the child. Human experience has told each of us, personally or vicariously, something of this anguish. Parents of such a child experience a welter of negative feelings—bewilderment, guilt, remorse and anguish—as well as anger, depression and despair. When such a tragedy comes without warning these terrible emotions are bound to be felt even more deeply. “Novelty shock” may well exacerbate the suffering. . . . Through the failure of the doctors to advise an expectant mother, and father, of the likelihood or certainty of the birth of a [defective] child, the parents were given no opportunity to cushion the blow, mute the hurt, or prepare themselves as parents for the birth of their seriously impaired child. Their injury is real and palpable. Moreover, it is not easy to overcome these feelings or adjust to the tragedy of having a defective child. It is recognized that a mother, even in normal circumstances, may suffer depressive and negative feelings upon the birth of a healthy child. If her psychological state has been further impaired by the shock of the birth of a defective child her recovery may well be even more prolonged and dubious. In any given case, the mental and emotional suffering of parents might continue for some period of time beyond the birth of a child and should be recognized as an important aspect of the parents’ injury.


The parents’ emotional harm also may include other elements such as the denial of the opportunity to make an “important moral choice” for one’s self, id.
recovery of emotional distress damages and have grounded their decisions in a variety of theories. The following discussion highlights the theories upon which courts have relied to disallow emotional distress damages and demonstrates that courts have adopted rules which inappropriately assume a male norm.

A. Theories Courts Have Used to Deny Damages for Emotional Harm in Wrongful Birth Cases

1. The Physical Injury Requirement and the Impact Rule

Many courts have difficulty reconciling wrongful birth claims with traditional tort law. Historically, tort law has required a plaintiff to show physical injury in order to recover damages for emotional distress.\(^\text{52}\) Courts have struggled with

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at 18, and the “diminished parental capacity” brought on by the strain of caring for an unhealthy child, \(\text{id.}\) at 15.

Persons, confronted with the awesome decision of whether or not to allow the birth of a defective child, face a moral dilemma of enormous consequence. They deal with a profound moral problem. To be denied the opportunity—indeed, the right—to apply one’s own moral values in reaching that decision, is a serious, irreversible wrong.

... Mental, emotional and moral suffering can involve diminished parental capacity. Such incapacity of the mother and father quæ parents is brought about by the wrongful denial of a reasonable opportunity to learn of and anticipate the birth of a child with permanent defects, and to prepare for the heavy obligations entailed in rearing so unfortunate an individual. Such parents may experience great difficulty adjusting to their fate and accepting the child’s impairment as nature’s verdict. While some individuals confronted by tragedy respond magnificently and become exemplary parents, others do not. \(\text{id.}\) at 18 (Handler, J., concurring in part and dissenting in part) (citations omitted).

\(\text{52}\). The law traditionally has been hesitant to award damages for mental distress in the absence of some physical injury. \(\text{KÈETON ET AL., supra}\) note 6, § 12, at 54-57. The reasons for denying recovery of mental distress damages have included the difficulty of proving and measuring such damages, \(\text{id.}\) § 12, at 55, the risk of fictitious claims, \(\text{id.}\) § 12, at 56, and the fear that a rule allowing recovery would open the door to “litigation in the field of trivialities and mere bad manners,” \(\text{id.}\). “Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be.” \(\text{Id.}\) § 12, at 55 (quoting Calvert Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033, 1035 (1936)). Courts have been less hesitant to award damages for mental distress when the claim for damages is “parasitic” to some other independent claim for relief under tort law. \(\text{Id.}\) § 12, at 56-57, § 54, at 362-63. Courts consider any physical harm resulting from the independent claim for relief sufficient evidence that the plaintiff is not feigning the emotional harm. \(\text{Id.}\) § 54, at 363.

More recently, courts have come to recognize that severe mental distress may be an injury in itself. The earliest cases recognizing mental distress as an independent injury involved liability of a common carrier for insult to a passen-
the fact that parents in a wrongful birth action do not seek damages for their own physical injuries or illnesses.\textsuperscript{53}

Traditional tort law and most states\textsuperscript{54} require plaintiffs to demonstrate some physical "impact" in order to recover damages for emotional distress.\textsuperscript{55} Courts do not require plaintiffs to show some minimum amount of physical injury; the impact can be as slight as a "trivial jolt or jar"\textsuperscript{56} or "dust in the eye."\textsuperscript{57} Further, the physical "impact" need not cause the mental harm.\textsuperscript{58} In-

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\textsuperscript{53} Id. \S 12, at 57-58, liability of an innkeeper for causing distress to a guest, id. \S 12, at 58, and intentional infliction of extreme emotional distress, id. \S 12, at 60-65. Courts have not yet completely defined the limits of any independent tort for emotional harm. Id. \S 12, at 57.

Courts have experienced the greatest difficulty determining whether a plaintiff should recover for acts that, although directed at third parties, have caused mental distress to the plaintiff. Id. \S 12, at 65-66. At least two different rules have emerged for determining whether liability should attach in such cases. See infra notes 73-82 and accompanying text (discussing the "zone of danger" rule and the Dillon test). Each test seeks to set some limits on the cause of action in order to exclude those cases which involve mere "trivialities." Id. \S 12, at 56.

When a defendant's negligence causes mental harm only, courts generally refer to the resulting cause of action as "negligent infliction of emotional distress" or "negligent infliction of mental distress." Id. \S 12, at 55-56.

53. In a typical wrongful birth case, the parents seek to recover for their emotional distress and for the ordinary or extraordinary caretaking expenses they incur in caring for their impaired child. Thus, the wrongful birth case differs from most other tort cases in that the primary element of damages does not arise from the physical injury suffered by the plaintiff. See generally id. \S 54, at 362-63 (discussing traditional cases in which mental harm flows from a physical harm). In the typical tort case, any pain and suffering or emotional distress for which the plaintiff seeks recovery usually is a result of the physical injury itself. Id.

54. Id. \S 54, at 363 (noting requirement that plaintiff show "physical impact").

55. At least two states which have allowed wrongful birth claims, however, have refused to adopt exceptions to the strict physical injury requirement. In Garrison v. Medical Ctr. of Del., Inc., 581 A.2d 288, 293 (Del. 1989), and Smith v. Cote, 513 A.2d 341, 351 (N.H. 1986), the courts did not allow the plaintiffs' claims for emotional harm because the plaintiffs could show no physical injuries. Feminist scholars have criticized the strict physical injury requirement as a rule which devalues "relational" and "intangible" interests in favor of monetary ones. See, e.g., Bender, Lawyer's Primer, supra note 42, at 37 (arguing that tort law devalues relational and intangible interests and instead values financial interests). When courts begin to apply the exceptions to this traditional rule, the male norms in those exceptions become apparent.


57. Id. \S 54, at 364 (citing Porter v. Delaware, L.W. R.R., 63 A. 360 (N.J. 1906)).

58. Id. \S 54, at 363.
stead, courts impose the physical injury requirement only to pro-
provide some guarantee that the claim of mental harm is genuine.59
Once the plaintiff has proved some slight physical touching or
effect, "the door opens to the full joy of a complete recovery."60

Courts have clung to the "impact" rule to deny wrongful
birth plaintiffs recovery of emotional harm damages. In Moores
v. Lucas,61 for example, the plaintiffs sought genetic counseling
from the defendant before conception.62 Linda Moores suffered
from Larsen's Syndrome,63 and she and her husband asked the
defendant whether her condition was inheritable.64 The defend-
ant told them it was not, and they conceived a child who later
was born with Larsen's Syndrome.65 The plaintiffs sought dam-
ages for their "past and future emotional pain and suffering . . .
resulting from the birth of their afflicted son."66 The court rec-
ognized a cause of action for wrongful birth,67 but refused to al-
low damages for mental harm "on the basis of the impact
document."68

At least two other courts have cited the "impact" rule to dis-
allow recovery for emotional harm. In Atlanta Obstetrics & Gyn-

59. Id. (noting the requirement's purpose as the prevention of disingenuous
claims).
60. Id. § 54, at 364 (quoting Herbert F. Goodrich, Emotional Disturbance
as Legal Damage, 20 Mich. L. Rev. 497, 504 (1922)).
62. Id. at 1024.
63. Larsen's Syndrome is characterized by "cleft palate, flattened faces,
multiple congenital dislocations, and foot deformities." Dorland's
Illustrated Medical Dictionary 1638 (27th ed. 1988) [hereinafter Dorland's].
64. Moores, 405 So. 2d at 1024.
65. Id.
66. Id.
67. Id. at 1026.
68. Id. (citing Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974); Herlong Avia-
tion, Inc. v. Johnson, 291 So. 2d 603 (Fla. 1974); Pazo v. Upjohn Co., 310 So. 2d
30 (Fla. Dist. Ct. App. 1975)).

1990), another district of the same Florida court disagreed with this application
of the "impact" rule and certified "express and direct conflict" with the Moores
decision. Id. at 988-89, 989 n.4. The court offered two reasons for its disagree-
ment. First, it said the "impact" rule should not apply, because the claim for
mental harm was not the plaintiffs' only claim for damages; they also sought
recovery of their extraordinary caretaking expenses. Id. at 988; see supra note
49 (discussing extraordinary caretaking expenses in wrongful birth cases). Sec-
ond, the court stated that even if the rule did apply, the physical testing and
pregnancy which the plaintiff mother experienced were sufficient to satisfy the
requirement of a physical impact. Id.; see infra text accompanying notes 132-
139 (explaining that mothers in wrongful birth actions can satisfy the require-
ments of the "impact" rule).
ecology Group v. Abelson, the Georgia Court of Appeals held that the "impact" doctrine barred the plaintiffs' claim for emotional harm. In Pitre v. Opelousas General Hospital, the Louisiana Supreme Court similarly held that the plaintiffs' mental distress and emotional harm were "not consequences which were caused by an impact on the person of the mother." No court which has applied the "impact" doctrine has concluded that a wrongful birth plaintiff can satisfy the rule's requirements.

2. The Bystander Doctrine

An exception to the traditional "impact" rule is the bystander doctrine. Under the "impact" rule, witnesses to an injury ordinarily cannot recover for their own mental distress unless they also have suffered physical impact. The bystander doctrine has emerged to allow recovery in limited circumstances. Courts allow recovery under the "zone of danger" rule and the Dillon test. Both rules are still extremely narrow.


70. Id. at 922. The court provided no explanation why plaintiffs could not meet the requirements of the "impact" rule in a wrongful birth case, but it did contrast the claim with one in which a physician's negligence has caused a healthy child to die. Id. at 922 (citing Ob-Gyn Assoc. of Albany v. Littleton, 386 S.E.2d 146 (Ga. 1989)). The court reasoned that because the Littleton court allowed no damages for emotional harm, such damages should not be allowed in a wrongful birth case either. Id. at 922. It is not clear why the court reached this decision, because parents of a healthy child killed through a defendant's negligence usually would not be able to satisfy the requirements of the "impact" rule. Such a case is more akin to a bystander case, in which courts might permit recovery despite the fact that plaintiffs can show no impact. See infra notes 73-82 (explaining the various bystander rules). In contrast, the plaintiff mother in a wrongful birth case always can show some physical effect or "impact" which followed the defendant's negligence. See supra text accompanying notes 54-60; infra text accompanying notes 132-139.

71. 530 So. 2d 1151 (La. 1988).

72. Id. at 1162.

73. See supra notes 54-60 and accompanying text (discussing the traditional physical impact requirement).
The "zone of danger" rule, which is the older and more narrow of the two rules, allows a plaintiff to recover for mental harm alone if the plaintiff was threatened by the same harm which caused physical injury to a third party. Courts have drawn the rule restrictively, however, to limit the negligent party's liability and to prevent fictitious or trivial claims.

The Dillon test is a less restrictive but still narrow rule first developed by the California Supreme Court. In Dillon v. Legg, the court set out a three-part test for determining whether a bystander can recover for mental distress. A bystander can recover if the bystander was at the scene of the accident when it occurred, witnessed the accident, and was closely related to the person physically harmed by the defendant's negligence. The California Supreme Court later held that a bystander need not meet all three requirements in order to recover, but it recently retreated from this position. Other state courts have followed California's approach.

Numerous courts have characterized wrongful birth cases as "bystander" cases, to which the "zone of danger" or Dillon test applies. The "zone of danger" rule, which is the older and more narrow of the two rules, allows a plaintiff to recover for mental harm alone if the plaintiff was threatened by the same harm which caused physical injury to a third party. Courts have drawn the rule restrictively, however, to limit the negligent party's liability and to prevent fictitious or trivial claims.

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Numerous courts have characterized wrongful birth cases as "bystander" cases, to which the "zone of danger" or Dillon test applies.

