Malpractice Claims Resulting from Negligent Preconception Genetic Testing: Do These Claims Present a Strain of Wrongful Birth or Wrongful Conception, and Does the Categorization Even Matter?

Imagine that parents of a child, who bears a genetic abnormality, attempt to discern the risks in conceiving another child. Because they are concerned about the possibility of conceiving a second child with a similar defect, the parents consult a doctor for genetic testing. The doctor carelessly neglects to facilitate critical genetic tests, yet ensures the parents that the risks of an abnormality in a second child are low. Based on these optimistic test results, the parents choose to have another child. Despite the doctor's assurances, the second child is born with the same genetic defect as the first child. The parents elect to sue the doctor for the erroneous medical consultation. Which prenatal cause of action should these parents bring for a claim based on negligent preconception genetic testing?

"Confusion . . . arises as to the proper denomination of these prenatal torts. Because this area of the law is new and fraught with emotion, both courts and commentators have often blurred . . . distinctions among the actions. Believing those distinctions are vitally important to both theory and outcome, we commence . . . ."[1]

I. INTRODUCTION

Medical advancements currently allow parents to undergo preconception or neonatal genetic testing to determine the likelihood of a childhood defect.[2] The advent of genetic testing has compelled courts to develop novel causes of action based on traditional negligence principles to address these medical malpractice claims.[3] Typically, courts recognizing such parental malpractice

1. Walker *ex rel.* Pizano v. Mart, 790 P.2d 735, 737 (Ariz. 1990).

2. *See* Kassama v. Magat, 792 A.2d 1102, 1115 (Md. 2002) (highlighting heightened genetic testing possibilities due to scientific and medical advancements); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 491 (Wash. 1983) (explaining genetic testing advancements and corresponding legal ramifications for medical personnel); James G. v. Caserta, 332 S.E.2d 872, 879 (W. Va. 1985) (discussing legal acknowledgment of medical standard of care as genetic testing develops); Mary B. Sullivan, *Wrongful Birth and Wrongful Conception: A Parent's Need For a Cause of Action*, 15 J.L. & HEALTH 105, 108 (2001) (detailing genetic testing development and corresponding medical malpractice claims).

3. *See* Keel v. Banach, 624 So. 2d 1022, 1028 (Ala. 1993) (noting traditional medical malpractice as root of wrongful birth); Lininger *ex rel.* Lininger v. Eisenbaum, 764 P.2d 1202, 1208 (Colo. 1988) (applying

actions address them as either wrongful birth claims or wrongful conception or pregnancy causes of action.[4]

A thorough lack of consistency in how jurisdictions consider these claims, however, permeates prenatal tort law and cultivates confusion.[5] Some courts compartmentalize facts into specific prenatal causes of action yet diverge in their differentiations and in how they provide compensation to parental victims.[6] Other jurisdictions recognize these parental claims exclusively under traditional negligence principles instead of a new set of prenatal legal rights.[7]

negligence principles to new medical procedures); Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 566 (Ga. 1990) (Benham, J., dissenting) (noting judicial ability to "accommodate" new medicinal developments in context of tort law). Justice Benham notes, "One of the beauties of American jurisprudence is its ability to accommodate new ideas . . . . [W]e cannot allow the law to be determined in the laboratory; but we would be derelict in our duty if we failed to take into consideration developments in the laboratory." *Abelson*, 398 S.E.2d at 566; Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 705 (Ill. 1987) (observing prenatal tort claims act as "extension" of ordinary tort principles). *But see* Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 15 (Minn. 1986) (Simonett, J., concurring) (stressing wrongful birth presents new tort rather than extension of existing negligence law); Azzolino v. Dingfelder, 337 S.E.2d 528, 533-34 (N.C. 1985) (emphasizing wrongful birth claims present "untraditional" tort analysis). The *Azzolino* court noted that wrongful birth claims involve an "*entirely untraditional analysis* by holding that the existence of a human life can constitute an injury cognizable at law" and thus judicially prohibited such a claim from legally proceeding. *Azzolino*, 337 S.E.2d at 534 (emphasis in original).

4. *See Kassama*, 792 A.2d at 1115 (clarifying parental claim categories as wrongful birth and wrongful conception or pregnancy); Jennifer R. Granchi, *The Wrongful Birth Tort: A Policy Analysis and the Right to Sue for an Inconvenient Child*, 43 S. TEX. L. REV. 1261, 1264-66 (2002) (discussing birth-related torts, including parental claims termed wrongful pregnancy and birth); *see also* Kush v. Lloyd, 616 So. 2d 415, 417 n.2 (Fla. 1992) (distinguishing wrongful conception from wrongful pregnancy). The *Kush* court associated situations involving sterilization and contraceptive administration with wrongful conception and associated faulty abortion procedures with wrongful pregnancy. *Kush*, 616 So. 2d at 417 n.2. This note will not distinguish between wrongful pregnancy and conception because numerous courts and commentators tend to use the terms interchangeably. *See, e.g.*, *Walker*, 790 P.2d at 737 (using terms wrongful conception and pregnancy interchangeably); *Siemieniec*, 512 N.E.2d at 696 (discussing wrongful conception and wrongful pregnancy as one cause of action); Paula Bernstein, *Fitting a Square Peg in a Round Hole: Why Traditional Tort Principles Do Not Apply to Wrongful Birth Actions*, 18 J. CONTEMP. HEALTH L. & POL'Y 297, 301-02 (2001) (defining wrongful conception and wrongful pregnancy claims in context of one tort).

5. Phillips v. United States, 508 F. Supp. 544, 546 n.1 (D.S.C. 1981) (emphasizing need for uniformity in judicial utilization and characterization of prenatal labels); Mark Strasser, *Misconceptions and Wrongful Births: A Call For Principled Jurisprudence*, 31 ARIZ. ST. L.J. 161, 161 (1999) (classifying present state of judicial inconsistency in treatment of prenatal claims as "chaotic"); Kimberly Wilcoxon, Comment, *Statutory Remedies For Judicial Torts: The Need For Wrongful Birth Legislation*, 69 U. CINN. L. REV. 1023, 1028-30 (2001) (highlighting inconsistencies in manner courts treat and define prenatal claims).

6. *See Keel*, 624 So. 2d at 1029 (identifying lack of consistency in how state courts allowing wrongful birth claims award damages); *Abelson*, 398 S.E.2d at 561-62 (emphasizing lack of consensus among courts in assessing damages in wrongful birth actions); Wilcoxon, *supra* note 5, at 1028-30 (identifying way courts diverge in categorizing certain factual scenarios as prenatal torts).

7. *See* Garrison v. Med. Ctr. of Del., Inc., 581 A.2d 288, 290 (Del. 1990) (refraining from use of wrongful birth label because claim presents traditional malpractice issues); Bader v. Johnson, 732 N.E.2d 1212, 1216 (Ind. 2000) (noting labels imply new torts and obscure malpractice analysis); Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs., Inc., 802 N.E.2d 723, 729 (Ohio Ct. App. 2003) (classifying parental prenatal claims under traditional negligence principles). The *Schirmer* court noted, however, that prenatal labels are "useful monikers" even though it discussed the parental claim at bar within the bounds of traditional negligence. *Schirmer*, 802 N.E.2d at 729.

Conversely, a minority of jurisdictions prohibit either one or more of the prenatal causes of action or traditional negligence suits stemming from birth-related circumstances.[8]

Despite these varied approaches among the states, many courts nevertheless identify "typical" factual elements that correspond with either wrongful birth or wrongful conception claims, even though these distinctions can vary slightly.[9] Wrongful birth cases tend to involve a planned pregnancy, postconception negligence, negligent neonatal testing or care, the birth of an unhealthy child and a parental action for the lost opportunity to terminate a pregnancy.[10] Wrongful conception cases, in contrast, typically involve preconception malpractice, an unplanned pregnancy resulting in the birth a healthy child, negligence in sterilizations, abortion procedures, pregnancy diagnoses or contraception administration and a parental action for the lost opportunity to avoid a pregnancy.[11]

Negligent preconception genetic testing involves certain aspects associated with both of the "typical" characterizations of wrongful birth and wrongful conception.[12] Specifically, it involves preconception negligence, a genetic testing context, a planned pregnancy, the birth of an unhealthy child and a

8. *See Abelson*, 398 S.E.2d at 563 (refusing to recognize wrongful birth as cause of action). The court in *Abelson* elected not to recognize wrongful birth as a cause of action because it "does not fit within the parameters of traditional tort law" and is a matter that the legislature should decide. *Id.* The court identified numerous problems with judicial recognition of birth-related torts, including unique standing issues and the lack of consensus in how courts have addressed these claims. *Id.* at 561-63; Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 691 (Ky. 2003) (declining to recognize wrongful birth claim). In refusing to recognize wrongful birth, the *Grubbs* court stressed that "at the close of the twentieth century, this talk of the 'unfit' and of 'defectives' has a decidedly jarring ring; we are, after all, above such lethal nonsense." *Grubbs*, 120 S.W.3d at 690 (quoting Taylor v. Kurapati, 600 N.W.2d 670, 690-691 (Mich. Ct. App. 1999)); *Taylor*, 600 N.W.2d at 690-91 (abrogating prior Michigan case recognizing wrongful birth).

9. *See* Wilcoxon, *supra* note 5, at 1027-30 (identifying typical elements of wrongful birth and wrongful conception, but noting present judicial inconsistencies).

10. *See* Haymon v. Wilkerson, 535 A.2d 880, 883 (D.C. 1987) (explaining wrongful birth); Coleman v. Dogra, 812 N.E.2d 332, 336 (Ohio Ct. App. 2004) (defining wrongful birth as parental claim involving unhealthy child after negligent neonatal genetic testing); Katherine Say, Note, *Wrongful Birth-Preserving Justice for Women and Their Families*, 28 OKLA. CITY U.L. REV. 251, 264 (2003) (noting wrongful birth claims involve planned pregnancies, unhealthy children, and postconception genetic negligence). *But see* Keel v. Banach, 624 So. 2d 1022, 1024 (Ala. 1993) (defining wrongful birth to include lost parental opportunity to avoid conception or terminate pregnancy); *Bader*, 732 N.E.2d at 1216 n.3 (noting wrongful birth cases envelop both preconception and postconception negligence).

11. *See* Phillips v. United States, 508 F. Supp. 544, 546 n.1 (D.S.C. 1981) (providing delineation of wrongful conception). The *Phillips* court noted that wrongful conception cases concern parental claims, an unplanned, yet healthy child, and situations involving negligent contraceptive distribution, sterilization, or abortion. *Id.* The court observed the occurrence of cases involving an unwanted pregnancy with a child "coincidentally" born with a genetic abnormality. *Id.*; *Taylor*, 600 N.W.2d at 676 (explaining factual situations falling under wrongful conception heading); Say, *supra* note 10, at 264 (defining wrongful conception to include preconception negligence and unplanned children). *See generally* Anne Payne, *Wrongful Pregnancy, Conception, or Diagnosis*, 62A AM. JUR. 2D Prenatal Injuries; Wrongful Life, Birth, or Conception § 53 (2005) (identifying circumstances involved in wrongful conception lawsuits).

12. *See supra* notes 10-11 and accompanying text (providing definitional elements of wrongful birth and wrongful conception actions).

parental action for the lost opportunity to avoid conception.[13] Preconception negligence and a lost opportunity to avoid pregnancy are facts associated with wrongful conception.[14] The involvement of a planned pregnancy and an unhealthy child in the genetic testing context, however, implicate wrongful birth.[15] Because negligent preconception genetic testing blurs these prenatal issues, it is not surprising that courts have treated such claims in an inconsistent manner.[16]

In Part II, this note provides a historical context of the prenatal torts, with a specific emphasis on wrongful birth and wrongful conception, and explains typical judicial approaches to these causes of action.[17] Part III details three different jurisdictional approaches to negligent preconception genetic testing issues.[18] Specifically, this note examines North Carolina and Minnesota, which treat negligent preconception genetic testing as wrongful conception, Colorado and Washington, which categorize genetic testing negligence as wrongful birth, and Indiana and Nevada, which are likely to treat such actions as ordinary malpractice.[19]

Part IV analyzes the merits of these different judicial approaches and suggests negligent preconception genetic testing best fits under the wrongful birth rubric, rather than wrongful conception.[20] Within the Analysis, this note acknowledges the state-to-state prenatal tort classification discrepancies.[21] Part

13. *See* Molloy v. Meier, 679 N.W.2d 711, 713-15 (Minn. 2004) (outlining facts of case involving negligent preconception genetic testing); McAllister v. Ha, 496 S.E.2d 577, 580 (N.C. 1998) (detailing factual scenario involving negligent preconception genetic testing). In *Molloy* and *McAllister*, the parental claimants argued that medical negligence deprived them of the opportunity to make an informed decision regarding whether to have a child. *Molloy*, 679 N.W.2d at 715; *McAllister*, 496 S.E.2d at 580.

14. *See supra* note 11 and accompanying text (defining aspects of wrongful conception action).

15. *See supra* note 10 and accompanying text (defining elements typically associated with wrongful birth claim).

16. *Compare* Gallagher v. Duke University, 852 F.2d 773, 776 (4th Cir. 1988) (explaining preconception genetic counseling negligence constitutes wrongful conception), *and Molloy*, 679 N.W.2d at 722-23 (classifying preconception genetic testing claim as wrongful conception), *with* Lininger *ex rel.* v. Eisenbaum, 764 P.2d 1202, 1204 (Colo. 1988) (identifying claim based on negligence in preconception genetic testing context as wrongful birth), *and* Viccaro v. Milunsky, 551 N.E.2d 8, 9 n.3, 10 (Mass. 1990) (phrasing preconception negligence action as wrongful birth although refraining from express label use).

17. *See infra* Part II (outlining traditional judicial treatments of prenatal torts).

18. *See infra* Part III (explaining different judicial treatments of negligent preconception genetic testing issues).

19. *See infra* Part III (describing approaches of two states per judicial treatment of negligent genetic testing issues); *see also Lininger*, 764 P.2d at 1208 n.9 (aligning asserted cause of action with wrongful birth); Bader v. Johnson, 732 N.E.2d 1212, 1216 (Ind. 2000) (treating prenatal claims as traditional medical malpractice); *Molloy*, 679 N.W.2d at 722-23 (classifying parental claim of preconception negligence as wrongful conception rather than statutorily prohibited wrongful birth); McAllister v. Ha, 496 S.E.2d 577, 581-82 (N.C. 1998) (identifying parental claim as wrongful conception instead of judicially barred wrongful birth); Greco v. United States, 893 P.2d 345, 348 (Nev. 1995) (refusing use of prenatal labels); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 487-88 (Wash. 1983) (distinguishing parental action as wrongful birth rather than wrongful conception).

20. *See infra* Part IV.A (contending negligent preconception genetic testing constitutes wrongful birth).

21. *See infra* Part IV.B (recognizing confusion in labeling birth-related claims).

IV ultimately argues, however, that courts should clearly classify prenatal claims because they dictate whether parents have a viable cause of action in certain states, affect the damages awarded to parental claimants and additionally, are "so entrenched in normal usage that it is difficult to abstain from their use."[22]

II. HISTORY OF THE PRENATAL TORTS: POLICY DILEMMAS, INDISTINCT DEFINITIONS, AND WIDE-RANGING DAMAGE ALLOCATION

In *Gleitman v. Cosgrove*,[23] an early prenatal tort case, the New Jersey Supreme Court precluded parental recovery.[24] The court prohibited the claim despite the parents' argument, now typical in birth-related actions, that a physician's negligence deprived them of the opportunity to terminate a pregnancy.[25] The court resisted awarding damages to compensate for the "intangible, unmeasurable, and complex human benefits of motherhood and fatherhood."[26] In dismissing the parental complaint, the court emphasized the sanctity of life.[27] The New Jersey Supreme Court has since modified its position on prenatal torts and has adapted its laws to permit such claims.[28]

22. Lininger *ex rel.* v. Eisenbaum, 764 P.2d 1202, 1204 n.2 (Colo. 1988) (noting labels part of common discussion of prenatal tort issues despite causing confusion); *infra* Part IV.B (arguing in favor of prenatal label retention for practical purposes, but acknowledging need for consistency); *see also* Phillips v. United States, 508 F. Supp. 544, 546 n.1 (D.S.C. 1981) (emphasizing vital role of label distinctions with reference to prenatal torts). The *Phillips* court specifically identified judicial prohibition or recognition of certain prenatal claims as a primary validation for the continued use of label distinctions. *Phillips*, 508 F. Supp. at 546 n.1; Say, *supra* note 10, at 262-63 (stressing importance of distinguishing labels where some states recognize one prenatal claim and not another). *But see* Strasser, *supra* note 5, at 202 (encouraging courts to refrain from using immaterial labels and theories with birth-related torts).

23. 227 A.2d 689 (N.J. 1967), *abrogated by* Berman v. Allen, 404 A.2d 8 (N.J. 1979).

24. *See Gleitman*, 227 A.2d at 692-94 (denying parental recovery). Mrs. Gleitman, a pregnant woman, consulted two doctors to determine whether her infliction of measles would harm her in-utero child. *Id.* at 690. The doctors assured her that, despite her illness, the child would be healthy. *Id.* Her child Jeffrey, however, was born with serious defects. *Id.* A medical expert testified that these abnormalities were "causally related" to Mrs. Gleitman's measles and that the two doctors deviated from medical standards by assuring her that the child would not be affected. *Id.*

25. *Id.* at 692-94 (concluding parental claim states no legal cause of action).

26. *Id.* at 693.

27. *Id.* (articulating moral concerns necessitating denial of parental recovery). The *Gleitman* court struggled with the argument that the parents' inability to seek an abortion was a legal injury. *Gleitman*, 227 A.2d at 693. It likewise encountered difficulty in considering how to measure damages associated with parenting an unhealthy child. *Id.* Despite the court's acknowledgement that Mrs. Gleitman could have sought an abortion without criminal punishment, it denied the parental claim because the sanctity of Jeffrey's life outweighed the parent's "unfortunate situation." *Id.* In dismissing the parental claim, the court similarly rejected a wrongful life claim brought on behalf of Jeffrey. *Id.* at 692.