74. Keeton et al., supra note 6, § 54, at 365-66.
75. Id. § 54, at 365. Prosser and Keeton give the example of a parent "threatened with physical injury by the defendant's negligence, as where she is standing in the path of his vehicle, and suffers physical harm through fright at the peril to her child [who may be hit by the vehicle]." Id.
76. Id. § 54, at 366.
77. 441 P.2d 912 (Cal. 1968).
78. Id. at 920.
79. Id.
80. Ochoa v. Superior Court, 703 P.2d 1, 8 (Cal. 1985) (holding that sudden occurrence is unnecessary); Krouse v. Graham, 562 P.2d 1022, 1031 (Cal. 1977) (holding that plaintiff need not visually witness injury); see also Nazaroff v. Superior Court, 145 Cal. Rptr. 657 (Cal. Ct. App. 1978) (holding that plaintiff need not witness accident).
rules apply. These courts, however, have uniformly denied mental harm damages to wrongful birth plaintiffs. While one court has recognized that the bystander rules should not apply, it nonetheless drew a distinction between the "direct" victim of the harm and "bystanders" to that harm. Finally, some courts

83. See infra notes 87-110. Actually, the bystander rules are simply inapplicable in wrongful birth cases. The bystander rules apply only when the defendant owes a duty of care to the third party but not directly to the plaintiff. The rules permit recovery by someone other than the person directly and physically injured by the negligence and may compensate the plaintiff when the only harm suffered is mental harm. Implied in any bystander claim is an assertion that the defendant owed a duty of care to the third party and that the defendant's negligence caused the third party to be physically harmed. The bystander claim thus depends on a claim that the defendant acted negligently toward the third party, and the bystander's claim derives from the third party's claim. See generally Keeton et al., supra note 6, § 54, at 365-67.

In wrongful birth cases, however, the defendants owe a duty of care directly to the parents, including a duty to properly perform prenatal tests and to recommend preconception or prenatal testing in appropriate circumstances. In fact, those courts that have recognized a cause of action for wrongful birth have been quite clear that the claim belongs to the parents. Parents often make accompanying claims for wrongful life on behalf of the child, and most courts, in denying recognition of the claim for wrongful life, explicitly distinguish the wrongful life claim from the wrongful birth claim. In a wrongful birth claim, the defendants owe a duty of care to the parents. In a wrongful life claim, if recognized, the defendants owe a duty of care to the child. If courts appropriately applied the bystander rules in wrongful birth cases, the parents would be claiming that the defendants owed a duty to the child, the defendants breached that duty, the child was physically injured, and the parents suffered only mental distress as a result of that physical harm. But that is not the claim of wrongful birth parents at all. In fact, most courts would reject such a claim by holding that the defendant owed no duty to the child. Thus, no claim for mental harm by the parents can derive from the child's claim. See, e.g., Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987) (Simon, J., specially concurring in part and dissenting in part) (arguing that bystander rules do not apply to wrongful birth cases because the parents are the direct victims and the only victims of the defendant's alleged negligence).

Accordingly, the parents' claim for mental harm is just one element of their claim for damages caused by the breach of a duty owed to them by the defendant. Thus, the bystander rules are not needed and courts instead should consider simply whether mental harm is a proper element of damages in a medical malpractice action when the only other harm claimed is an economic loss. This question is a difficult one, but it is more appropriate than the question of whether "bystander" liability should attach.


have held that regardless of whether plaintiffs are characterized as "bystanders" or as "direct victims," they should not recover. 86

The Illinois courts have applied the "zone of danger" rule to determine whether plaintiffs in wrongful birth actions should recover damages for emotional harm. 87 In Siemieniec v. Lutheran General Hospital, 88 the Illinois Supreme Court determined that wrongful birth plaintiffs may recover for mental harm only if they meet the requirements of the "zone of danger" rule. The court stated that to recover, a plaintiff "must have, himself, 89 been endangered by the negligence." 90 The court concluded that because the defendant's negligence at no time placed the child's parents at risk of personal physical harm, the parents could not recover for their own emotional distress. 91


87. In Goldberg v. Ruskin, 471 N.E.2d 530 (Ill. App. Ct. 1984), aff'd, 499 N.E.2d 406 (Ill. 1986), an Illinois court first hinted that the "zone of danger" rule might apply in wrongful birth cases. In that case, the court noted that Illinois recently had adopted the "zone of danger" rule, which requires that "a bystander who is in a zone of physical danger and who, because of the defendant's negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress." Id. at 539 (quoting Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983)).

The court did not clearly spell out whether it thought the "zone of danger" rule should apply to the Goldberg case, and it remanded the action to allow the plaintiffs to replead. The court noted that in spite of the shift toward applying the "zone of danger" rule in bystander cases, plaintiffs must accompany all claims for mental harm, whether involving direct victims or bystanders, with claims for physical harm or illness. Id. at 539-40. The court remanded to allow the plaintiffs to add an allegation that they had suffered a physical harm or illness. Id. Thus, it is not clear whether the court mentioned the "zone of danger" rule because it believed the rule applied to wrongful birth cases, or because direct cases—such as that of the Goldbergs—still require an allegation of physical harm.

88. 512 N.E.2d 691 (Ill. 1987).

89. It seems odd that the court used a male pronoun, since both the mother and father of the child were plaintiffs in the case. Though the court's choice of pronoun most likely was only an oversight or an example of the common usage of the male pronoun by judges and many other people to refer to both men and women, it highlights the court's lack of awareness that one of the plaintiffs was a woman. The court's pronoun choice is another small indication that in deciding this wrongful birth case, the court was not sensitive to the unique facts of pregnancy which made application of the bystander rules particularly inappropriate for the circumstances. See generally infra notes 140-162 and accompanying text (critiquing courts' use of the bystander rule in wrongful birth cases).

90. Siemieniec, 512 N.E.2d at 707.

At least one court has used the Dillon rule to deny emotional distress damages in a wrongful birth case. In Arche v. United States, the Kansas Supreme Court presumed that the plaintiffs' wrongful birth claim was a bystander case. The court held that the plaintiffs could not recover under the rule applicable in Kansas because they had not witnessed the occurrence which caused the injury. The court explained that "[t]he child's injury in this case occurred without human fault during development of the fetus; the parents were not aware of the injury at the time." Thus, the court disallowed the plaintiffs' claim for mental harm damages because the plaintiffs failed to meet the requirements of the three-part Dillon test.

The California Court of Appeals in Andalon v. Superior Court refused to apply the bystander doctrine in a wrongful birth case because it correctly recognized that the parents in such cases are themselves direct victims of the defendant's negligence. Like the Arche court, it formulated its inquiry in terms of "direct victims" versus "bystanders." The court drew a clear distinction between "direct victims" and "bystanders" by noting that if Dillon did apply, the plaintiffs would be unable to recover because they did not "witness" the "harming event."

The dissent in Siemieniec argued correctly that the bystander rules do not apply in a wrongful birth case, because the parents are not bystanders at all, but instead are direct victims of the defendant's alleged negligence. Siemieniec, 512 N.E.2d at 711 (Simon, J., specially concurring in part and dissenting in part) (arguing that the defendants owed the duty of care to the parents alone and that the majority held as much when it refused to recognize a wrongful life action); see also supra note 83 (explaining that defendants in a wrongful birth case owe a duty of care directly to the parents, making the bystander rules inapplicable).

93. Id. at 482 (stating the Kansas rule regarding bystander claims without first explaining why the rule was applicable).
94. Kansas seemed to have previously adopted the three-part test first formulated in Dillon. See Smelko v. Brinton, 740 P.2d 591, 598 (Kan. 1987) (holding that plaintiff could not recover under the Dillon rule); Schmeck v. City of Shawnee, 647 P.2d 1263, 1266 (Kan. 1982) (same).
95. The first prong of the three part Dillon test requires that the plaintiff physically witness the harm done to the third party. See supra text accompanying note 79.
96. Arche, 798 P.2d at 482.
97. Id.
98. Id.
100. Id. at 905; see supra note 83 (explaining that defendants in a wrongful birth case owe a duty of care directly to the parents).
101. Andalon, 208 Cal. Rptr. at 903 n.4.
According to the court, "[t]he 'injury' to the child occurred . . . in utero, presumably at the moment of conception."\(^{102}\)

Finally, at least one court has refused in all cases to award damages for mental distress in the absence of physical injury. Applying this rule to wrongful birth cases, the New York Court of Appeals twice has denied recovery for mental harm in wrongful birth cases by treating the parents as "bystanders" to the harm done by the physician.\(^{103}\) In *Howard v. Lecher*,\(^{104}\) the court pointed out that the plaintiffs "were made to bear no physical or mental injury, other than the anguish of observing their child suffer."\(^{105}\) Citing the leading case in New York regarding liability to bystanders,\(^{106}\) the court concluded that it should impose no liability in a wrongful birth action for mental harm caused to the parents.\(^{107}\) A year later, in *Becker v. Schwartz*,\(^{108}\) the New York court followed the rule it adopted in *Howard* and concluded that parents in a wrongful birth action cannot recover damages for mental harm.\(^{109}\) It contrasted the emotional harm suffered in wrongful birth cases with the harm suffered in cases

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102. *Id.* The child in question in *Andalon* was born with Down's Syndrome. *Id.* at 900. Consequently, the genetic defect which caused the child's condition was present from the moment of conception. *Oxford's* supra note 16, at 1373.


105. *Id.* at 66.

106. *Id.* (citing *Tobin v. Grossman*, 249 N.E.2d 419 (N.Y. 1969)). In *Tobin*, a mother who was nearby when a car struck her child sought to recover for the mental anguish she suffered at seeing the harm done to her child by the defendant's alleged negligence. *Tobin*, 249 N.E.2d at 419. The court held that the mother could not recover for her own mental injuries regardless of whether she witnessed the harm done to her child. *Id.* at 419-20. The court thus rejected the rule adopted by the California Supreme Court in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968). *Tobin*, 249 N.E.2d at 419-20; *see supra* text accompanying notes 77-82 (explaining the *Dillon* rule). The court also implicitly rejected the "zone of danger" rule. *Tobin*, 249 N.E.2d at 423; *see supra* text accompanying notes 74-76 (explaining the "zone of danger" rule). Later, the court reversed itself in part and adopted the "zone of danger" rule for bystander cases. *See* *Bovsun v. Sanperi*, 461 N.E.2d 843 (N.Y. 1984). Since their adoption of the "zone of danger" rule, the New York courts have not had the opportunity to determine whether the rule applies in a wrongful birth action. Even if it does apply, it probably would not yield a result contrary to the one reached in *Howard* and *Becker*. *See generally infra* text accompanying notes 140-149.

107. *Howard*, 366 N.E.2d at 66. Because the plaintiffs in *Howard* only sought damages for mental harm, the court disallowed the entire wrongful birth claim. *Id.*


109. *Id.* at 813.
in which the defendant breached a duty owed directly to the plaintiff, and not as a bystander to harm.110

3. The “Benefit/Burden” Rule

Other courts have used the “benefit/burden” rule found in section 920 of the Second Restatement of Torts either to deny recovery of mental distress damages or to limit the amount of damages awarded. The “benefit/burden” rule is a general rule of tort law which requires the court to offset any award of damages for the “burden” imposed by the defendant’s negligence against any “benefit” the plaintiff has enjoyed because of the defendant’s negligence.111 Defendants in wrongful birth actions have cited section 920 and claimed that courts should offset any emotional harm suffered by the plaintiffs against the emotional benefit the plaintiffs have derived from the defendants’ negligence. Defendants have argued that in the absence of their negligence, the parents would not have carried the child to term, and would not have enjoyed the benefits of parenthood which the defendants’ negligence made possible.112

At least two approaches to the “benefit/burden” rule have emerged in wrongful birth cases. Under the first approach, courts have held that any damages a jury would award, after balancing the emotional harm suffered by the parents against the benefits they have gained from parenthood, would be too speculative.113 These courts have concluded that because of the speculative nature of the damages, no damages for emotional

110. The court contrasted Johnson v. State, 334 N.E.2d 590 (N.Y. 1975), with Becker. In Johnson, the plaintiff had received notice incorrectly telling her that her mother had died. The court reasoned that Johnson was distinguishable from Becker because only in Johnson did the defendant owe a duty of care directly to the plaintiff. Thus, it characterized Johnson as a case involving a “direct victim,” while it characterized wrongful birth cases like Becker as involving a “bystander.” This characterization of wrongful birth cases, however, misstates the claims made by the plaintiffs. See generally supra note 83.

111. The text of § 920 of the Second Restatement of Torts describes the balancing test under the “benefit/burden” rule:

When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

Restatement (Second) of Torts § 920 (1965).


113. See, e.g., Becker, 386 N.E.2d at 814; Jacobs, 519 S.W.2d at 849.
harm can be allowed as a matter of law.\textsuperscript{114} Under the second approach, courts have allowed the question of mental harm damages to go to the jury, but have instructed the jury to weigh the emotional harm done to the parents against the benefit the parents experienced as a result of the child's birth.\textsuperscript{115}


In one of the first wrongful birth cases decided by an American court, the New York Court of Appeals in Becker \textit{v.} Schwartz\textsuperscript{116} held that damages for emotional harm are not recoverable as a matter of law. In part,\textsuperscript{117} the court reasoned that damages for mental harm are not recoverable because the parents most likely enjoyed an emotional benefit from defendant's negligence—the benefit of parenthood:

To be sure, parents of a deformed infant will suffer the anguish that only parents can experience upon the birth of a child in an impaired state. However, notwithstanding the birth of a child afflicted with an abnormality, and certainly dependent upon the extent of the affliction, parents may yet experience a love that even an abnormality cannot fully dampen.\textsuperscript{118}

The court cited section 920 of the Second Restatement of Torts and stated that it would weigh the emotional burdens to the parents against the emotional benefits they enjoyed.\textsuperscript{119} Without explanation, the court concluded that because this analysis "remains too speculative,"\textsuperscript{120} the parents cannot recover emotional harm damages.\textsuperscript{121}

With even less explanation, the Texas Supreme Court held, in the first case recognizing a wrongful birth claim, that damages for emotional harm are not recoverable as a matter of law.\textsuperscript{122} Although the court did not cite section 920, its reasoning

\textsuperscript{114} See, e.g., Becker, 386 N.E.2d at 814; Jacobs, 519 S.W.2d at 849.

\textsuperscript{115} See, e.g., Viccaro, 551 N.E.2d at 11-12; Eisbrenner, 308 N.W.2d at 214; Harbeson, 656 P.2d at 495.

\textsuperscript{116} 386 N.E.2d 807 (N.Y. 1978).

\textsuperscript{117} The court also refused to allow recovery of damages for mental harm because the plaintiffs failed to show a physical injury to accompany their claim for mental harm. \textit{Id.} at 902 (citing Howard \textit{v.} Lecher, 366 N.E.2d 64 (N.Y. 1977)); see generally supra note 52 (discussing the traditional hesitance of courts to award damages for mental harm without proof of physical injury).

\textsuperscript{118} Becker, 386 N.E.2d at 813-14.

\textsuperscript{119} \textit{Id.} at 814.

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} Jacobs \textit{v.} Theimer, 519 S.W.2d 846, 849 (Tex. 1975); see supra notes 14-22 and accompanying text (discussing the \textit{Jacobs} decision).
acknowledged the force of a "benefit/burden" rule. The court concluded without substantial analysis that an award of mental harm damages would be "based upon speculation as to the quality of life and as to the pluses and minuses of parental mind and emotion." ¹²³

b. Recovery as a Jury Question Under the "Benefit/Burden" Rule.

Several courts consider the "benefit/burden" rule relevant to their assessment of damages, but leave to the jury the difficult task of determining how to weigh the relative benefits and burdens of parenthood in wrongful birth cases.¹²⁴ In Harbeson v. Parke-Davis, Inc.,¹²⁵ for example, the court cited section 920 of the Second Restatement of Torts and concluded that "[i]n considering damages for emotional injury, the jury should be entitled to consider the countervailing emotional benefits attributable to the birth of the child."¹²⁶ Similarly, in Eisbrenner v. Stanley,¹²⁷ the Michigan Court of Appeals concluded that the jury should apply the "benefit/burden" rule in a wrongful birth case.¹²⁸ In Viccaro v. Milunsky,¹²⁹ the Massachusetts Supreme Court agreed with the plaintiffs' concession that the jury should apply the "benefit/burden" rule in assessing damages for emotional harm.¹³⁰ No court has explained, however, exactly how a jury should balance the benefits and harms or what factors it should consider in its analysis.

¹²³. Id.
¹²⁵. 656 P.2d 483 (Wash. 1983) (en banc).
¹²⁶. Id. at 493.
¹²⁸. Id. at 214 (citing RESTATEMENT (SECOND) OF TORTS § 920 (1965)).
¹³⁰. Id. at 11-12. Apparently, the parents conceded that the court should offset any emotional benefits they derived from the existence of their impaired child against the damages they would receive for emotional harm. The court noted that the "benefit/burden" rule should apply to the assessment of damages for extraordinary caretaking expenses as well, although the court was not asked to address this question on appeal. Id. The offset of emotional benefits against caretaking expenses is inconsistent with the rule set out in the Restatement; the Restatement explicitly states that only benefits of the same type as the damages sought may be offset. See RESTATEMENT (SECOND) OF TORTS § 920 cmt. b (1965) ("Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited.").
B. A Feminist Analysis of Theories Courts Have Used to Deny Damages for Emotional Harm in Wrongful Birth Cases

Whether they use the "impact" rule, the bystander doctrine, or the "benefit/burden rule" to deny recovery of emotional harm damages, courts in wrongful birth cases have premised their reasoning upon assumptions about women's reproductive lives that do not accord with women's actual experiences. The following discussion applies Wishik's seven-step inquiry\textsuperscript{131} to demonstrate this disparity between women's presumed and actual experiences, reveals the patriarchal interests which the current misrepresentation of women's experiences serve, and suggests possible reforms.

1. The Disparity Between Women's Actual Experiences and the Law's Description of Those Experiences


Although courts have employed the impact doctrine to deny emotional harm damages, plaintiffs in a wrongful birth case can easily satisfy the simple requirement of a "physical impact." The plaintiff mother always experiences some physical effects flowing from the defendant's negligence: she carries her pregnancy to term. In fact, the essence of her claim is that had the defendant exercised due care, she would have terminated her pregnancy. Certainly, pregnancy is a "physical" condition or effect. Further, wrongful birth plaintiffs sometimes undergo medical examinations which defendants perform negligently.\textsuperscript{132} Of course, these medical examinations involve a physical "touching." After giving birth to an impaired child, moreover, the woman might breast-feed the child. Certainly, these conditions are physical "impacts" as significant as a "trivial jolt or jar"\textsuperscript{133} or "dust in the eye."\textsuperscript{134} Further, the law does not require the plain-

\textsuperscript{131} See supra text accompanying notes 43-45.

\textsuperscript{132} For instance, the plaintiff mother in Garrison v. Medical Ctr. of Del., Inc., 581 A.2d 288 (Del. 1989), twice underwent an amniocentesis; she claimed her physician was negligent in performing the first examination and in delaying the results of the second examination. \textit{Id.} at 289-90. This negligence resulted in the birth of a child with Down's Syndrome. \textit{Id.} The physical impact experienced by the mother was hardly "slight." Amniocentesis is performed by inserting a needle through a woman's abdomen and into her uterus in order to withdraw amniotic fluid. Oxford's, supra note 16, at 41.

\textsuperscript{133} \textit{Keeton et al.}, supra note 6, § 54, at 363.

\textsuperscript{134} \textit{Id.} § 54, at 364.
tiff to show that the physical impact is the cause of the mental harm.\textsuperscript{135}

The courts in \textit{Moores},\textsuperscript{136} \textit{Abelson},\textsuperscript{137} and \textit{Pitre}\textsuperscript{138} failed to recognize that a wrongful birth plaintiff can easily meet the physical impact requirement. The \textit{Moores} court went so far as to conclude explicitly that Linda Moores had experienced no physical impact as a result of the defendant's negligence.\textsuperscript{139} The courts' reasoning in these cases reveals an obvious male stance which regards pregnancy as a non-physical experience. For women, few experiences are more physical than pregnancy and childbirth. Yet these courts fail to recognize this simple fact. Of course, when viewed from the male perspective, pregnancy is not a physical experience; men do not carry their unborn children inside them, amniocentesis needles do not enter their abdomens, and their children do not pass through their bodies as they enter the world. A rule that treats pregnancy from this male perspective, however, denies the reality of women's experiences. It also yields the absurd conclusion that pregnancy and childbirth are not physical experiences.

b. \textit{A Feminist Critique of Courts' Use of the Bystander Doctrine.}

Traditional rules governing "bystander" cases create a dichotomy between the self and the other.\textsuperscript{140} If one's self suffers direct physical harm, courts will compensate plaintiffs for any emotional harm also suffered. If other individuals suffer physical harm, however, the law in most states will not compensate plaintiffs for their own emotional harm. The rules do not contemplate any other circumstances; either one's "self" is injured, or an "other" is injured. The dichotomy between self and other breaks down in a wrongful birth action, however, because the distinction between the self and the other is blurred in the case of a pregnant woman and her unborn child.\textsuperscript{141} The law's as-

\begin{itemize}
  \item \textsuperscript{135} Id. § 54, at 363.
  \item \textsuperscript{136} 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981).
  \item \textsuperscript{137} 392 S.E.2d 916 (Ga. Ct. App. 1990), rev'd on other grounds, 398 S.E.2d 557 (Ga. 1990).
  \item \textsuperscript{138} 530 So. 2d 1151 (La. 1988).
  \item \textsuperscript{139} \textit{Moores}, 405 So. 2d at 1026.
  \item \textsuperscript{140} Feminist theorists have argued that such dichotomies are prevalent throughout the law, and that they represent a male world view. See, e.g., \textit{Bender, Lawyer's Primer, supra} note 42, at 27.
  \item \textsuperscript{141} "Pregnancy is the quintessential female experience. It is an experience of attachment and separation, both more total than is possible in any other relationship. It is an attachment so complete that it can only be torn apart in
sumption that we are all "essentially, necessarily" separate from others is inaccurate when we speak about pregnancy because the pregnant woman is quite clearly connected to an "other": her unborn child. The difficulties courts have in recognizing this reality demonstrate the inadequacy of the existing rules.

Feminist legal theorists have pointed out the "false oppositions" or dualities in the law, including the false duality of self and other. This dichotomy reflects a "culture designed from a masculine perspective," one that fails to account for the uniquely female experience of pregnancy.

Not surprisingly, when the rules regarding recovery of damages for emotional harm depend on the dichotomy between self and other, any attempt to apply those rules to the case of the pregnant woman will be difficult. One simply cannot speak of a pregnant woman only as a "bystander" to anything that happens to her unborn child. In a real, physiological sense, what happens to her unborn child happens to her as well. It is untenable for the law to split the mother and her unborn child into two entities. By applying the bystander rules to wrongful birth cases, however, this is precisely what courts have done.

The Siemieniec court, for example, made no attempt to discuss the particular facts of the wrongful birth scenario when it concluded that the parents were unable to meet the requirements of the "zone of danger" rule. Instead, the court summarily concluded that the plaintiffs were unable to satisfy the rule's re-


142. Robin West, Jurisprudence and Gender, 55 U. CHI. L. Rev. 1, 2 (1988) ("Women are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women, distinctively, are quite clearly connected to another human life when pregnant.").

143. Id.

144. See, e.g., Bender, Lawyer's Primer, supra note 42, at 27.


146. This statement does not depend on a belief that the child is not a separate "person" who deserves to be recognized as such under the law. Opposing sides in the abortion debate argue over the status of the fetus as a separate "person." Regardless of which side one takes in this debate, the simple fact remains that one cannot draw a clear physiological distinction between the pregnant woman and her unborn child. Although one may wish to recognize the separate "rights" of a fetus, one cannot deny that the fetus lies inside the pregnant woman's body, that the body of the fetus is physically linked to the body of the pregnant woman, and that the bodies of the two interact.

quirements. Of course, the rule's formulation made it impossible for the plaintiffs—especially the mother—to recover. No wrongful birth plaintiff ever could satisfy the rule because the rule presupposes a "bystander" who watches the injury to a separate individual. The language of the rule simply does not contemplate a circumstance in which two individuals—an unborn child and its mother—are physiologically inseparable.

Furthermore, when the Arche court attempted to apply the Dillon rule, it stumbled because courts did not draft the rule with pregnant women in mind; the rule assumes a self and an other as two distinct beings. The court noted the requirement that the plaintiff must witness the injury done to the third party, and concluded that the plaintiffs failed to meet that requirement. Obviously, a pregnant woman cannot "witness" injuries done to her self/unborn child. The term "witness" assumes two separate entities, one who is the subject of the tortious act and one who watches. Of course, a pregnant woman literally cannot "see" inside her uterus to witness whatever is happening to her unborn child. Nonetheless, she experiences something much more intimate with her unborn child than a

148. "[W]e are unable to perceive, under the facts of this case, how [the plaintiffs] can satisfy the . . . rule, namely, that they were 'in a zone of physical danger and . . . [had] reasonable fear for . . . [their] own safety.'" Siemieniec, 480 N.E.2d at 1232 (quoting Rickey v. Chicago Transit Auth., 457 N.E.2d 1 (Ill. 1983)).

The court also indicated that Illinois still recognizes the "impact" doctrine and that the "zone of danger" rule is only an exception for courts to apply when the plaintiffs cannot satisfy the requirements of the "impact" rule. Id. at 1232. Yet, it did not examine in detail whether the plaintiffs could meet the requirements of the "impact" rule. Id. If the court had analyzed the "impact" rule in more detail, it may have determined that its requirements were easily met in a wrongful birth case, at least with respect to the plaintiff mother. See supra text accompanying notes 132-139.