28. *See* Berman v. Allen, 404 A.2d 8, 13-15 (N.J. 1979) (abrogating *Gleitman* to allow wrongful birth claim but upholding *Gleitman*'s rejection of wrongful life claim), *abrogation recognized by* Hummel v. Reiss, 608 A.2d 1341, 1344-45 (N.J. 1992) (explaining wrongful life claim now actionable); *see also* Procanik *ex rel.* Procanik v. Cillo, 478 A.2d 755, 762 (N.J. 1984) (permitting wrongful life claim, thereby overruling *Gleitman* and *Berman*); P. v. Portadin, 432 A.2d 556, 559-60 (N.J. Super. 1981) (allowing parental recovery in wrongful conception case involving failed sterilization procedure).

Other states have engaged in a similar legal struggle regarding the general permissibility of these prenatal suits, their legal character, the policy difficulties in favor of and opposition to these claims, and how to fairly compensate claimants.[29]

A. Policy Dilemmas

The emergence a few decades ago of birth-related actions, from decisions such as New Jersey's *Gleitman*, has resulted in a divergent field of prenatal tort law.[30] Much of this variance is due to the inherently divisive policies that surround birth-related torts.[31] Courts, by their prohibition or allowance of these claims and their allocation or exclusion of damages, are impliedly holding certain values or policies over others.[32] These policy questions permeating prenatal tort discussion include whether genetic disabilities are compensable injuries, whether damages associated with an unhealthy or unwanted child should have a monetary value, the extent of medical duty in the face of rapidly developing scientific and genetic capability, discrimination against persons with disabilities, abortion, reproductive rights, and the sanctity of life.[33]

Even if one state's legislature or judiciary does not sanction one or more of the birth-related torts, most courts at least recognize their legal pervasiveness in

29. *See, e.g.*, Garrison v. Med. Ctr. of Del., Inc., 581 A.2d 288, 292 (Del. 1990) (modifying earlier decision relative to damages awarded in wrongful birth action); Taylor v. Kurapati, 600 N.W.2d 670, 691 (Mich. Ct. App. 1999) (abrogating prior decisions allowing wrongful birth action); Simmerer v. Dabbas, 733 N.E.2d 1169, 1174 (Ohio 2000) (distinguishing prior decision relating to damages recoverable by parental claimants).

30. *See supra* note 5 and accompanying text (detailing lack of uniformity in prenatal jurisprudence); *see also* Keel v. Banach, 624 So. 2d 1022, 1025-26 (Ala. 1993) (discussing *Gleitman* and noting most jurisdictions have rejected its reasoning for prohibiting wrongful birth).

31. *See* Becker v. Schwartz, 386 N.E.2d 807, 810 (N.Y. 1978) (stressing policies pervading birth-related claims). The *Becker* court stressed that "[i]t borders on the absurdly obvious to observe that resolution of this question transcends the mechanical application of legal principles. Any such resolution . . . must invariably be colored by notions of public policy, the validity of which remains, as always, a matter upon which reasonable men may disagree." *Id.* at 810; Granchi, *supra* note 4, at 1281-85 (discussing policy considerations involved in birth-related lawsuits); Christy Hetherington, Note, *Rhode Island Facing the Wrongful Birth/Life Debate: Pro-Disabled Sentiment Given Life*, 6 ROGER WILLIAMS U. L. REV. 565, 565 (2001) (explaining prenatal policy "undertones" and corresponding state-wide discrepancies in treatment of birth-related claims); Wilcoxon, *supra* note 5, at 1053 (emphasizing wrongful birth and conception are "anything but traditional" because policies pervade legal issues).

32. *See* Bernstein, *supra* note 4, at 316-21 (explaining policy issues permeating birth-related torts); Wilcoxon, *supra* note 5, at 1035-40 (discussing public policy issues pervading prenatal tort law).

33. *See* Bernstein, *supra* note 4, at 316-21 (discussing "eugenic abortions," medical duty, children as subjects of prenatal lawsuits feeling unwanted, and disabilities); Granchi, *supra* note 4, at 1281-85 (considering discrimination against disabled persons and abortion); Kelly E. Rhinehart, Student Article, *The Debate Over Wrongful Birth and Wrongful Life*, 26 LAW & PSYCHOL. REV. 141, 143-46 (2002) (considering policy issues pervading birth-related tort discussion). Rhinehart discusses policies surrounding the sanctity of life, a woman's reproductive choices, the judicial award of parental damages in lawsuits involving unhealthy children, equal protection for disabled persons, and the medical duty involved in these lawsuits. Rhinehart, *supra*, at 143-46.

the medical malpractice arena.[34] In their acknowledgement of these malpractice claims, many courts generally address them either under the basic theory of negligence or three specific prenatal labels.[35] One of the prenatal classifications is wrongful life, which is a cause of action brought by or on behalf of an unhealthy child.[36] In contrast, the other two classifications, wrongful birth and wrongful conception, are both parental claims.[37]

With the exception of Washington, New Jersey, and California, wrongful life claims have met widespread judicial and statutory rejection.[38] The majority of courts prohibit a child's recovery for wrongful life primarily because of the policy problems with allowing a child to claim legal injury for having been born.[39] A majority of courts, however, have identified legal merit in the two parental causes of action: wrongful birth and wrongful conception.[40] Legal recognition of the two parental claims, specifically wrongful birth, became prevalent in large part due to the legalization of abortion after *Roe v. Wade*.[41]

34. *See, e.g.*, Kush v. Lloyd, 616 So. 2d 415, 417 nn. 2-3 (Fla. 1992) (per curiam) (discussing three prenatal claims: wrongful birth, wrongful conception or pregnancy, and wrongful life); *Taylor*, 600 N.W.2d at 674 (recognizing three birth-related torts of wrongful life, wrongful conception and wrongful birth); *Becker*, 386 N.E.2d at 810-11 (distinguishing wrongful life, wrongful conception, and wrongful birth).

35. *See* Haymon v. Wilkerson, 535 A.2d 880, 883 (D.C. 1987) (recognizing three prenatal torts: wrongful birth, wrongful conception, and wrongful life); Bader v. Johnson, 732 N.E.2d 1212, 1216-17 (Ind. 2000) (discussing birth-related actions as mere negligence and discussing connotations of prenatal labels).

36. *See* Pizano *ex rel.* Walker v. Mart, 790 P.2d 735, 737 (Ariz. 1990) (recognizing wrongful birth and conception as parental claims and wrongful life as child's claim).

37. Hetherington, *supra* note 31, at 568 (characterizing wrongful birth and conception as parental claims).

38. *See* Azzolino v. Dingfelder, 337 S.E.2d 528, 533 (N.C. 1985) (emphasizing majority of jurisdictions prohibit wrongful life claims). *See generally* Turpin v. Sortini, 643 P.2d 954 (Cal. 1982) (allowing wrongful life claim); Procanik *ex rel.* Procanik v. Cillo, 478 A.2d 755 (N.J. 1984) (permitting recovery for wrongful life action); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983) (allowing child's claim for wrongful life).

39. *See* Lininger *ex rel.* Lininger v. Eisenbaum, 764 P.2d 1202, 1210 (Colo. 1988) (emphasizing majority of courts' refusal to recognize disabled life as legally recognizable injury); T. Brendan Kennedy, Comment, *The Cost of Living: Maryland's Refusal to Recognize the Wrongful Life Cause of Action Short-Changes Plaintiffs*, 32 U. BALT. L. REV. 97, 102-03 (2002) (discussing rationales behind majority of jurisdictions' prohibition of wrongful life). Kennedy explains that many courts refuse to recognize a "legal right to be born" and, thus, children bringing such suits do not present a recognizable legal injury. Kennedy, *supra*, at 102. Additionally, Kennedy highlights the numerous public policy issues involved in allowing recovery, including respect for "the sanctity of life" and "defective" or genetically unhealthy children. *Id.* at 103.

40. *See* Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs., Inc., 802 N.E.2d 723, 728 (Ohio Ct. App. 2003) (noting twenty states and District of Columbia recognize parental claims of wrongful birth); Flanagan v. Williams, 623 N.E.2d 185, 773-74 (Ohio Ct. App. 1993) (discussing majority of jurisdictions allow parental recovery either as wrongful birth or traditional negligence), *abrogated by* Simmerer v. Dabbas, 733 N.E.2d 1169, 1174 (Ohio 2000). The *Flanagan* court noted parental claimants should recover because if courts prohibited recovery, the prohibition would act to "immunize from liability those health care providers who negligently fail to provide adequate guidance to parents regarding potential genetic defects, either through pre-pregnancy counseling or prenatal care." *Flanagan*, 623 N.E.2d at 775; *see also* Sullivan, *supra* note 2, at 113 (emphasizing majority of states' legal systems permit wrongful conception claim).

41. Walker *ex rel.* Pizano v. Mart, 790 P.2d 735, 737 n.3 (Ariz. 1990) (explaining strong historical influence of *Roe* on judicial recognition of wrongful birth); Christine Intromasso, Note, *Reproductive Self-Determination in the Third Circuit: The Statutory Proscription of Wrongful Birth and Wrongful Life Claims as an Unconstitutional Violation of* Planned Parenthood v. Casey*'s Undue Burden Standard*, 24 WOMEN'S RTS. L. REP. 101, 108 (2003) (emphasizing affect of *Roe* on prenatal jurisprudence, specifically wrongful birth).