149. The plaintiff mother could never satisfy the rule. Most likely, plaintiff fathers could never satisfy the rule either, though the father is always physically separate from the impaired child. My argument is only that the plaintiff mother can never satisfy the bystander rules because a mother can never be a bystander to events involving her unborn child. The formulation of the rule ignores this reality.

150. 798 P.2d 477 (Kan. 1990); see supra text accompanying notes 92-98 (discussing the Arche decision).

151. See supra text accompanying notes 77-82 (discussing the Dillon rule).

152. "We have thus far held that visibility of results as opposed to visibility of the tortious act does not give rise to a claim for emotional damages . . . . [T]he parents were not aware of the injury at the time [of the alleged negligence]." Arche, 798 P.2d at 482.
mother experiences when watching from a physical distance while her (born) child is injured.\textsuperscript{153}

Even after the child is born, the existing rules fail to acknowledge the degree of connectedness which the mother experiences with her child. Apart from the case of pregnancy, the law in this area incorporates a male norm by assuming that all individuals are inherently separate from one another. In contrast, a female norm would assume a certain degree of connectedness with one another.\textsuperscript{154} The easiest case to make for this connectedness is the case of the mother and child, especially during the child's early life.\textsuperscript{155} Yet courts have applied the bystander rules and denied recovery for the emotional distress the mother en-

\footnotesize{\textsuperscript{153} This analysis also reveals yet another flaw in the use of the bystander rules in wrongful birth cases. Even if the mother could physically "see" what happens to her unborn child, nothing "happens" to the child in the wrongful birth case. Indeed, the essence of the wrongful birth claim is not that someone has done something affirmatively and physically which caused the child to be born with a birth defect. Instead, the plaintiffs claim that the defendant physician \textit{failed} to do something with regard to the unborn child (by not testing the child for birth defects, for example). Once again, the difficulty of applying the existing rules demonstrates that courts did not formulate the rules with this kind of case in mind. Instead, the rules contemplate a scenario in which a sudden occurrence (such as a traffic accident) caused physical harm to another. In a wrongful birth case, the physical harm—the birth defects—are caused or perpetuated by the physician's failure to do anything when some affirmative action was called for.

\textsuperscript{154} "[P]erhaps the central insight of feminist theory of the last decade has been that woman [sic] are 'essentially connected,' not 'essentially separate,' from the rest of human life, both materially, through pregnancy, intercourse, and breast-feeding, and existentially, through the moral and practical life." West, \textit{supra} note 142, at 3.

West contrasts her view of human existence with that espoused by several male legal theorists that all human beings are essentially separate. \textit{Id.} at 1-2 (citing Robert Nozick, \textit{Anarchy, State, and Utopia} (1974); Roberto Mangabeira Unger, \textit{Knowledge and Politics} (1984); Michael J. Sandel, \textit{Liberalism and the Limits of Justice} (1982)). These advocates of the "separation thesis" argue that the fact of separation is the foundation for law and liberal society. West argues that the separation thesis is "patently untrue of women." \textit{Id.} at 2, 4-42; \textit{see} Bender, \textit{Lawyer's Primer, supra} note 42, at 28-30 (stating that the legal system should respond to the "interdependencies and interconnectedness" reflected in the feminist voice) (citing Carol Gilligan, \textit{In a Different Voice} (1982)).

\textsuperscript{155} This is so because during the first months of a child's life, the child is completely dependent upon another (usually but not always the mother) for its very survival; all its physical and emotional needs must be met by another. The fact that a newborn's sole source of food usually comes physically from the mother's body is evidence of a degree of "connectedness" between mother and child. "[W]omen are in some sense 'connected' to life and to other human beings during . . . the post-pregnancy experience of breast-feeding." West, \textit{supra} note 142, at 2-3.}
dures by witnessing her young infant suffer from severe physical or mental defects. Once again, the apparently neutral rules governing bystander cases fail to acknowledge women's actual experiences and instead adopt a male norm which inevitably disfavors the claims of women for recovery of damages.

Because the rules do not contemplate a world in which individuals may be physiologically inseparable—as in the case of a woman and her unborn child—any attempt to apply the bystander rules to a wrongful birth case will be awkward at best and absurd at worst. Courts will conclude quickly that the rules make it impossible for the wrongful birth plaintiff to recover, without analyzing whether it makes good policy sense in these cases for courts to award mental harm damages. In this manner, the bystander rules become a proxy for other, unstated reasons for denying recovery.

For instance, courts have been slow to award damages for emotional harm alone because they wish to avoid claims for harm that is often "temporary and relatively trivial," they fear that claims of emotional harm are too easily falsified, and they worry about imposing financial liability disproportionate to the harm caused. Courts should examine these concerns directly when deciding whether to award mental harm damages in wrongful birth cases, instead of hiding behind rules that were conceived for a world in which pregnant women do not exist.


When courts conclude as a matter of law that emotional harm damages are not recoverable under the "benefit/burden"

156. "It cannot be denied that [the parents] themselves were made to bear no physical or mental injury, other than the anguish of observing their child suffer." Howard v. Lecher, 366 N.E.2d 64, 66 (N.Y. 1977).
157. That is, women experience as mothers a unique psychological and physical connection with their children.
158. Of course, this approach also disfavors the wrongful birth claims of men, because fathers can be plaintiffs in wrongful birth actions.
159. Again, wrongful birth claims are not claims for mental harm "alone." Plaintiffs also seek other damages, including extraordinary caretaking expenses. Thus, the general rule that mental harm damages, standing alone, are not recoverable is inapposite in the context of wrongful birth claims. See generally supra note 83.
160. KEETON ET AL., supra note 6, § 54, at 360-61.
161. Id. § 54, at 361.
162. Id.
wrongful birth rule, they assume that in all wrongful birth cases, the parents are better off because of the defendant’s negligence. The Becker\textsuperscript{163} court expressed this sentiment when it noted that the parents “may yet experience a love that even an abnormality cannot fully dampen.”\textsuperscript{164} This sort of generalization is dangerous, because it plays on the stereotype that all women are fulfilled through motherhood, and that all women are better off in their traditional role as mothers. This belief does not often hold true even in the case of a healthy child. In the case of a severely impaired child, the stereotype plays on the romanticized notion of parenthood while it trivializes the emotional pain of parents who must witness the early death of a young child\textsuperscript{165} or care for a severely impaired child for the rest of their own lives.\textsuperscript{166} By invoking the stereotypical view of woman as fulfilled mother, courts play a cruel joke on parents who may have been emotionally devastated by their child’s impairment and who may have found little if any emotional satisfaction in the burden they have taken on as a result of the defendant’s negligence.

A rule allowing a jury to consider the relative benefits and burdens of parenting an impaired child is an improvement over one that simply stereotypes women and motherhood. Unless juries are expressly cautioned, however, they may resort to the same stereotypes the Becker\textsuperscript{167} and Jacobs\textsuperscript{168} courts used. Courts that choose to invoke the “benefit/burden” rule should expressly instruct jurors that they should avoid oversentimentalizing parenthood and should avoid stereotypical notions of women as satisfied mothers. Instead, jurors should look to the particular facts of the case, including the severity of the child’s impairment and the emotional strain the impairment has imposed upon the particular plaintiffs.

This task never will be easy. Courts, however, often ask jurors to decide difficult questions, especially when they must as-

\begin{tabular}{l}
164. Id. at 814. \\
165. For instance, children born with anencephaly die within a few days of birth. Oxford’s, supra note 16, at 66. The parents of these children have little if any time to experience “a love that even an abnormality cannot fully dampen.” Children afflicted with Tay-Sachs disease die within the first few years of life. Id. at 1373. \\
166. For instance, children with Down’s Syndrome often live well into adulthood; yet some of these children require constant care and never become self-sufficient. Id. at 325. \\
\end{tabular}
Certainly, some cases will be easier than others; the parents of an anencephalic infant will derive little emotional benefit from their child's few days of life, while the parents of a Down's Syndrome child may derive great pleasure at every new accomplishment they witness as their child grows into an adult. Still, stereotypes of women as mothers have no place in these determinations, and rules that invoke those stereotypes fail to acknowledge the complex experiences and emotions of individual women.

2. Patriarchal Interests Served by the Misrepresentation of Women's Actual Reproductive Experiences

Although the language of the cases discussing emotional harm damages in wrongful birth actions does not reveal any explicit patriarchal motives, the resulting pattern of distortion evidences some of the motives served by a continuation of the distortion. By speaking only of the technical rules regarding emotional harm damages and ignoring the details of the actual harm that results from wrongful birth, courts deny the importance and severity of the emotional harm suffered by parents who must watch their children suffer and sometimes die, while at the same time knowing they may have been able to do something to prevent it. This disregard for emotional harm is consistent with the suggestion of feminist theorists that the law traditionally has devalued emotional harm and instead has placed greater value on financial harm. By resorting to any rule available without first examining whether the rule fits the situation, courts have been able to discard the claims of women with ease.

Perhaps courts have looked for any rule that will deny recovery of emotional harm damages in wrongful birth cases because the claims in these cases make judges uncomfortable. Indeed, these are difficult cases to address; plaintiffs ask judges to acknowledge that a child's birth caused enormous suffering, and that thought simply does not fit into the simpler framework that assumes all births are happy births and that all children

169. I do not envy the juror who must assign a dollar value to the harm of spending the rest of one's life in a wheelchair, or of losing the companionship of a spouse, or of forfeiting one's reproductive capacity to a defective birth control device. But juries must decide these hard cases; they have proved capable of doing so and are capable of measuring damages in wrongful birth cases as well.

170. See, e.g., Bender, Lawyer's Primer, supra note 42, at 37 (noting that tort law provides compensation for financial loss but makes recovery for "relational loss" and intangible harm difficult).
will be healthy and bring joy to their parents.\textsuperscript{171} Judges, like most people, do not like to confront the fact that these expectations will not always be met. Many women and men, however, are faced with a more tragic reality. As long as we refuse to confront these more difficult cases, parents will be left to fend for themselves and their anguish will remain private.\textsuperscript{172}

3. Suggestions for Legal Reforms and Other Changes That Will Lead to a Better Situation for Women

Courts should hold explicitly that plaintiffs in wrongful birth cases can recover damages for emotional harm. Indeed, any legal reforms that would allow parents to recover damages for the emotional harm they have suffered would improve women's situation, because it would signal that the emotional harm suffered in wrongful birth cases is significant enough that the legal system will acknowledge and provide compensation for it. The law no longer should devalue women's suffering in these cases but rather should acknowledge the pain as a real and important element of the harm caused.

Even if a court is disinclined to allow damages in wrongful birth cases,\textsuperscript{173} however, it should adopt a more honest approach

\textsuperscript{171} I do not mean to imply that impaired children cannot bring joy to their parents, nor that parents always will want to avoid the birth of an impaired child. In fact, I am troubled by the tone taken by many of the courts in these cases, because they seem to assume that the birth of an impaired child always is a bad thing, to be avoided whenever possible. Such a view devalues children, parenthood, and persons with disabilities. The Washington Supreme Court highlighted the difficulties presented by new medical technology when it asked, "[A]re these developments the first steps towards a 'Fascist-Orwellian societal attitude of genetic purity,' . . . or Huxley's brave new world?" Harbeson v. Parke-Davis, Inc., 656 P.2d 493, 491 (Wash. 1983) (en banc) (citation omitted). Barbara Katz Rothman also argues that the ability to detect birth defects \textit{in utero} and to terminate a pregnancy is leading to a new social norm under which parents are expected to prevent the birth of an impaired child. \textit{See Rothman}, \textit{supra} note 141, at 11-13.

\textsuperscript{172} For a thorough discussion of the feminist argument that the law has privatized women's concerns, and so placed them beyond the reach of the law, see Ruth Gavison, \textit{Feminism and the Public/Private Distinction}, 45 \textit{STAN. L. REV.} 1 (1992).

\textsuperscript{173} I suspect that courts are hesitant to award damages for emotional harm partially because of a concern that tort verdicts already are too large. State legislatures have initiated many efforts to limit recovery in tort cases. George L. Priest, \textit{The Current Insurance Crisis & Modern Tort Law}, 96 \textit{YALE L.J.} 1521, 1550-63 (1987) (noting that 42 states have enacted tort reform legislation). Much of this concern has grown out of the insurance crisis, in which many potential tort defendants have found it increasingly difficult to secure liability insurance. \textit{Id.} This concern has been especially keen among physicians threatened with medical malpractice liability. David J. Nye et al., \textit{The
by examining the policy reasons which courts traditionally have invoked to deny recovery for emotional harm alone. Such an approach would treat women's emotional concerns openly and seriously. Although this exercise might still result in a denial of recovery, women would know that courts are taking their experiences seriously, instead of misrepresenting the reality of women's experiences in order to reach a quick and easy result.

An honest examination of policy, though, would make it difficult for courts to dismiss many wrongful birth claims. Generally, courts have been hesitant to allow recovery for emotional harm alone because of the difficulty of proving and measuring damages, the risk of fictitious claims, and the fear that a rule allowing recovery would lead to litigation over trivial matters. In most wrongful birth cases, courts would be hard pressed to characterize the parents' claims as "trivial"; it is difficult to imagine any greater pain than watching a child suffer or die an early death. Similarly, a court rarely would be justified in questioning whether such claims are genuine; it would be a most unusual case in which a court might doubt the grief expressed by the parents. Likewise, most plaintiffs would not have trouble proving that they have suffered emotionally.

Thus, the only possible ground on which a court might base a decision to deny recovery would be that the measure of damages is difficult to establish. This argument has some merit, especially when the child will live many years and provide some emotional satisfaction to the parents. The argument is much

Causes of the Medical Malpractice Crisis: An Analysis of Claims Data & Insurance Company Finances, 76 Geo. L.J. 1495 (1988) (discussing the liability crisis among doctors). Among physicians, obstetricians constitute the group most threatened with loss of insurance. Id. (noting that specialties such as obstetrics have been disproportionately affected by the insurance crisis). Because obstetricians often are defendants in wrongful birth cases, it is no wonder that courts have tried to provide some protection against large verdicts in these cases.

I share the concern regarding the liability crisis, but I do not believe that the way to solve the crisis is to invoke rules which do not fit the situation at hand and which devalue women's experiences.

174. See supra note 52 (stating three policy reasons why courts have denied emotional harm damages in the absence of physical injury).

175. The cases involving Down's Syndrome come to mind here. While the suffering of the parents of these children is great, it seems most difficult to measure that suffering against the joy the parents might experience at watching their children grow and develop, especially when the children in question only suffer from mild mental retardation and have no severe physical problems. If a court were to invoke the "benefit/burden" rule, see supra notes 111-130, a jury might find it nearly impossible to determine whether the benefits outweighed the burdens.
weaker when the child in question dies shortly after birth.\textsuperscript{176} If jurors can determine that any emotional benefits did not outweigh the emotional harm suffered by the parents, the only issue will be determining the dollar amount to assign to that suffering. Yet our legal system routinely asks jurors to assign dollar values to emotional suffering, and there is no reason to assume jurors could not also do so in wrongful birth cases.\textsuperscript{177}

Of course, much of the mental anguish suffered by parents in wrongful birth cases would not exist if our world were less hostile toward the physically and mentally impaired. A significant portion of the emotional pain these parents\textsuperscript{178} suffer is caused by the fact that society will discriminate against their children. Children with physical impairments will fight a constant battle throughout their lives for access to education, jobs, and public facilities.\textsuperscript{179} Children with mental impairments will be even worse off; education for these children may be inadequate or unaffordable.\textsuperscript{180} All impaired children will be the target of jokes by cruel children and may find it difficult to obtain adequate care and community support after their parents are gone. In a more ideal world, parents would not suffer to the extent they do now, because society would accept and care for their children.

III. ESTABLISHING PROOF OF CAUSATION IN WRONGFUL BIRTH CASES

Even if a court decides to recognize a cause of action for wrongful birth, the plaintiffs still must establish each element of

\textsuperscript{176} For instance, I believe most jurors would have little difficulty determining that the benefits of having an anencephalic infant did not outweigh the emotional burden of watching the child die shortly after birth.

\textsuperscript{177} See supra note 169.

\textsuperscript{178} I am speaking now of parents of children who will not necessarily die early in life, for example, parents of children with Down's Syndrome, cystic fibrosis, or various physical abnormalities.

\textsuperscript{179} Though in 1990 Congress passed the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12117 (Supp. 1993), which was intended to remove these barriers, progress toward compliance has been slow, and legal action to enforce its provisions is inevitable.

\textsuperscript{180} Bernadette Marczely, The Americans With Disabilities Act: Confronting the Shortcomings of Section 504 in Public Education, 78 EDUC. L. RPTR. 199 (1993) (setting out the difficulties handicapped children have faced since passage of the Education for All Handicapped Children Act); Martha M. McCarthy, The Public School's Responsibility to Serve Severely Handicapped Children, 49 EDUC. L. RPTR. 453 (1989) (showing how courts have struggled to determine the extent of the state's obligation to educate severely mentally impaired children).
a negligence claim. Among the elements they must show, plaintiffs must prove that the defendant's lack of due care "caused" the plaintiffs' harm. To satisfy this requirement, most courts have assumed wrongful birth plaintiffs must show that in the absence of the defendant's negligence, the child in question would not have been born. Because the plaintiffs claim that the child's birth and continued existence places upon them monetary and emotional demands, they must show that the child would not have existed absent the defendant's negligence. When plaintiffs claim the defendant negligently failed to diagnose an impairment in utero, the only way the parents could have avoided their damages would have been to undergo prenatal testing and abort the fetus once they discovered the impairment. Thus, to establish causation, courts require plaintiffs to show they would have undergone prenatal testing and would

181. Negligence law traditionally has required that the plaintiffs prove the defendant owed a duty of care to the plaintiffs, the defendant breached that duty of care, the defendant's lack of due care was the "factual cause" and "legal cause" of plaintiffs' injuries, and the plaintiffs suffered actual damages or loss. KEETON ET AL., supra note 6, § 30, at 164-65.

182. Tort law recognizes two types of causation, and plaintiffs must establish both in order to recover. Courts commonly refer to the first type of causation as "cause in fact" or "factual cause." The question of cause in fact requires the fact finder to examine what would have occurred in the absence of defendant's lack of due care. Traditionally, plaintiffs satisfy the requirement of cause in fact if they establish that in the absence of defendant's lack of due care, they would not have suffered the injury or harm in question. Id. § 41, at 264-65. But see infra notes 242-248 (discussing alternative causation tests).

Courts refer to the second type of causation that plaintiffs must establish as "proximate cause" or "legal cause." Proximate cause or legal cause presents the question of whether, having established a causal chain between defendant's act and plaintiff's harm, the court should hold the defendant legally responsible. See generally id. § 42, at 272-80.

Confusion often arises between the two types of causation, in large part because courts often combine factual cause and legal cause under the label "proximate cause." Though the terminology used by courts in wrongful birth cases varies, the type of causation relevant to this section is "cause in fact" or "factual cause."

183. See supra notes 31-32.

184. Several courts have noted that because the physicians could not have corrected the birth defects in question, the only thing they could have done was to tell the parents about the defect before birth so they could obtain an abortion; or in the case of a condition which could have been diagnosed before conception, they could have avoided conception entirely. The choice, then, is not between a healthy child and an unhealthy child, but between an unhealthy child and no child. See, e.g., Berman v. Allan, 404 A.2d 8, 13 (N.J. 1979) (noting that the plaintiffs "do not assert that defendants increased the risk that [the child], if born, would be afflicted with Down's Syndrome. Rather, at bottom, they allege that they were tortiously injured because [the mother] was deprived of the option of making a meaningful decision as to whether to abort the fetus").
have aborted the fetus, had the defendant acted with due care.185

Certain distorted presumptions about women's reproductive lives underlie the causation requirement many courts and legislatures impose on wrongful birth plaintiffs. These presumptions appear to be grounded in a male norm, one that assumes decision making about moral questions takes place in a certain manner. The way many women make moral decisions is profoundly different from the method courts assume, and this method of decision making is inherently incompatible with the traditional causation model employed in wrongful birth cases. This portion

185. One could make a strong argument that parents must only show they would have aborted in order to satisfy the existing rules of causation, if they seek damages for extraordinary caretaking expenses and for the emotional harm of watching their child suffer from the impairments. After all, if the plaintiffs had aborted the fetus, they would not have incurred these damages. Yet, many courts treat the emotional harm in wrongful birth cases in part as a denial of the choice of whether to terminate the pregnancy. See supra note 51 and infra note 190 and accompanying text. Plaintiffs do suffer some amount of emotional harm regardless of what their choice would have been, because the defendant robbed them of the chance to make that all-important decision for their child and for themselves; the defendant, in a sense, made that choice for them. This type of harm more closely resembles a harm to personal dignity and privacy interests. Traditionally, courts have protected these types of interests under tort law through invasion of privacy law, though none of the specific causes of action termed "invasion of privacy" seem to fit this type of fact scenario. See generally Keeton et al., supra note 6, § 117, at 849-69; 2 Fowler v. Harper et al., The Law of Torts § 9.5 (2d ed. 1986) (noting that the tort of invasion of privacy redresses offenses to personal dignity and privacy).

At least one court has acknowledged that additional emotional harm can result from the defendant's failure to inform the parents of the impairment before the child's birth, regardless of whether the parents would have chosen to abort the pregnancy. In Shelton v. St. Anthony's Med. Ctr., 781 S.W.2d 48 (Mo. 1989), the court held that in spite of a state statute prohibiting any cause of action "based on the claim that but for the negligent conduct of another, a child would have been aborted," see Mo. Rev. Stat. § 188.130(2) (Supp. 1993), the mother could recover for emotional harm. The court recognized that because of the defendant's negligence, the mother did not learn until the time of the child's birth that the child carried serious physical abnormalities: the child was born without arms and had other deformities. Shelton, 781 S.W.2d at 48. The court held that had the defendant acted with due care, the plaintiff would have learned before her child's birth that the child would be born with severe deformities. Id. at 49. With this knowledge, the plaintiff could have prepared herself for the emotional trauma of giving birth to the child and could have avoided the sudden shock of learning about her child's deformities at the time of birth. Id. at 50.

Thus, plaintiffs can establish at least two types of emotional harm under the existing rules of causation even in the absence of proof that the parents would have terminated the pregnancy: the denial of the chance to choose whether to bring the impaired child into the world and the shock of learning at the time of birth of the child's impairment.
of the Article will illustrate this method of moral decision making by citing a study of women who have confronted the decision whether to undergo prenatal testing and whether to abort an abnormal fetus. This study demonstrates the absence of women's voices in the law and reveals that courts and legislatures have constructed the rules of causation in wrongful birth cases without consideration of female voices. Because women's method of moral decision making is inherently incompatible with the traditional causation model, courts and legislatures should adopt an alternative model that accounts for both the medical negligence which contributed to the harm and the inherent "unknowability" of any event which might have occurred in the absence of that negligence.

186. My method of analysis draws in part on the suggestion of several feminist scholars that we must "tell the stories" of women in order to more fully inform the law with women's reality and women's viewpoints. "We need to flood the market with our own stories until we get one simple point across: men's narrative story and phenomenological description of law is not women's story and phenomenology of law." West, supra note 142, at 65. According to one scholar, "[t]he ostensible 'neutrality' of the law disguises the extent to which it is premised on the perspectives of the powerful; the narratives of those who occupy a comparatively powerless position are not only evidence of what has been excluded, but testimony to the law's relentless perspectivity." Kathryn Abrams, Hearing the Call of Stories, 79 CAL. L. REV. 971, 975-76 (1991) (defending use of narratives in feminist legal scholarship).

The stories of women who have had to decide whether to undergo prenatal testing and whether to abort an impaired fetus illustrate best how difficult, if not impossible, it is to determine in retrospect whether the parents would have avoided the birth of their child. Some might argue that because we cannot know what the parents would have done in the absence of the defendant's negligence, the plaintiffs simply cannot establish causation, and thus, courts should never allow recovery for wrongful birth.

But feminist method allows us to probe this question more deeply and ask whether the problem is the claim itself, or the underlying, male-based assumptions which dictate how we establish the claim. I argue that the problem lies in the male-based assumptions that underlie the rules of causation. Courts did not construct those rules with women and their decisions regarding pregnancy in mind. Once we remove the male norms from the causation rules, we can examine more clearly whether the law should deter the type of negligence alleged in a wrongful birth case through assessment of damages.