Parental birth-related claims are more widely accepted than wrongful life claims because courts generally are able to pinpoint a legal injury.[42] The courts that allow such claims view the lost parental opportunity to avoid conception or terminate a pregnancy as the legally cognizant injury, rather than expressly framing the child's life itself as the injury.[43] This enables many courts to circumvent policy difficulties.[44] Only a minority of states prohibit one or both of the parental birth-related causes of action.[45] States that do prohibit one or more of the parental claims do so largely because of perceived policy concerns.[46] These morality-dominated concerns prevent such legal systems from recognizing the presence of a legal injury or causation.[47]

42. *See* Keel v. Banach, 624 So. 2d 1022, 1029 (Ala. 1993) (framing injury as lost opportunity to decide whether to conceive child or terminate pregnancy); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 695 (Ill. 1987) (discussing negligence in birth-related action deprives parents of choice regarding whether to have child).

43. *See supra* note 42 and accompanying text (discussing character of injury in parental birth-related action); Hetherington, *supra* note 31, at 569 (identifying injury in birth-related lawsuit as denial of parental choice regarding whether to have child). Hetherington reflects on how courts have changed perceptions of what constitutes a recognizable injury and causation when discussing prenatal torts. Hetherington, *supra* note 31, at 569. Generally, courts recognizing such claims do not hold that a doctor's negligence caused the child's defect, but instead, conclude that medical negligence deprived parents of a choice regarding whether to conceive or give birth to a child. *Id.*

44. Hetherington, *supra* note 31, at 569 (discussing prenatal injury in context of birth-related torts). By viewing the lost parental opportunity as a recognizable injury in birth-related cases, courts refrain from concluding that a child's genetic abnormality is the compensable injury, thereby avoiding public policy problems. *Id. But see* Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 689 (Ky. 2003) (declining "to equate" parents' lost opportunity to terminate unhealthy child with cognizable legal injury). The court in *Grubbs* prohibited the parental claim based on perceived policy difficulties. *Id.*

45. *See* Haymon v. Wilkerson, 535 A.2d 880, 883-85 (D.C. 1987) (recognizing wrongful birth claim but noting judicial refusal to award damages in wrongful conception lawsuit); *Grubbs*, 120 S.W.3d at 688-91 (prohibiting recovery for wrongful birth and noting North Carolina, Michigan, and Georgia also prohibit it); Molloy v. Meier, 679 N.W.2d 711, 722-23 (Minn. 2004) (holding wrongful birth action statutorily banned but confirming actionability of wrongful conception); Don C. Smith, Jr., *Cause of Action Against Physician for Wrongful Conception or Wrongful Pregnancy*, 3 C.O.A. 83, § 4 (2004) (listing thirty-one states and District of Columbia as recognizing wrongful conception); Say, *supra* note 10, at 255 n.25 (citing jurisdictions statutorily barring parents from bringing wrongful birth lawsuits). Say identifies Idaho, Minnesota, Missouri, Pennsylvania, South Dakota and Utah as jurisdictions that statutorily preclude wrongful birth actions. Say, *supra* note 10, at 255 n.25.

46. *See* Coleman v. Garrison, 349 A.2d 8, 13-14 (Del. 1975) (denying parental recovery because of public policy to value human life), *overruled by* Garrison v. Medical Ctr. of Delaware, Inc., 581 A.2d 288, 291-92 (Del. 1990) (allowing wrongful birth claim); Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 561 (Ga. 1990) (citing problem with viewing life as injury as reason to prohibit wrongful birth actions); Wilson v. Kuenzi, 751 S.W.2d 741, 745 (Mo. 1988) (suggesting states recognizing birth-related claims ignore causation requisite of tort action); Azzolino v. Dingfelder, 337 S.E.2d 528, 534 (N.C. 1985) (declining to view disabled human life as legal injury); Taylor v. Kurapati, 600 N.W.2d 670, 688 (Mich. Ct. App. 1999) (discussing risk of eugenics and harm in viewing disabled children as defective).

47. *See supra* note 46 and accompanying text (highlighting policy questions based in moral concerns regarding human life); *see also* Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 150 (2005) (stressing pervading morality and policy concerns). Hensel notes "[E]ven a casual reading of the case law addressing wrongful birth . . . reflects the uncertainty and discomfort courts feel when they must confront issues that implicate the fundamental, and sometimes divergent, goals of tort law and the meaning of life itself." Hensel, *supra*, at 150.

B. Indistinct Definitions

Many courts that recognize birth-related claims select certain characteristics as distinctive hallmarks to differentiate between wrongful birth and wrongful conception.[48] These distinguishing features can include the health of the child, the timing of the medical negligence, or the factual circumstances in which the negligence occurred.[49] The "hallmark" that one state court selects, however, can directly create a definitional conflict with another state court's selected "hallmark."[50] This then generates inconsistencies from state to state in how courts associate facts with a parental cause of action.[51]

Some courts avoid this labeling confusion by refraining from the use of classifications altogether and by discussing the claims without distinction, thereby adding another layer to the multifaceted prenatal tort backdrop.[52] Regardless of whether one state's courts use prenatal labels, however, all parental claimants must prove the fundamental elements of a negligence claim.[53] Parents must prove that the defendant owed and breached a legal duty to the parents that caused the resulting injury.[54]

C. Wide-Ranging Damage Allocation

In addition to the varied ways courts define wrongful birth and wrongful conception, the distribution of damages associated with these claims is also inconsistent from state to state.[55] Just as policy difficulties permeate a court's decision regarding the allowance or prohibition of these claims, policy

48. *See infra* note 74 and accompanying text (utilizing timing of negligence as defining characteristic of birth-related lawsuits); *infra* note 85 and accompanying text (using health of child as defining characteristic).

49. *See* Wilcoxon, *supra* note 5, at 1027-30 (explaining three ways courts distinguish wrongful birth and wrongful conception). Wilcoxon identifies these distinguishing approaches and highlights inconsistencies caused by the varied ways that states differentiate between the two claims. *Id.*

50. *See* Rhinehart, *supra* note 33, at 141-42 (noting difficulties with characterizing birth-related claims). Rhinehart notes, "[t]he present problem is that the same set of facts may encompass a cause of action in one state, but not in another." *Id.*

51. *See* Wilcoxon, *supra* note 5, at 1027-30 (identifying discrepancies among states in birth-related tort field).

52. *See supra* note 7 and accompanying text (providing examples of courts refraining from labeling prenatal claims); *infra* Part III.C (explaining Indiana and Nevada refrain from prenatal tort labeling).

53. *See* Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs., Inc., 802 N.E.2d 723, 729 (Ohio Ct. App. 2003) (applying common law tort principles to birth-related claim "no matter what it is called"); Julie Gantz, Note, *State Statutory Preclusion of Wrongful Birth Relief: A Troubling Re-Writing of a Woman's Right to Choose and the Doctor-Patient Relationship*, 4 VA. J. SOC. POL'Y & L. 795, 813 (1997) (explaining parents must prove duty, breach, injury, and causation because prenatal claims grounded in negligence).

54. *See* Becker v. Schwartz, 386 N.E.2d 807, 811 (N.Y. 1978) (detailing fundamental negligence elements required in birth-related malpractice lawsuits); Say, *supra* note 10, at 264-65 (discussing four negligence elements integral to wrongful birth claim).

55. *See* Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 706 (Ill. 1987) (discussing lack of consensus regarding how to award and measure damages); Reed v. Campagnolo, 630 A.2d 1145, 1150 (Md. 1993) (noting damages disagreement with birth-related tort claims).

complexities likewise influence how courts award damages to parents.[56] Notwithstanding policy concerns, courts generally attempt to award compensation to claimants in birth-related cases subject to the overarching goal of common-law tort.[57] Tort law dictates that courts award damages to make claimants whole and adequately compensate them for injuries sustained at the hands of the wrongdoing party.[58]

In wrongful birth and wrongful conception claims, courts choose from a few different theories to compensate parents.[59] These conventional avenues in wrongful birth actions include awarding damages for the extraordinary costs associated with raising an unhealthy child until the child attains the age of majority, these same costs beyond the age of the child's majority, damages for parental emotional harm, and compensation for comprehensive child rearing costs.[60] When compensating a wrongful conception claimant, damages typically range from hospital costs and pain associated with the faulty medical procedure, the unexpected pregnancy and birth of a child, to these medical costs plus extensive child rearing costs.[61] Some courts that award child rearing

56. *See Siemieniec*, 512 N.E.2d at 706 (articulating how complex issues involved in birth-related lawsuits affect damage distribution to claimants); Schroeder v. Perkel, 432 A.2d 834, 841 (N.J. 1981) (discussing difficulties in awarding damages in wrongful conception and wrongful birth lawsuits), *abrogation recognized by* Hummel v. Reiss, 608 A.2d 1341, 1344-45 (N.J. 1992) (noting prohibition of wrongful life action no longer applies). The *Schroeder* court noted, "the problems of wrongful conception and wrongful birth involve an evaluation not only of law, but also of morals, medicine and society. Thus, it is not surprising that the same issue may elicit divergent judicial responses." *Schroeder*, 434 A.2d at 841.