187. In addition, my proposal would provide a humane alternative to the current requirement that parents declare their born child "unwanted." Strong public policy supports eliminating this requirement in order to affirm the dignity of women and men struggling with their own tragedy and to strengthen family harmony. See infra note 202 (arguing that public policy is not served by requiring parents to say that their child was unwanted).
A. Case and Statutory Law on the Causation Element

Most courts in wrongful birth cases have required evidence that the mother would have terminated the pregnancy, but they have not analyzed what level of proof is necessary or whether this requirement might be detrimental to the emotional well-being of the mother or her family. In some cases, courts have found proof that the parents would have chosen to terminate the pregnancy persuasive. In other cases, courts only

188. See, e.g., Robak v. United States, 658 F.2d 471, 477 (7th Cir. 1981) (finding that plaintiff mother's testimony that she would have aborted pregnancy had she contracted rubella, along with physician's testimony that she would have recommended an abortion, was sufficient to establish causation) (applying Alabama law); Lininger v. Eisenbaum, 764 P.2d 1202, 1204-05 (Colo. 1988) (holding that plaintiffs' complaint properly pled a cause of action by alleging that had defendant exercised due care, they would have avoided conception or terminated pregnancy); Haymon v. Wilkerson, 535 A.2d 880, 882 (D.C. 1987) (concluding that plaintiff must establish, as an element of her claim, that had she learned of the impairment during her pregnancy, she would have terminated the pregnancy); Goldberg v. Ruskin, 471 N.E.2d 530 (Ill. App. Ct. 1984), aff'd, 499 N.E.2d 406 (Ill. 1986) (assuming for purposes of appeal that parents' allegation that they would have sought an abortion was true); Profiti v. Bartolo, 412 N.W.2d 232, 237 (Mich. Ct. App. 1987) (concluding that a plaintiff satisfies the causation element by showing that she would have obtained an abortion in the absence of defendant's negligence); Eisbrenner v. Stanley, 308 N.W.2d 209, 210 (Mich. Ct. App. 1981) (summarizing parents' claim that had they learned of impairment during pregnancy, they would have aborted); Smith v. Cote, 513 A.2d 341, 343, 347 (N.H. 1986) (stating that the chain of causation was not too remote when plaintiffs claimed that they would have aborted the fetus had they learned of the impairment); Schroeder v. Perkel, 432 A.2d 884, 887 (N.J. 1981) (summarizing mother's testimony that had she learned of child's affliction during her pregnancy, she would have obtained an abortion); Becker v. Schwartz, 386 N.E.2d 807, 810 (N.Y. 1978) (noting parents' allegation that had they learned through amniocentesis of the abnormality, they would have terminated the pregnancy); James G. v. Caserta, 332 S.E.2d 872, 879 (W. Va. 1985) (recognizing that "the underlying theory . . . is that the physician or other health care provider failed to discover the birth defect and to advise the parents so that they could intelligently decide whether to . . . consider the termination of the pregnancy"); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 374 (Wis. 1975) (noting that plaintiffs' allegation that the child was not aborted as a result of defendant's negligence "is apparently an allegation that an abortion would, in fact, have been sought").

189. See, e.g., Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 693 (Ill. 1987) (noting that several members of mother's family were afflicted with hemophilia; mother told doctor of her desire to terminate her pregnancy if her child was at risk for hemophilia, but defendants negligently told her that testing was unnecessary); Garrison v. Medical Ctr. of Del., Inc., 561 A.2d 288, 289-90 (Del. 1989) (summarizing parents' allegation that defendants were negligent in delaying results of amniocentesis until third trimester; mother sought abortion after she learned of child's impairment, but was unable to secure one because of advanced stage of pregnancy); Jacobs v. Theimer, 519 S.W.2d 846, 847 (Tex. 1975) (finding that defendant failed to properly diagnose rubella early in
have required evidence that the plaintiffs were denied the opportunity to abort, without proof that the parents would have chosen that option.\textsuperscript{190} In most cases, however, the appellate courts show little concern for how the parents might prove the causation element once the cause of action is recognized and the case returns to the trial level.\textsuperscript{191}

Several state legislatures have been so uncomfortable with the causation requirement that they have adopted prohibitions on some wrongful birth actions.\textsuperscript{192} None of these statutes disallow actions in which the parents claim they would have avoided conception altogether.\textsuperscript{193} Thus, state legislatures do not seem concerned with the wrongful birth cause of action as a whole.\textsuperscript{194}

mother's pregnancy despite her concerns, based on mother's testimony that had defendant not reassured her, "I would have gone to any length to have found out what the chances of my child were, and after having found this out, I would have done the kindest thing that I could have known to have done for her, and that would have been to terminate the pregnancy").

In addition, the case of Phillips v. United States, 566 F. Supp. 1 (D.S.C. 1981), is one of the few reported decisions of a trial court as fact finder. In the judge's findings of fact which followed the bench trial, the court addressed in detail the mother's testimony that she would have sought an abortion, and the defense's attempts to discredit that testimony. The court viewed the parents' testimony on the subject as "determinative," despite the defense's attempts to discredit their statements by "eliciting testimony concerning their love for the afflicted child, their desire to keep the child and not place him for adoption, possible moral or religious objections to abortion, and Mrs. Phillips's decision to undergo a tubal ligation rather than risk the necessity of future abortion." \textit{Id.} at 4-5 (citations to record omitted).

190. See, e.g., Walker v. Mart, 790 P.2d 735, 738 (Ariz. 1990) (holding that parents may recover "if parents establish that a physician's negligence prevented them from exercising their right of choice to terminate the pregnancy"); Arche v. United States, 798 P.2d 477, 480 (Kan. 1990) ("We assume that plaintiff Nicole Arche was denied her right to make an informed decision whether or not to seek an abortion.").

191. A defendant could attempt to disprove plaintiffs' claim that they would have terminated the pregnancy, and past experience suggests that attempts by aggressive counsel may be harsh and even outside the bounds of common decency. See, e.g., Phillips, 566 F. Supp. at 4-5 (finding defense counsel's attempt to disprove plaintiffs' claim with testimony regarding plaintiffs' love for their child and religious convictions "neither persuasive nor germane").

192. See supra note 33.

193. See supra note 33.

194. Moreover, few legislatures seem concerned with other issues, such as the difficulty of measuring damages, which have caused some courts to deny recognition of the wrongful birth claim. See, e.g., Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 561-62 (Ga. 1990) (finding traditional rules regarding tort damages difficult to apply in wrongful birth cases); Azzolino v. Dingfelder, 337 S.E.2d 528, 535-36 (N.C. 1985), \textit{cert. denied}, 479 U.S. 835 (1986) (finding measure of damages difficult to determine in wrongful birth cases).
Instead, the statutes only prohibit actions in which plaintiffs must show they would have aborted the pregnancy had they learned of an impairment.\textsuperscript{195}

Several courts that have refused to allow the wrongful birth cause of action also have expressed concern about the difficulty of proving causation. For instance, in \textit{Azzolino v. Dingfelder},\textsuperscript{196} the North Carolina Supreme Court denied recognition of the cause of action, expressing doubt that wrongful birth plaintiffs could establish causation:

\begin{quote}
[T]he wrongful birth claim will almost always hinge upon testimony given by the parents after the birth concerning their desire prior to the birth to terminate the fetus should it be defective. The temptation will be great for parents, if not to invent such a prior desire to abort, to at least deny the possibility that they might have changed their minds and allowed the child to be born even if they had known of the defects it would suffer.\textsuperscript{197}
\end{quote}

Similarly, in \textit{Wilson v. Kuenzi},\textsuperscript{198} the Missouri Supreme Court rejected the cause of action for wrongful birth and expounded on the difficulty of proving causation with any degree of certainty:

In the wrongful birth action, the right to recovery is based solely on the woman testifying, long after the fact and when it is in her financial interest to do so, that she would have chosen to abort if the physician had but told her of the amniocentesis test. The percentage of women who under pressure refuse to consider abortion, whether for reasons of

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\textsuperscript{195.} For example, Idaho's statute states in part that "[a] cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted." \textit{IDAHO CODE} § 5-334(1) (1992). Legislatures in Minnesota, Missouri, Pennsylvania, and Utah have adopted statutes that contain similar language. \textit{See supra} note 33.

The Idaho legislature adopted its wrongful birth statute following a decision by the Idaho Supreme Court to recognize the cause of action. Like most decisions recognizing wrongful birth claims, the decision showed little concern for the ramifications of the causation element. \textit{See Blake v. Cruz}, 698 P.2d 315, 319-20 (Idaho 1984) (arguing that "the element of [causation] does not present an obstacle to the wrongful birth analysis, assuming that the parents allege and show that, but for the physician's negligence, they would have terminated the pregnancy . . ., and therefore no child would have been born"). Only six months after the Idaho Supreme Court announced the \textit{Blake} decision, the Idaho legislature adopted \textit{IDAHO CODE} § 5-334.

\textsuperscript{197.} Id. at 535.
\textsuperscript{198.} 751 S.W.2d 741 (Mo. 1988), \textit{cert. denied} 488 U.S. 893 (1988). Although Missouri has barred some wrongful birth claims by statute, \textit{see supra} note 33, the claim in \textit{Wilson} accrued before passage of that statute. After determining that the legislature did not intend the statute to operate retroactively, \textit{Wilson}, 751 S.W.2d at 742, the court concluded that even under Missouri common law, the parents had no viable cause of action, \textit{id.} at 745-46.
\end{flushright}
religious belief, strong motherly instincts, or for other reasons, is sometimes astounding. It would seem that testimony either more verifiable based upon experience or more verifiable by some objective standard should be required as the basis for any action for substantial damages.\textsuperscript{199}

The Georgia Supreme Court also has refused to recognize the cause of action,\textsuperscript{200} citing concern with the element of causation.\textsuperscript{201}

The Azzolino and Wilson courts seem concerned primarily with the woman who might "falsely" claim under oath that she would have chosen an abortion. In contrast, courts ignore the difficulty the woman may have in determining for herself what she would have done had she known of the impairment. Notably, the cases do reveal the problems with imposing such an odd requirement on a plaintiff in a medical malpractice action.\textsuperscript{202}

B. A Feminist Critique of Courts' Requirement That Plaintiff Prove She Would Have Chosen Abortion

Although courts should not deny recognition of the wrongful birth cause of action because of the causation difficulties,\textsuperscript{203} it is

\textsuperscript{199} Id.
\textsuperscript{200} Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 560 (Ga. 1990).
\textsuperscript{201} Id. at 561. The court actually seemed more concerned with the fact that the defendant did not cause the child's impairment. This argument mischaracterizes the wrongful birth claim; plaintiffs do not claim the defendant caused the impairment, but instead they claim the defendant caused the parents to carry the pregnancy to term. \textit{See supra} note 184.
\textsuperscript{202} One of the dissenters in Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987), may have stated another, more realistic concern with this requirement: One cannot pass over how painful to parents and child alike an action by parents [for wrongful birth] must be. Parents will show that they did not want the child in his condition and that he would have been aborted had it not been for the professional inattentiveness of a physician or other medical person. Had they known, he never would have been. It is public policy obviously to encourage love and harmony in family relationships. Public policy which in importance transcends individual disputes will hardly be served by lawsuits of this character. \textit{Id.} at 709 (Ward, J., concurring in part and dissenting in part).
\textsuperscript{203} I suspect that in some of the states that have restricted wrongful birth claims by statute, the main concern of legislatures has not been with the burden imposed upon the woman plaintiff in deciding after the fact how she would have resolved this difficult moral problem. Instead, these legislatures seem far more concerned with expressing their disapproval of abortion in any way they can. Several of the states which restrict wrongful birth claims by statute also have enacted restrictive abortion legislation since the Supreme Court decided Roe v. Wade, 410 U.S. 113 (1973). \textit{See}, e.g., \textit{Minn. Stat.} \textsection 144.343 (1989) (re-
important to address these concerns in order to strive for a more acceptable framework for the cause of action. The problem does not lie in the premise of the cause of action itself—that a physician’s negligence has at least in part contributed to a severe financial and emotional burden on a family—or in some threat that plaintiffs will make false claims under oath in order to collect damages. Instead, the problem lies in the strict rules of causation themselves; they are incapable of accounting for the complexities of the abortion decision.

The rules assume a male method of moral decision making and so naturally have failed to account for female decision-making methods in what is a uniquely female experience. Two distortions are present in the case law: courts assume that mothers reach the decision to abort an impaired fetus by examining abstract moral principles, and courts assume that the decision to abort is easy because this type of abortion is more “acceptable.”

1. The Current Application of Causation Rules in Wrongful Birth Cases Distorts Women’s Experiences

a. Courts Wrongly Assume that the Decision to Abort is Based on Abstract Principles, and Therefore Is Easy to Determine After the Fact.

In using the traditional test for causation, courts deciding wrongful birth cases have failed to acknowledge the complexities of uniquely female experiences: pregnancy, prenatal testing, and abortion. Typically, courts reason that if the physician or other medical professional had not been negligent, the parents would have chosen to undergo the testing in question, learned of the fetal defect, aborted the fetus, and thus avoided the damages they now seek. Such a formulation, however, reduces the abortion decision to a “yes-or-no,” detached, and objective decision that must flow directly from the knowledge gained from the fetal testing. The formulation also ignores the fact that a decision to undergo fetal testing itself may be a harrowing one that


204. See supra note 31 and accompanying text.
hinges in large part on moral concerns. Thus, the rule assumes that a decision in retrospect is possible: if the woman is morally "opposed" to abortion, she would not have undergone the test or terminated the pregnancy, but if she is not morally "opposed" to abortion, she would have undergone the test and terminated the pregnancy. This assumption denigrates the abortion decision by simplifying it and minimizing the host of considerations which may affect it.\textsuperscript{205} It also assumes a male method of decision making in which abstract principles control.\textsuperscript{206}

i. Gilligan's Study of Moral Decision Making.