57. *See* Kush v. Lloyd, 616 So. 2d 415, 424 (Fla. 1992) (acknowledging courts abide by fundamental goal when awarding damages to compensate tort claimants); *Siemieniec*, 512 N.E.2d at 706 (explaining "general rule of damages in a tort action").

58. *See* Flannery v. United States, 297 S.E.2d 433, 435 (W. Va. 1982) (reciting general theory behind awarding damages for negligence claims); Say, *supra* note 10, at 271 (highlighting goal behind awarding damages in tort law).

59. *See* Sullivan, *supra* note 2, at 119 (detailing different approaches to awarding damages in birth-related context).

60. *See* Keel v. Banach, 624 So. 2d 1022, 1029-30 (Ala. 1993) (allowing extraordinary expenses during child's minority, parents' emotional and physical damages, and loss of consortium); *Siemieniec*, 512 N.E.2d at 706 (noting some jurisdictions award extraordinary expenses beyond child's majority); Viccaro v. Milunski, 551 N.E.2d 8, 10-11 (Mass. 1990) (providing discussion of jurisdictional damage allocation in wrongful birth lawsuits); Granchi, *supra* note 4, at 1279-81 (discussing array of damages awarded in wrongful birth action). Granchi explains that the majority of courts award damages for extraordinary costs associated with caring for an unhealthy child until the age of majority, while a minority of jurisdictions have awarded all child-rearing costs. Granchi, *supra* note 4, at 1279-80. Granchi also discusses recovery for emotional harm for parental claimants in the wrongful birth context. *Id.* The *Keel* court noted, however, that a majority of jurisdictions do not compensate parents for emotional distress. *Keel*, 624 So. 2d at 1029.

61. *See* Simmerer v. Dabbas, 733 N.E.2d 1169, 1172 (Ohio 2000) (recognizing four different recovery theories for wrongful conception action). The *Simmerer* court discussed four theories: full recovery (including child rearing and pregnancy-related costs), limited recovery (damages related to the failed procedure, pregnancy, and birth), the benefits rule (offsetting damages with the benefits associated with having a child), and no recovery. *Id.* at 1172; James G. v. Caserta, 332 S.E.2d 872, 877-78 (W. Va. 1985) (discussing damages awarded to claimant in wrongful conception claim). The *James G.* court awarded hospital and medical costs, and expenses for lost wages and loss of consortium, but did not grant expenses for raising a healthy child, partly because of the speculative nature of child-rearing costs. *James G.*, 332 S.E.2d at 877-78. The court

costs to compensate parents for wrongful conception or wrongful birth actions follow the benefits rule.[62] Under this rule, the court monetarily offsets the benefits associated with parenthood from the total damages awarded.[63]

III. AN EXAMINATION OF THREE DIFFERENT APPROACHES TO NEGLIGENT PRECONCEPTION GENETIC TESTING

Like the more typical factual situations associated with prenatal torts—including deficient sterilizations, abortions, contraceptive distribution, pregnancy diagnoses and neonatal medical testing and care—courts approach negligent preconception genetic testing in a divergent manner.[64] Because this strain of parental claims factually implicates aspects associated with both wrongful birth and wrongful conception, courts have varied in their approaches to this specific prenatal issue.[65] Courts' characterizations of prenatal torts generally determine whether they address negligent preconception genetic testing issues as wrongful birth, wrongful conception, or simply as ordinary negligence.[66]

A. Minnesota and North Carolina: Categorizing Negligent Genetic Testing Claims as Wrongful Conception

The Minnesota and North Carolina legal systems generally prohibit wrongful birth actions.[67] Minnesota statutorily bars parental action alleging

aligned itself with the majority of courts by not awarding childrearing costs to the claimants. *Id.*; Debra E. Batten, Note, McAllister v. HA*: Wrongful Conception or Misconception?*, 34 WAKE FOREST L. REV. 915, 926-27 (1999) (detailing different damage routes courts may take in wrongful conception lawsuits); Melissa K. Smith-Groff, Note, *Wrongful Conception: When an Unplanned Child Has a Birth Defect, Who Should Pay the Cost?*, 61 MO. L. REV. 135, 138-40 (1996) (explaining majority and minority views on wrongful conception damages). Smith-Groff notes that a majority of jurisdictions allow recovery solely for the costs associated with "pregnancy and childbirth," while a minority allow full recovery for child rearing costs or limited recovery offset by the benefits of having a child. Smith-Groff, *supra*, at 139-40.

62. *See* Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977) (applying benefit rule to offset child rearing damages); Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. App. 1973) (denying recovery of child rearing costs because benefits of child completely offset parental loss).

63. *See* Paul Coltoff et al., 70 C.J.S. *Physicians and Surgeons* § 161 (2005) (discussing benefits rule); *see also* Strasser, *supra* note 5, at 202 (opposing rule qualifying damage awards with parenthood benefits).

64. *See supra* note 16 and accompanying text (discussing dissimilar judicial approaches to negligent preconception genetic testing issues).

65. *See supra* note 13 and accompanying text (providing summary of negligent preconception genetic testing context).

66. *See* Lininger *ex rel.* Lininger v. Eisenbaum, 764 P.2d 1202, 1204-05 (Colo. 1988) (approaching negligent genetic testing as wrongful birth issue because unhealthy child involved); Greco v. United States, 893 P.2d 345, 348 (Nev. 1995) (concluding lawsuits stemming from birth-related circumstances present traditional negligence claim); McAllister v. Ha, 496 S.E.2d 577, 582 (N.C. 1998) (aligning negligent genetic testing with wrongful conception action).

67. Molloy v. Meier, 679 N.W.2d 711, 722 (Minn. 2004) (explaining Minnesota's statutory bar to wrongful birth action); Azzolino v. Dingfelder, 337 S.E.2d 528, 537 (N.C. 1985) (concluding wrongful birth action not legally recognizable under North Carolina law).

wrongful birth, while the North Carolina Supreme Court has refused to recognize it.[68] Despite these prohibitions on wrongful birth, parents can bring wrongful conception claims in both states.[69]

Both North Carolina and Minnesota, in *McAllister v. Ha*[70] and *Molloy v. Meier*[71] respectively, have extended the more traditional approach to wrongful conception.[72] These states have expanded wrongful conception from the contexts of negligent sterilizations, abortions, pregnancy diagnoses, or contraceptive administration, to circumstances involving negligent genetic testing.[73] The courts in these states focus primarily on the timing of the negligence when characterizing these claims, rather than the health of the child or the factual circumstances surrounding the malpractice.[74] In Minnesota, for

68. *See* MINN. STAT. § 145.424 (2004) (prohibiting wrongful birth and wrongful life claims). The Minnesota statute specifically bans wrongful birth claims and provides that: "[N]o person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted." *Id.*; *see also Azzolino*, 337 S.E.2d at 537 (barring both wrongful birth and wrongful life actions). The *Azzolino* court refused to recognize a wrongful birth claim absent legislative action on the issue. *Azzolino*, 337 S.E.2d at 533. The court declined to treat human life as an injury, and considered the lack of consensus among the states regarding damages as evidence of the problems associated with birth-related claims. *Id.* at 533-34. Additionally, because prenatal torts involve compensation for the "creation" of human life, the court emphasized that prenatal torts are not ordinary tort claims. *Id.* at 534.

69. *Molloy*, 679 N.W.2d at 723 (noting wrongful conception action not barred under Minnesota's statute barring wrongful birth and life claims). Rather than barring wrongful conception, subdivision three of the Minnesota statute specifically preserves the wrongful conception cause of action. MINN. STAT. § 145.424 (2004); *Molloy*, 679 N.W.2d at 723 n.11; Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 170-71 (Minn. 1977) (permitting wrongful conception claim in case involving negligent sterilization procedure); Jackson v. Bumgardner, 347 S.E.2d 743, 749-50 (N.C. 1986) (permitting wrongful conception recovery, despite *Azzolino*'s bar to wrongful birth and life actions).

70. 496 S.E.2d 577 (N.C. 1998).

71. 679 N.W.2d 711 (Minn. 2004).

72. *See supra* note 11 and accompanying text (discussing typical factual circumstances in wrongful conception claim); *see also* Batten, *supra* note 61, at 927 (arguing North Carolina Supreme Court incorrectly extended wrongful conception framework to negligent genetic testing). Batten argues the court's decision in *McAllister* "adds confusion and inconsistency to an area of the law that is already plagued with a multitude of philosophical and moral challenges" and it "is not illustrative of a wrongful conception cause of action." Batten, *supra* note 61, at 927, 932.

73. *See* Gallagher v. Duke Univ., 852 F.2d 773, 776 (4th Cir. 1988) (labeling negligent genetic testing as wrongful conception action); *Molloy*, 679 N.W.2d at 722-23 (classifying negligent genetic testing as wrongful conception action); McAllister v. Ha, 496 S.E.2d 577, 582 (N.C. 1998) (allowing wrongful conception claim in case involving negligent genetic testing). The *Gallagher* and *McAllister* courts both likened claims for negligent genetic testing to a case involving a failed sterilization where the court granted recovery under the theory of wrongful conception, rather than *Azzolino*, which barred wrongful birth. *Gallagher*, 852 F.2d at 775-76; *McAllister*, 496 S.E.2d at 581-82. The *Gallagher* court noted, "[b]ecause the North Carolina Supreme Court recognizes a cause of action for medical malpractice based on wrongful conception when a normal child is born, we are confident that the Court would recognize a cause of action based on the same malpractice when a genetically defective child is born." *Gallagher*, 852 F.2d at 776.

74. *See* Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 17 (Minn. 1986) (Simonett, J., concurring) (emphasizing wrongful birth involves right to abort and wrongful conception involves right not to conceive); *McAllister*, 496 S.E.2d at 582 (distinguishing parents' wrongful conception claim from prohibited wrongful birth action). The *McAllister* court emphasized that the parents' lost opportunity to decide whether to conceive a child was the legal injury. *McAllister*, 496 S.E.2d at 582.

example, the legislature exclusively identifies the prohibited wrongful birth claim as one that, "but for the negligent conduct of another, a child would have been aborted," thus leaving parents to recover only in situations involving preconception negligence.[75] Accordingly, the approach of North Carolina and Minnesota to such issues requires that negligent genetic testing claims fit plainly into the wrongful conception category.[76] Though negligent preconception genetic testing appears to involve aspects associated with the wrongful birth action, the courts in these two states label these claims as wrongful conception.[77] Because of this designation, the claim itself survives scrutiny and is not barred by the existing judicial or statutory prohibitions against wrongful birth claims.[78]

B. Colorado and Washington: Applying the Wrongful Birth Label to Negligent Genetic Testing Claims

While the Washington legal system specifically permits wrongful conception actions, the Colorado court system and legislature have yet to directly address the issue.[79] Courts in both states, however, legally permit parents to bring wrongful birth claims.[80] Colorado and Washington courts have treated claims involving preconception negligence issues as wrongful birth actions, in *Lininger ex rel. Lininger v. Eisenbaum*[81] and *Harbeson v. Parke-Davis*,[82] respectively.[83] Thus, because these states allow wrongful birth claims

75. MINN. STAT. § 145.424 (2004) (barring wrongful birth claims).

76. *See* Molloy v. Meier, 679 N.W.2d 711, 723 (Minn. 2004) (holding complaint stated wrongful conception action because of preconception timing of negligence). Because the parents argued that they would have avoided conception had they known of the possibility of a genetic deformity in a second child, the court in *Molloy* concluded that the complaint stated a wrongful conception rather than wrongful birth action. *Id.*; *see also McAllister*, 496 S.E.2d at 582 (noting complaint alleging inability to make informed choice regarding conception stated wrongful conception claim).

77. *See supra* note 73 and accompanying text (noting negligent genetic testing presents wrongful conception claim).

78. *See Molloy*, 679 N.W.2d at 723 (concluding claim survives scrutiny despite statutory wrongful birth prohibition); *McAllister*, 496 S.E.2d at 582 (holding suit not barred under North Carolina's judicial ban against wrongful birth); *see also* Lindsay Fortado, *Genetic Testing Maps New Legal Turf; Doctor's Liability Grows as Tests are More Widely Used*, NAT'L L.J., Sept. 6, 2004 at 1 (noting *Molloy* case presents "newer strain of wrongful conception litigation").

79. *See* Lininger *ex rel.* Lininger v. Eisenbaum, 764 P.2d 1202, 1204 n.3 (Colo. 1988) (refusing to express opinion on wrongful conception because facts not presented in case); McKernan v. Aasheim, 687 P.2d 850, 856 (Wash. 1984) (permitting wrongful conception action but limiting damages).

80. *See Lininger*, 764 P.2d at 1208 (allowing action and classifying it as wrongful birth largely due to birth of unhealthy child); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 488 (Wash. 1983) (permitting parental recovery for wrongful birth claim). The *Harbeson* court emphasized that wrongful birth "conforms comfortably to the structure of tort principles and that recognition of wrongful birth claims is a logical and necessary development." *Harbeson*, 656 P.2d at 488.

81. 764 P.2d 1202 (Colo. 1988).

82. 656 P.2d 483 (Wash. 1983).

83. *See Lininger*, 764 P.2d at 1208 (treating negligent genetic testing under wrongful birth heading); *Harbeson*, 656 P.2d at 494 (classifying preconception medical malpractice resulting in birth of unhealthy child

generally, parents have been successful in alleging these issues.[84]

Many courts, including those in Colorado and Washington, distinguish wrongful birth as involving the birth of an unhealthy child and wrongful conception as relating to the birth of a healthy child.[85] Because the courts in these states view the health of the child as a defining differentiation between the two parental claims, negligent genetic testing issues involving unhealthy children straightforwardly fits into these states' wrongful birth rather than wrongful conception category.[86] Additionally, several courts and commentators define wrongful birth as negligence resulting in a "defective" child that deprived parents of the choice to avoid conception or terminate a pregnancy.[87] Therefore, states utilizing this definition may also consider negligent preconception genetic testing allegations as a wrongful birth issue

as wrongful birth). *Lininger* involved a typical negligent preconception genetic testing situation: parents underwent genetic testing to determine whether a defect in their first child was likely to manifest in a second child. *Lininger*, 764 P.2d at 1203-04. Despite optimistic medical feedback, they conceived another child with genetic defects. *Id. Harbeson*, in contrast, presents a variation on the negligent preconception testing situation: a mother who ingested medication to treat epilepsy discussed with a doctor the effects this medication would have on a pregnancy. *Harbeson*, 656 P.2d at 463. She received assurances that a child would be healthy and subsequently gave birth to two children with birth defects emanating from her ingestion of the epilepsy medication. *Id.* Although *Harbeson* involves medicinal side-effects rather than genetic testing, the parents in the case presented a comparable claim involving preconception malpractice, an intentional pregnancy in reliance on medical assurances, and a child subsequently born with a birth defect. *Id.*

84. *See Lininger*, 764 P.2d at 1208 (allowing parental recovery for wrongful birth); *Harbeson*, 656 P.2d at 493 (permitting parental recovery under theory of wrongful birth).

85. *See* Lininger *ex rel.* Lininger v. Eisenbaum, 764 P.2d 1202, 1204 (Colo. 1988) (defining claim for wrongful birth as malpractice resulting in birth of unhealthy child); Viccaro v. Milunsky, 551 N.E.2d 8, 9 n.3 (Mass. 1990) (noting wrongful birth involves unhealthy children and wrongful conception or pregnancy involves healthy children); *Harbeson*, 656 P.2d at 488 (distinguishing wrongful birth from wrongful conception based on health of child); *see also* Hensel, *supra* note 47, at 151-55 (discussing wrongful birth as involving unhealthy children and wrongful conception as involving healthy children).

86. *See Lininger*, 764 P.2d at 1204 (concluding involvement of genetically unhealthy child corresponds with wrongful birth); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 488 (Wash. 1983) (holding claim involving "defective" child states wrongful birth action).

87. *See* Keel v. Banach, 624 So. 2d 1022, 1024 (Ala. 1993) (characterizing parental claims for lost opportunity to avoid conception or abort pregnancy as wrongful birth); Kush v. Lloyd, 616 So. 2d 415, 417 n.2 (Fla. 1992) (defining wrongful birth action). Specifically, the *Kush* court defined wrongful birth as "that species of medical malpractice in which parents give birth to an impaired or deformed child and allege that negligent treatment or advice deprived them of the opportunity or knowledge to avoid conception or to terminate the pregnancy." *Kush*, 616 So. 2d at 417 n.2 (citing BLACK'S LAW DICTIONARY 1612 (6th ed. 1990)); Lori B. Andrews, *Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks*, 29 HOUS. L. REV. 149, 153-54 (1992) (noting wrongful birth entails failure to warn before or after conception); Catherine Palo, *Cause of Action for Wrongful Birth or Wrongful Life*, 23 C.O.A.2d 55 (2003) (defining wrongful birth as negligence depriving parental choice regarding conceiving or preventing birth); Ronen Perry & Yehuda Adar, *Wrongful Abortion: A Wrong in Search of a Remedy*, 5 YALE J. HEALTH POL'Y, L., & ETHICS 507, 513-15 (2005) (defining wrongful birth and wrongful conception). Perry and Adar define wrongful birth as those "cases in which a woman . . . seeks medical advice regarding the health of her fetus, and decides *to conceive or to continue her pregnancy* once the adviser maintains that the child will not be born with congenital disabilities, a statement that is later found to be incorrect." Perry & Adar, *supra*, at 514 (emphasis added); Sullivan, *supra* note 2, at 109 (acknowledging wrongful birth action as involving lost opportunity to avoid conception or abort pregnancy).

because it corresponds within their existing wrongful birth framework.[88]

C. Indiana and Nevada: Negligent Preconception Genetic Testing Claims as Traditional Negligence

The legal systems in Indiana and Nevada regard prenatal claims as presenting traditional medical malpractice issues.[89] Therefore, courts in both states, in *Bader v. Johnson*[90] and *Greco v. United States*[91] respectively, have declined to label parental causes of action as either wrongful birth or wrongful conception because they consider the labels as unnecessary in the legal analysis.[92] Although these states have not specifically dealt with negligent preconception genetic testing issues, their refusal to apply new characterizations would likely extend to this area.[93]

When presented with negligent preconception genetic testing, the Indiana and Nevada courts, and other courts that similarly avoid prenatal labeling, are likely to continue refraining from any form of categorization.[94] Instead, these courts will examine negligent genetic testing facts to determine whether the claim satisfies the requisite negligence analysis.[95] Only if these parents prove all of the elements of a negligence action will these courts permit parental recovery.[96]

88. *See supra* note 87 and accompanying text (noting wrongful birth definition utilized by many courts and commentators).