A study conducted by Carol Gilligan in preparing her influential book, \textit{In A Different Voice},\textsuperscript{207} illustrates the complexities of the abortion decision. Gilligan interviewed twenty-nine women who were considering whether to abort and used the results of her study to demonstrate the gendered nature of moral decision making.\textsuperscript{208} She concluded that women make moral decisions\textsuperscript{209} in a manner remarkably different from the methods

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\item \textsuperscript{205} The degree of emotional detachment courts assume seems more akin to that exercised when deciding whether to mitigate one's damages in the face of a breach of contract. Compare the statement "Because A has refused to sell me the widgets at $1 each as promised, shall I buy the widgets from B at $2 each and try to collect the difference?" with "Because my unborn child is carrying a defect, shall I abort and try again?" This example illustrates the inadequacy of the traditional causation analysis; it requires behavior of expectant parents that is more like that of businesspersons.
\item \textsuperscript{206} "[A]bortion ethics could be argued to be masculinist where the answer to a question about abortion is seen to hinge on the abstract proposition of whether a clump of cells is indeed human." Lynn T. Shepler, M.D., \textit{Values, Gender, and the Abortion Question: A Feminist Perspective}, in \textit{Psychiatric Aspects of Abortion} 75, 79 (Nada L. Stotland, M.D. ed., 1991).
\item \textsuperscript{207} Carol Gilligan, \textit{In a Different Voice} (1982).
\item \textsuperscript{208} \textit{Id.} at 73-105. Gilligan's research may not fully reflect the way in which women make moral decisions. The group of women Gilligan interviewed all had visited an abortion clinic and were at least considering having an abortion. Because her study only included women who were considering an abortion, it necessarily excluded any women who concluded after abstract analysis that abortion is "morally wrong." Presumably, these women never would have visited an abortion clinic, nor would they have considered an abortion. Thus, they would not have become a part of Gilligan's study, and their method of decision making therefore is not reflected in her results. Accordingly, although Gilligan's study reveals a method of moral decision making that is not apparent from studies of male decision making, it does not establish that \textit{all} women or even that the majority of women make moral decisions in the contextual manner which Gilligan illustrates.
\item \textsuperscript{209} Gilligan's interviews focused on how the women reached the decision whether to abort, especially on how they considered the moral dimensions of that decision.
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used by men. While men think about moral questions by examining abstract ideals, women are more concerned with contextual and relational issues raised by moral problems. Thus, in the abortion context, a man might think about whether a fetus is a "person," while a woman would consider the feelings and interests of all those who might be affected by her decision, including her partner, her unborn child, other children or family members, and herself.

Accordingly, the question in a wrongful birth case becomes much more complicated than simply whether the woman is "morally opposed" to abortion. The woman's decision invariably would have been bound up in the competing and complementary interests of those around her. And in the wrongful birth context, of course, the woman's decision is made in hindsight, because her physician's negligence denied her the opportunity to

210. Many have misunderstood Gilligan; she does not claim that all women think differently than all men, but rather that there are two distinctly different ways of thinking about moral questions. Gilligan discovered that the relational and contextual method of deciding moral issues was more prevalent in the women in her study. Gilligan, supra note 207, at 24-63. Gilligan concluded that while psychologists and sociologists had asserted that women and girls generally were not as morally developed as men and boys, the standards they used for supporting that assertion were developed in psychological studies of men and boys only. Id. at 5-23. Since those studies did not include women and girls, the standards developed were gender-biased, and failed to take account of the different, but valid, methods of thinking about moral questions more prevalent among women and girls. Id.

211. Id. at 73-105.

212. If courts used this method of moral reasoning, they could resolve the causation problem in a wrongful birth case simply by determining the abstract ideal held by the plaintiff. If the plaintiff were "morally opposed" to abortion, then she would not have chosen abortion and cannot prove causation. If the plaintiff were not "morally opposed" to abortion, however, then she would have chosen abortion and therefore can establish causation.

213. Gilligan, supra note 207, at 73.

214. Gilligan posits that women resolve moral dilemmas not by choosing one moral principle over another, but rather by finding a balance among all of the conflicting responsibilities they face—to themselves, to the unborn child, to a partner, to other children, and to family members. Women find a "morality of mutual care" which allows them simultaneously to balance all responsibilities and minimize hurt to others and to themselves. Id. at 73-105. Thus, a woman considering whether to abort a fetus carrying birth defects might resolve that an abortion is the most moral thing to do. Among the "hurts" she would try to minimize would be the financial and emotional strain the child would impose upon her, her partner, and other family members, and the emotional and physical pain the child might suffer because of the defect. The woman might regard her desire to have the child, despite the pain that child would suffer, as a selfish one that she should balance against the hurts to be avoided. See infra notes 215-231 and accompanying text (illustrating the moral decision making process of women considering whether to abort because of fetal abnormalities).
consider all of these factors and reach a decision she felt would be best for all. It is no wonder that this seems an impossible task. Yet this is what a wrongful birth plaintiff must prove in order to establish her right to damages under the traditional rule of causation. The decision is just not as simple as traditional causation presumes.

ii. Gilligan’s Conclusions Illustrated: Rothman’s Study of Women and Prenatal Testing.

After interviewing genetic counselors and their patients, Barbara Katz Rothman discovered that when deciding whether to undergo prenatal testing or to abort an abnormal fetus, a woman considers many intangible factors. The decision to undergo prenatal testing is itself a difficult one for many women. Some women, even those who have had previous abortions, choose to forego testing:

This was a child that when we started the child, we wanted the child. The second child had colic, was difficult. They would have been too close together. We decided to have an abortion. It wasn't terrible, but it wasn't a pleasant experience. We hadn't planned that to be a child, but this one was planned to be a child. It seemed wrong to reject it because it was damaged.

In addition, the process of prenatal testing itself can add further complexity to any abortion decision the woman might have to make:

I was not sure that I would be able to go through with an abortion and I am still not sure what I would have done if [an abnormality had been found]. During the procedure I saw my baby very clearly on the sonogram and I saw her move her arms and fingers. Then before the results came in, I felt the movements. Those two factors made me very attached to her, much more than before the amniocentesis. Also knowing her sex made her so much more like a real person.

Another woman made the following observation about prenatal testing and its effect on her perception of the pregnancy:

It was easy to say at the beginning of the pregnancy that I would have an abortion. However, as part of the [amniocentesis] procedure an ul-

215. For her book The Tentative Pregnancy, Barbara Katz Rothman interviewed genetic counselors and the women who were their patients. Rothman, supra note 141, at 15. All of these women saw the counselors during pregnancy. Id. at 17. Rothman spoke both with women who had decided to undergo amniocentesis and with those who had decided to continue their pregnancies without recommended testing. Id. She also spoke with women who had learned through amniocentesis that their fetuses carried some genetic defect. Id. at 18. The quotations from her book which follow are excerpts from those interviews.

216. Id. at 69.

217. Id. at 58.
trasound is done. We could see the baby and she became real to us. After that it was extremely difficult to think of abortion... The procedure is performed so late and the pregnancy is advanced enough that abortion is not a simple matter. It seems more like murder.

Other women, who before testing believed they would not have terminated their pregnancies, felt differently once they learned the results of the tests. One of the women Rothman interviewed made the following statement after her amniocentesis but before she received the results:

So what made us [have an amniocentesis]? ... It was those nice competent people sitting there saying, "we can see if there's a Downs baby in there, and if there is, we'll help get rid of it." That was a tempting plum—ugly, distorted, perverse, but still, to be assured that our lives won't be disrupted by that, was too tempting not to pluck. It feels like an ignoble choice, a choice offered by the devil himself. Pardon my lapse into the biblical, but the whole thing made me sick, the deliberate vote of no, baby, if you are a Mongol, death to you, no right to exist. I see these children occasionally—what’s so terrible? That’s while they’re children, and no, I’ve not forgotten about growing old with a handicapped adult child to care for. It’s truly your right but it’s got a moral stink to it that sickens me.

This same woman learned three weeks later that her child carried Down’s Syndrome, and she terminated the pregnancy.

Another woman Rothman interviewed learned through amniocentesis that her unborn daughter carried Trisomy X. After researching the limited information on Trisomy X, the woman decided to terminate the pregnancy:

I never would have thought that I'd have done that. If someone told me I'd have aborted a child that didn't have a severe thing, I'd have said no, never... I guess I'll deal with it the rest of my life. Not guilty, but it will be an issue. I don't know whether it was right or wrong, just what I had to do.

At the time of their tests, most of Rothman’s subjects were uncertain what they would do if amniocentesis revealed an abnormality:

I would want to know if there were any defects. I don't know whether I would choose to abort—the concrete facts of the situation would come

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218. Id. at 58-59 (omission in original).
219. Id. at 62.
220. Id.
221. Trisomy X is a condition in which a female carries three X chromosomes instead of the normal two X chromosomes. OXFORD'S, supra note 16, at 1393 (defining “Trisomy”); ROTMAN, supra note 141, at 166. Researchers have shown no definitive link between this chromosomal condition and any physical or mental disorder. Some evidence suggests, however, that those with Trisomy X will be sterile, while other evidence shows a possible link between Trisomy X and mental retardation or schizophrenia. Id. at 166-67.
222. ROTMAN, supra note 141, at 168 (omission in original).
into play and so would my feelings... it depends on when I’d have learned of it [the defect] and what kind of information I obtained. The potential suffering of the child would have to be figured into a decision too.\textsuperscript{223}

Most women had to revisit the issue of whether to abort after a bad diagnosis. In some cases, this was because the women were pressured into the amniocentesis in the first place.\textsuperscript{224} Other women purposefully postponed consideration of the moral question until they received the test results.\textsuperscript{225} Some expected that they would abort if they received a bad diagnosis, but they felt less certain of their initial decision once the diagnosis arrived.\textsuperscript{226} Still others learned the fetus carried an unexpected condition.\textsuperscript{227}

An overwhelming percentage of the women to whom Rothman spoke who eventually learned that their children carried abnormalities chose to abort their pregnancies.\textsuperscript{228} Even those women who terminated their pregnancies remained uncertain whether the choice was more or less difficult than carrying the child to term and they recognized that they could never resolve this question for certain. A woman whose unborn child carried Trisomy 18\textsuperscript{229} and spina bifida\textsuperscript{230} made the following statement after her abortion:

\begin{quote}
	In retrospect, I have wondered if it might have been easier on me just to carry the pregnancy to term and lose the child that way. I think emotionally it might have been—well, that's guessing. Maybe it would just have dragged it out for a longer time and made it just as hard if not harder, for a longer period. Yeah, this was a real person to me, and
\end{quote}

\textsuperscript{223} Id. at 82 (omission in original).
\textsuperscript{224} “[Women] sometimes give in [to pressure to have an amniocentesis] because the chances of a bad diagnosis are so remote that it is easier to go along with it than to argue with husband or doctor.” Id. at 181.
\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} For instance, many women believe they know what they would do if they learned their child carried a fatal condition such as Tay Sachs syndrome, but when they learn their child carries some unexpected condition like Trisomy X, they must decide anew whether to continue the pregnancy. \textit{Rothman, supra} note 141, at 181-82.
\textsuperscript{228} Id. at 181.
\textsuperscript{229} Trisomy 18 is “a condition characterized by mental retardation, scaphocephaly or other skull abnormality, micrognathia, blepharoptosis, low-set ears, corneal opacities, deafness, webbed neck, short digits, ventricular septal defects, Meckel’s diverticulum, and other deformities. It is due to the presence of an extra chromosome 18.” \textit{Dorland’s, supra} note 63, at 1645-46.
\textsuperscript{230} Spina bifida is “a developmental anomaly characterized by defective closure of the bony encasement of the spinal cord, through which the cord and meninges may . . . or may not . . . protrude.” Id. at 1560.
all the rationalizing in the world is not going to change my feeling. But my husband doesn't consider that the baby was a person.\textsuperscript{231}

b. \textit{Courts Wrongly Assume that the Decision to Terminate a Pregnancy Because of Fetal Impairment Is Less Difficult than the Decision to Terminate for Other Reasons.}

In deciding wrongful birth cases, courts generally assume that the decision to abort because of a fetal abnormality is somehow "easier" than the decision to abort for another reason,\textsuperscript{232} noting that abortions performed because of a fetal abnormality are more socially acceptable.\textsuperscript{233} This assumption is inaccurate, however, and does not reflect women's actual experiences. By the time a diagnosis of a fetal abnormality is made, the woman often is well along in her pregnancy; she may have in fact already felt the fetus move. According to one woman, "by the time the results came in the baby had been leaping in my womb for a month. . . . During one of the sleepless nights before the results were in I decided I would raise the child if it looked like E.T."\textsuperscript{234} If the woman otherwise desires the pregnancy, moreover, she is more likely to think of the fetus as her "baby" than would a woman who becomes pregnant by accident:

If a woman sees a pregnancy as an accident—if, for example, her pregnancy is a by-product of contraception that did not work—then in her definition the fetus is not a person and not meant to be one. The abortion is the solution to the problem of failed contraception.