89. *See* Bader v. Johnson, 732 N.E.2d 1212, 1216-17 (Ind. 2000) (discussing parental claim as ordinary medical malpractice); Greco v. United States, 893 P.2d 345, 348 (Nev. 1995) (applying traditional negligence principles rather than creating new birth-related tort). In both *Bader* and *Greco*, the parents asserted medical negligence in the neonatal context. *Bader*, 732 N.E.2d at 1215; *Greco*, 893 P.2d at 346-47. Essentially, in both cases, medical professionals either neglected to perform neonatal testing or failed to diagnose abnormalities with which the child would be born. *Bader*, 732 N.E.2d at 1215; *Greco*, 893 P.2d at 347. The plaintiffs argued that this negligence deprived them of the opportunity to make an informed choice about whether to terminate the unhealthy pregnancy. *Bader*, 732 N.E.2d at 1215; *Greco*, 893 P.2d at 347.

90. 732 N.E.2d 1212 (Ind. 2000).

91. 893 P.2d 345 (Nev. 1995).

92. *See Bader*, 732 N.E.2d at 1216 (refraining from specific characterizations of birth-related claims); *Greco*, 893 P.2d at 348 (declining use of prenatal labels with reference to birth-related claims). The Greco court noted, "we see no reason for compounding or complicating our medical malpractice jurisprudence by according this particular form of professional negligence action some special status apart from presently recognized medical malpractice or by giving it the new name . . . ." *Greco*, 893 P.2d at 348.

93. *See Bader*, 732 N.E.2d at 1216 (discussing common law negligence application); *Greco*, 893 P.2d at 348 (emphasizing parental claim in birth-related context presents ordinary negligence).

94. *See supra* note 92 and accompanying text (discussing Nevada and Indiana courts' abstention from labeling birth-related parental claims); *see also* Viccaro v. Milunsky, 551 N.E.2d 8, 9 n.3 (Mass. 1990) (allowing parental recovery for wrongful birth but abstaining from utilizing prenatal labels). The *Viccaro* court noted, "[t]hese labels are not instructive. Any 'wrongfulness' lies not in the life, the birth, the conception, or the pregnancy, but in the negligence of the physician . . . . [W]e . . . abstain in this case from using the labels. . . ." *Viccaro*, 551 N.E.2d at 9 n.3.

95. *See Bader*, 732 N.E.2d at 1216-17 (requiring negligence elements of duty, breach, causation, and damages).

96. *See Greco*, 893 P.2d at 348 (noting recovery based on claimants proving defendant breached duty to parents causing injury).

IV. ANALYSIS

Despite the inconsistent case-law surrounding prenatal actions, courts should nevertheless make an initial determination regarding whether the facts presented by parents implicate wrongful birth or wrongful conception.[97] Specifically, courts should align facts involving negligent genetic testing issues with the wrongful birth action.[98] After making the determination that wrongful birth is the best applicable designation for negligent genetic testing scenarios, courts should analyze the claim using traditional negligence principles to conclude whether parents have a cognizable claim.[99]

A. Negligent Preconception Genetic Testing Issues Best Correspond to the Wrongful Birth Classification

Colorado and Washington provide models for courts regarding the treatment of parental claims involving negligent genetic testing issues.[100] These states appropriately treat the parental claims as implicating wrongful birth.[101] Although the Minnesota and North Carolina courts properly view the preconception timing of the negligence as denoting wrongful conception, scrutinizing the factors associated with negligent genetic testing in their totality lends to a different interpretation.[102] A planned pregnancy and the birth of an unhealthy child in a negligent genetic testing context overwhelmingly signify that this claim is, in essence, for wrongful birth.[103]

Classifying a claim involving negligent genetic testing as wrongful birth, instead of wrongful conception, makes the most sense from a definitional and conceptual standpoint.[104] The crux of the wrongful birth complaint is that a

97. *See supra* note 4 and accompanying text (discussing categorizations of parental prenatal tort claims as wrongful birth or wrongful conception); *see also* Wilcoxon, *supra* note 5, at 1028-30 (recognizing difficulties in distinguishing whether courts should associate facts with wrongful birth or conception).

98. *See supra* note 83 and accompanying text (identifying treatment of negligent preconception genetic testing issues as presenting wrongful birth); *see also* Kush v. Lloyd, 616 So. 2d 415, 422-23 (Fla. 1992) (allowing recovery for negligent preconception genetic testing issues as wrongful birth).

99. *See supra* notes 53-54 and accompanying text (explaining negligence elements parents must prove in birth-related tort lawsuits).

100. *See supra* Part III.B (discussing approaches in Colorado and Washington concerning negligent genetic testing issues).

101. *See supra* Part III.A (noting Minnesota and North Carolina consider negligent preconception genetic testing as presenting wrongful conception); Part III.B (explaining Colorado's and Washington's treatment of negligent genetic testing issues as wrongful birth).

102. *See supra* notes 10-11 and accompanying text (relaying factual circumstances surrounding both parental prenatal claims); *supra* note 13 and accompanying text (discussing preconception genetic testing negligence specifically); *supra* note 74 and accompanying text (highlighting Minnesota and North Carolina focus on preconception timing and conclude facts present wrongful conception).

103. *See supra* notes 10-11 and accompanying text (comparing typical characteristics of both wrongful birth and wrongful conception causes of action).

104. *See supra* note 10 and accompanying text (identifying typical definitional aspects associated with wrongful birth action); *supra* note 87 and accompanying text (explaining frequent conceptualization of wrongful birth as involving lost chance to terminate or avoid pregnancy).

medical professional neglected to give parents indispensable information concerning a potential child's health, thereby depriving them of the opportunity to make an educated decision regarding whether to have the child.[105] Parents assert essentially the same argument in lawsuits stemming from preconception genetic testing negligence.[106]

Most wrongful birth case law has specifically dealt with neonatal negligence and the lost opportunity to terminate a pregnancy, rather than preconception negligence and the lost opportunity to avoid conception, and this seems to support a wrongful conception classification.[107] The timing of the negligent act, however, should not single-handedly transform such a complaint into a wrongful conception action.[108] Courts should instead examine all of the circumstances of claims stemming from negligent genetic testing and conclude that such characteristics are most compatible with a wrongful birth classification.[109]

Additionally, numerous jurisdictions and commentators already define wrongful birth as involving the lost opportunity for parents to make an informed choice regarding whether to avoid conception or terminate a pregnancy.[110] By defining wrongful birth in such a manner, these courts appropriately negate timing as the sole imperative factor in distinguishing these parental claims.[111] When courts utilize such a definition, there is no question that negligent genetic testing corresponds to wrongful birth.[112] Courts should

105. *See* Haymon v. Wilkerson, 535 A.2d 880, 883 (D.C. 1987) (noting wrongful birth theory involves deprivation of choice regarding whether "to avoid" having unhealthy child); Sullivan, *supra* note 2, at 108-09 (highlighting fundamental theory behind claims in wrongful birth actions). Sullivan notes that the theory behind wrongful birth is centered in compensating parents for the deprivation of an informed choice regarding whether to avoid conceiving an unhealthy child or to abort an unhealthy child. Sullivan, *supra* note 2, at 108-09.

106. *See supra* note 13 and accompanying text (highlighting claimants' deprivation of informed choice regarding whether to avoid pregnancy).

107. *See supra* notes 10-11 and accompanying text (distinguishing wrongful birth as involving postconception negligence and wrongful conception as involving preconception negligence).

108. *See* Batten, *supra* note 61, at 930-31 (arguing preconception timing of negligence not sole factor when determining type of parental prenatal claim). Batten compared *McAllister*, a case concerning negligent genetic testing issues, with a prior North Carolina case involving a more typical wrongful conception context concerning a faulty sterilization procedure. *Id.* Batten argued that when courts contemplate which prenatal cause of action applies, the decisive differences between the wrongful birth and wrongful conception labels should outweigh any importance attached to the preconception timing of the negligent act. *Id.*

109. *See supra* notes 10-11 and accompanying text (discussing all factors typically associated with wrongful birth and conception).

110. *See supra* note 87 and accompanying text (noting courts and commentators frequently define wrongful birth as involving preconception and postconception negligence).

111. *See supra* notes 10-11 and accompanying text (noting timing of negligence as one factor associated with wrongful conception and birth claims); *supra* note 87 and accompanying text (discussing wrongful birth as involving preconception and neonatal negligence).

112. *See supra* note 13 and accompanying text (reviewing factors generally associated with negligent preconception genetic testing scenario); note 87 and accompanying text (defining wrongful birth without regard to mere timing of negligence).

align a complaint alleging an unplanned pregnancy, the birth of a healthy child, and factual contexts such as negligent sterilization, erroneous pregnancy diagnosis, faulty contraceptive distribution, or unsuccessful abortion procedures specifically with wrongful conception.[113] Rather than extend the definition of wrongful conception, jurisdictions should view negligent preconception genetic testing issues as presenting a preconception strain of wrongful birth.[114]

B. An Argument in Favor of Prenatal Tort Label Retention

The Indiana and Nevada courts properly conclude that prenatal claims invoke ordinary negligence principles.[115] Courts, however, should not similarly abandon prenatal nomenclature.[116] Because these labels are embedded in the prenatal landscape, neglecting to acknowledge their legal pervasiveness creates a detrimental result.[117]

By failing to accept these classifications and by refusing to define the legal meanings behind them, courts intensify the confusion associated with birth-related torts.[118] Because the labels permeate birth-related tort discussion, courts should attempt to associate the facts presented with the corresponding prenatal designation before discussing the legal merits of the claim.[119] Courts may not

113. *See supra* note 11 and accompanying text (relaying typical factual circumstances associated with wrongful conception); *see also* Perry & Adar, *supra* note 87, at 513-14 (defining wrongful conception). Perry and Adar define wrongful conception as involving those "cases in which negligence by the defendant resulted in the birth of a healthy yet unwanted child. The negligence may manifest itself in the manufacture, provision, or installation of contraceptives; in the performance of vasectomy or tubal ligation; or in the carrying out of an abortion." Perry & Adar, *supra* note 87, at 513. *See generally* Payne, *supra* note 11, at § 53 (identifying circumstances surrounding wrongful conception). Payne specifically identifies that "an action for wrongful pregnancy or wrongful conception is generally brought by the parents of a healthy, but unwanted, child against a pharmacist or pharmaceutical manufacturer for negligently filling a contraceptive prescription or against a physician for negligently performing a sterilization procedure or an abortion." Payne, *supra* note 11, at § 53; Smith, *supra* note 45, § 4 (identifying nature of wrongful conception lawsuit). Smith discusses wrongful conception as involving circumstances including unsuccessful abortion procedures, sterilizations, and pregnancy diagnoses. *Id.*

114. *See supra* Part III.B (reviewing Colorado and Washington's stance on negligent preconception issues specifically and prenatal torts generally).

115. *See supra* notes 53-54 and accompanying text (explaining parental claimants must prove negligence elements notwithstanding which label claim falls under); *see also* note 89 and accompanying text (explaining Indiana and Nevada consider birth-related torts as presenting traditional negligence principles).

116. *See supra* note 92 and accompanying text (explaining Indiana and Nevada abandon prenatal labels in favor of treating claims as ordinary negligence); *see also* Rhinehart, *supra* note 33, at 142 (urging legislatures to abandon prenatal tort distinctions in favor of malpractice principle utilization). Rhinehart emphasizes that because of the problem associated with differentiating prenatal torts, legislatures should terminate distinctions among them or actively operate to fine-tune their "parameters." Rhinehart, *supra* note 33, at 142.

117. *See supra* notes 34-37 and accompanying text (emphasizing pervasiveness of discussion regarding prenatal torts and label usage); *see also* Lininger *ex rel.* Lininger v. Eisenbaum, 764 P.2d 1202, 1204 n.2 (noting integration of birth-related labels in general legal discussion regarding prenatal torts).

118. *See supra* note 5 and accompanying text (identifying present state of birth-related tort discussion as highly chaotic and confusing).

119. *See* Walker *ex rel.* Pizano v. Mart, 790 P.2d 735, 737 (Ariz. 1990) (suggesting courts make

necessarily recognize strong legal merit, beyond a confusing name game, in the birth-related labels.[120] Despite such attitudes, however, birth-related classifications have a persistent legal presence which courts should attempt to understand so they can ameliorate the confusion.[121]

In addition to their innate pervasiveness, the parental birth-related claims are not universally allowed, and this serves as a further reason for continuing to use prenatal designations.[122] Because courts typically attach a certain set of facts with a particular prenatal label, their use imparts an understanding regarding how states consider the claims.[123] In many states, a label is critical to ascertaining whether parents have a legally cognizable birth-related claim.[124] This is true in states where the courts or legislature have prohibited wrongful birth claims but allowed wrongful conception claims or vice versa.[125] Without the classifications, there is little legal guidance as to whether parental claimants could successfully bring a prenatal action based on a certain set of facts in a particular state.[126]

Furthermore, prenatal designations determine how courts award damages to parents.[127] Wrongful conception and wrongful birth cases usually result in a dissimilar distribution of damages because the courts must compensate parents for different injuries.[128] The prenatal classifications convey an understanding for parental claimants specifically and the legal community at large regarding typical damage distribution in lawsuits stemming from wrongful birth or wrongful conception circumstances.[129]

Because the labels have become an integral part of the birth-related legal

definitional and theoretical distinctions regarding birth-related torts).

120. *See supra* note 7 and accompanying text (stressing certain states disregard labels when discussing birth-related torts because labels cause confusion); *supra* note 92 and accompanying text (explaining rationale behind courts refraining from utilization of birth-related tort labels).

121. *See supra* notes 34-37 and accompanying text (reflecting on presence of birth-related actions in current tort law).

122. *See* Phillips v. United States, 508 F. Supp. 544, 546 n.1 (D.S.C. 1981) (stressing non-universal acceptance of prenatal torts as rationale in favor of labels); Say, *supra* note 10, at 262-63 (arguing for retention of labels because of different judicial and statutory treatments of prenatal torts).

123. *See supra* notes 74-75 and accompanying text (highlighting Minnesota and North Carolina utilize timing as critical fact in assessing which label attaches); *supra* note 85 and accompanying text (emphasizing Washington and Colorado focus on child's health when considering which prenatal label applies).

124. *See supra* note 8 and accompanying text (providing examples of legal systems prohibiting one or more birth-related causes of action).

125. *See supra* note 45 and accompanying text (noting some courts or legislatures allow one parental claim and not another).

126. *See supra* notes 8 and 45 and accompanying text (reflecting on allowances or prohibitions of parental birth-related claims).

127. *See supra* notes 59-63 and accompanying text (detailing typical damage awards in wrongful birth and wrongful conception lawsuits).

128. *See supra* notes 60-61 and accompanying text (distinguishing damages typically awarded to parents in wrongful conception from wrongful birth claims).

129. *See supra* notes 59-63 and accompanying text (explaining different damages associated with birth-related tort labels).

arena, courts should strive to make sense of their implications.[130] Instead of terminating label usage, courts should attempt to create clear delineations of what factual scenarios correspond to which parental prenatal category.[131] After establishing definitive categories and aligning a factual situation with its appropriate classification, courts then should apply negligence principles to the cause of action at bar.[132]

V. CONCLUSION

In a simplistic legal landscape, all courts and legislatures would treat issues of law in one uniform manner. When emotionally charged policies saturate an area of state law, however, uniformity among the states does not always prevail. In the birth-related tort field, courts consider the controversial policies involved and address the legal issues presented with diametrically different approaches.

Specifically, courts have approached claims alleging negligent preconception genetic testing from distinct perspectives. Courts have treated these claims as presenting either a wrongful birth or wrongful conception claim or simply as ordinary negligence. Courts' inconsistent discussion of these claims has generated an unclear body of preconception birth-related case law, and legal systems should aim to clarify it.

When presented with a claim alleging negligent genetic testing, courts should make a preliminary determination regarding which birth-related classification best corresponds to the facts presented. Courts should not bypass this analysis, because neglecting to make this preliminary determination intensifies the lack of clarity currently pervading the law. Courts should conclude that negligent genetic testing issues best encompass the theoretical and definitional aspects associated with wrongful birth, rather than wrongful conception. Courts should then assess the merits of the claim by drawing upon traditional negligence principles. Finally, if the claim properly asserts the requisites of a negligence action, courts should compensate claimants under the wrongful birth rubric for their injuries suffered in a negligent genetic testing

130. *See* Walker *ex rel.* Pizano v. Mart, 790 P.2d 735, 737 (Ariz. 1990) (emphasizing necessity of distinguishing birth-related claims from one another). The court in *Walker* highlighted the importance of deciphering distinctions between the birth-related causes of action and summarized the dissimilar definitions of wrongful birth, wrongful conception, and wrongful life. *Id.* at 737-38. The court recognized that several jurisdictions blur the prenatal causes of action together, failing to identify the importance of distinguishing them. *Id.*

131. *See supra* note 5 and accompanying text (highlighting disorder surrounding judicial characterizations of wrongful birth and wrongful conception).

132. *See supra* notes 53-54 (explaining claimants must prove essential negligence requirements notwithstanding claim classification); *see also* Grubbs v. Barbourville Family Health Ctr., 120 S.W.3d 682, 686 (Ky. 2003) (concluding traditional tort principles applicable to parental birth-related tort claims). *But see* Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 561 (Ga. 1990) (concluding traditional negligence principles "break down" when examining wrongful birth cause of action).

context.

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