But if the fetus is to be her child, if she has chosen to have this baby—chosen by consciously and purposively becoming pregnant, or by willingly and openly accepting an unintended pregnancy—then she considers that fetus to be a person. It is her baby.

. . . [Prenatal diagnosis] sets up a contradiction in definitions. It asks women to accept their pregnancies and their babies, to take care of the babies within them, and yet be willing to abort them. We ask them to think about the needs of the coming baby, to fantasize about

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  \item \textsuperscript{231} Rothman, \textit{supra} note 141, at 183.
  \item \textsuperscript{232} Among all the wrongful birth cases, only one court has acknowledged that the decision to abort under these circumstances might be difficult. See Harbeson v. Parke-Davis, Inc., 646 P.2d 483, 491 (Wash. 1983) (en banc) ("Parents may avoid the birth of [a] defective child by aborting the fetus. The difficult moral choice is theirs.").
  \item \textsuperscript{233} More than 80\% of Americans approve of abortion in the case of a fetal abnormality. Rothman, \textit{supra} note 141, at 5 (citing 1984 New York Times-CBS poll).
  \item \textsuperscript{234} Id. at 7 (omission in original) (citing Meredith B. Burke and Aliza Kolker, Amniocentesis and the Social Construction of Pregnancy (1982) (Paper presented to the annual meeting of the District of Columbia Sociological Society, Baltimore, Maryland)).
\end{itemize}
the baby, to begin to become the mother of the baby, and yet to be willing to abort the genetically damaged fetus. At the same time. For twenty to twenty-four weeks,235 Nonetheless, the language courts use to discuss the causation requirement seems to assume that the decision to abort an abnormal fetus always is a simple one,236 at least for women who are not "morally opposed" to abortion. The reality of women's experiences, however, is that the decision is complex and difficult. Women who have been through the experience express surprise at feelings they never would have imagined or predicted. Accordingly, judges and juries cannot expect women to know how they would have felt were they presented with the choice.

2. Patriarchal Interests Served by the Current Characterization of Causation Requirements in Wrongful Birth Cases

State legislatures that prohibit wrongful birth claims in which the plaintiffs allege they would have aborted reinforce patriarchy in two ways: by denying women recovery for harm that has resulted at least in part from another's negligence and by signalling to women and men that the decision to abort in the case of a fetal abnormality is not acceptable.237 Courts that re-

235. Id. at 5-6.

236. The assumption that the abortion choice will be easier in the case of a fetal abnormality also has the potential for robbing women of the choice not to abort upon finding a fetal abnormality. When courts assume that a woman confronted with the decision will always choose to abort, they take choice away. Abortion becomes the expected choice, and the only acceptable choice.

Rothman argues that the availability of contraception and the right to control the size of one's family already has led to similar pressures. Once women gained the right to control the size of their families through use of contraception, society soon began to expect them to use birth control for this purpose. Rothman, supra note 141, at 11-13. Thus, this expectation foreclosed the option of choosing a large family. Society looks down on women who choose to have large families—to not control their fertility. Id. North American society is now structured around small families, as evidenced by car sizes and apartment sizes, for example. Id. at 13. Rothman expresses the fear that with the availability of prenatal diagnosis and abortion, society will expect women to undergo prenatal testing as a routine matter and abort any abnormal fetuses. Id. at 13-15. Others will look down on women who give birth to children with Down's Syndrome, for instance, and society will become even more structured around the assumption that all of its members are physically healthy and mentally capable. Id.

237. Statutes that prohibit a cause of action based on a claim that, in the absence of defendant's negligence, a pregnancy would have been terminated, send a message to at least two groups: those who have learned that their unborn child is impaired, and are considering termination, and those who are the
fuse to recognize the cause of action because of a problem with causation send the same message. Courts that recognize the claim, yet establish a burdensome causation requirement, may do the most damage: plaintiffs in these cases are left to the mercy of aggressive defense counsel, and must prove to a judge or jury that, despite any mixed feelings they may have now or might have had at the time, they would have aborted their (now born) child.

Not only do these courts impose a heavy emotional price upon women and men who seek relief from the defendant's negligence, but they also avoid having to address any difficult moral dilemma themselves. Women's actual experiences illustrate that the decision to abort an impaired fetus is one of the most difficult any human being ever will have to make. Moreover, few women know with certainty what choice they would make until actually confronted with the decision. It is therefore nearly impossible to make the decision in hindsight. Instead of confronting this reality and acknowledging the burden the causation rule places upon women—the burden of deciding what one would do after giving birth to the child and caring for it—the courts take the easy way out and conclude that "[t]he difficult moral choice" belongs to the parents. Thus, courts and the rest of us do not have to struggle with these difficult moral dilemmas. Once again, the decision becomes a private one.

3. **Legal Reforms and Other Suggestions for More Ideal Circumstances for Women**

In order to deter the type of medical malpractice at issue in wrongful birth cases and protect future parents from the emotional and financial burden to which this type of negligence leads, courts should reformulate the causation requirement. As it now stands, future parents in seven states have little protec-

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victims of medical negligence and have learned only after their child's birth that an abortion could have been chosen. The message sent to both groups is that abortion (or a desire that one could have been obtained in the past) is not a proper or acceptable response.


- 240. Feminist legal theorists argue that the law tends to privatize women's concerns, and so place them beyond the reach of the law. See Gavison, *supra* note 172.
tion against this type of malpractice; their tort systems provide no deterrence against this kind of negligence. Even those future parents who have some protection against negligence may face an emotional nightmare if they are the victims of negligence and seek compensation as a result.

Fortunately, traditional causation rules are not written in stone. In many contexts, courts have modified the traditional causation rules in order to further some important policy interest. In cases involving "concurrent causes," for instance, most courts have abandoned the traditional causation requirement in favor of a "substantial factor" test. In the absence of this formulation, negligent actors would not be held liable, even when the lack of due care is apparent. In addition, courts have shifted the burden of proof in cases in which it has been particularly difficult for plaintiffs to prove causation. When plaintiffs have been unable to establish the identity of the defendant, courts also have adopted a "market share" theory of causation in order to ensure that as against an industry which manufactured a defective drug, an innocent plaintiff will not go uncompen-

241. Georgia, Idaho, Minnesota, Missouri, North Carolina, Pennsylvania, and Utah prohibit some or all wrongful birth actions. See supra notes 2 & 33.

242. See generally KEETON ET AL., supra note 6, § 41, at 266-68 (discussing different concepts of causation).

243. In cases involving concurrent causes, two independent acts of negligence converge to cause one harm. Id. § 41, at 266-67. Either cause standing alone would have been sufficient to cause the harm. Id. The traditional test of causation fails under these circumstances because but for the negligence of one actor, the plaintiff still would have suffered damages; the other actor's negligence alone would have caused the harm. Id. Thus, the traditional test absolves both negligent actors of liability.

244. Id. § 41, at 267-68. The substantial factor test holds a negligent actor liable where that actor's negligence, standing alone, would have been sufficient to cause the plaintiff's damages, even if another actor's negligence also would have been sufficient alone to cause the harm. Id.

245. Id. § 41, at 270-72. The prototypical case is Summers v. Tice, 199 P.2d 1 (Cal. 1948). In Summers, two defendants negligently shot in the direction of the plaintiff, and one of the shots hit and injured the plaintiff. Id. at 1-2. The plaintiff, unable to establish which of the two defendants fired the shot that hit him, failed to meet his burden of proof for establishing causation under the traditional test. The California Supreme Court held that under these circumstances, in which the plaintiff clearly established the negligence of both actors, the burden of proof should shift to the defendants, who each must establish that the shot they fired did not hit the plaintiff. Id. at 4. Most courts now generally accept this rule. KEETON ET AL., supra note 6, § 41, at 271.

246. The first case to apply the market share theory was a product liability suit brought by a woman injured as a result of her mother's ingestion of the drug DES during pregnancy. See Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980), cert. denied, 449 U.S. 912 (1980). The plaintiff, unable to determine the manufacturer of the drug her mother ingested, sued several manufacturers.
A strong policy consideration underlies all of these decisions: when the choice is between imposing the loss on an innocent plaintiff or on culpable defendants, the defendants should carry the loss.248

A closer examination of the problems presented by the traditional causation rule in wrongful birth cases reveals strong policy reasons for altering that rule as well. The decision whether to undergo prenatal testing is usually difficult, and the decision whether to abort an impaired fetus is almost always painful. Women who have been through the experience report that they could not have known their decision until they were confronted with the choice.249 Thus, in almost all wrongful birth cases, courts simply cannot know what a woman would have done had she been faced with the decision. This uncertainty is not because of any failure on the woman's part. Instead, it is the kind of "fact" that simply is unknowable given human nature and women's methods of decision making. If a plaintiff can establish clearly that the defendant fell below the applicable standard of care, she should recover. Like other cases in which courts have altered the causation rules, the choice here is between a clearly culpable defendant, who at least contributed in some way to the plaintiff's damages, and a clearly innocent plaintiff.250

Courts could effectively change the causation rules in one of several ways. For instance, courts could impose liability if the plaintiff shows that the defendant's negligence was "a contributing cause" of the plaintiff's damages. Under such a formulation, courts would not require a plaintiff to prove that she would have terminated her pregnancy. Instead, courts would only require a plaintiff to show that the defendant's negligence was one significant occurrence which did lead to the birth of the child in question. In the alternative, courts could impose liability through use of a presumption that in the absence of the defendant's negligence, the plaintiff would have undergone the testing and ter-

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247. Keeton et al., supra note 6, § 41, at 271-72.
248. Id. § 41, at 271.
249. See supra notes 215-231 and accompanying text.
250. See supra note 248.
minated the pregnancy. This alternative is less attractive, though, due to tactics which aggressive defense counsel might pursue in order to rebut the presumption.

Alternatively, state legislatures might establish a scheme in which wrongful birth plaintiffs who wish to avoid the emotional demands placed upon them by the traditional causation rule could opt for a lesser burden of proof (e.g., that the defendant's negligence contributed to the birth of the child). The statute might cap damages for emotional harm and extraordinary caretaking expenses at some reasonable amount, as a trade-off for application of the more favorable causation rule.

Any of these proposals would improve women's lives by recognizing the realities of women's experiences, especially the complexities involved in decisions regarding pregnancy and abortion. In addition, the reforms would make it more likely that women and men in wrongful birth cases could recover compensation necessary to care for their impaired children.

Recovery of damages would not be as necessary, though, if more resources were available to families to care for physically or mentally impaired children. Women and men would not need to bring suit, putting themselves and their families through enormous financial and emotional strain, if other financial resources necessary to care for their children were available. Until our society provides the kind of financial support these families need, however, wrongful birth suits will be necessary.

Furthermore, proper medical care could avoid many of the tragedies revealed by wrongful birth cases. Some of the birth defects at issue in these cases did not result from genetic abnormalities. Instead, they occurred early in pregnancy because the women in question did not receive proper medical care before and during their pregnancies. Appropriate medical care could effectively avoid these defects in the future. For example, vaccination of women before they become pregnant could easily prevent the birth of children with rubella syndrome.

251. On the basis of Rothman's study, this presumption seems well-grounded in fact, because nearly all of the women with whom she spoke terminated their pregnancies once they learned of a fetal abnormality. See supra note 228 and accompanying text. The presumption that a woman would have chosen to undergo the prenatal testing, however, is less supportable. Rothman talked with many women who decided to forego prenatal testing. See supra note 216 and accompanying text.


253. See Craig C. White et al., Benefits, Rises and Costs of Immunization for Measles, Mumps and Rubella, 75 AM. I. PUB. HEALTH 739, 739-40 (1985) (stat-
women would receive adequate health care before and during their pregnancies (and throughout their lives), reducing the number of women faced with pregnancies they feel they must terminate or wish they would have terminated.

CONCLUSION

By using male norms, courts and legislatures have distorted women's experiences of pregnancy, motherhood, and abortion, especially as those experiences affect women whose unborn or born children are physically or mentally impaired. By replacing the male norm with a female norm, the law of wrongful birth will more accurately reflect the reality of these cases. As a result, courts will struggle less with attempts to fit the existing rules to the facts of wrongful birth cases, and states will reach greater consensus on these issues.

Undoubtedly, male norms presented as objective standards lurk beneath other seemingly innocuous issues of law. This Article has examined some male norms, but may have ignored others within the law of wrongful birth and tort. Hopefully, through this Article, the reader will gain greater awareness of potential male norms within the law and will work to eliminate them.

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...ing that vaccination programs have prevented approximately 1.5 million rubella cases).