South Texas Law Review
Fall 2002

Comments

***1261** THE WRONGFUL BIRTH TORT: A POLICY ANALYSIS AND THE RIGHT TO SUE FOR AN INCONVENIENT CHILD

Jennifer R. Granchi [FNa1]

I. Introduction

It has been predicted that the Human Genome Project ("HGP"), will have completed a high-quality sequence map of the entire human genome by 2003 and a rough draft is already completed. [FN1] While the ultimate goal is to use the information to develop new ways to treat, cure, or prevent diseases that afflict mankind, the project concedes ***1262** that the road is "long and fraught with challenges." [FN2] With each new defective gene sequence discovered, "biotechnology companies are racing ahead with commercialization by designing diagnostic tests to detect errant genes" despite the scientific community's continued debate over the best way to use the tests. [FN3] The public and medical communities are often unaware of the tests' scientific and social implications. [FN4]

As science advances, people may be able to choose whether to terminate a fetus based on genetic information encoded by the human genome. [FN5] The medical community currently regulates the issue of termination and what information should be given to their patients to decide whether to terminate. [FN6] While the medical community handles this burgeoning area of science as well as it can, it is not ethically or legally possible for health care providers to withhold relevant information from a patient. This issue becomes concerning as the entire human genome is eligible for analysis. [FN7]

With this background in mind, consider the wrongful birth tort. This tort allows the parents of "defective" [FN8] children to sue the physician for negligently interfering with the parents' right to ***1263** terminate a child. [FN9] Of the jurisdictions to have considered this claim, twenty-one states and the District of Columbia recognize the cause of action by judicial decision. [FN10] Three states bar the action by judicial decision, reasoning that significant policy decisions need to be made before the courts can act. [FN11] Seven of the eight state legislatures that have considered the cause of action bar it. [FN12]

The very notion of a wrongful birth claim seems vastly at odds with the ideas about disability that serve as the foundation of the Americans with Disabilities Act ("ADA"). [FN13] This comment argues that the wrongful birth cause of action is based on a flawed legal analysis that hinges on judicially created public policy irreconcilable with current congressional policy announced in the ADA. Part II defines each of the three prenatal tort actions giving the underlying theory for each tort and the possible damages. Part III discusses the background or history of the development of the tort, which was unknown at common law. This section critically examines the Roe v. Wade decision and the proposed "rights" given in that decision. [FN14] Part IV analyzes the legal underpinnings of the tort and the policy issues.

***1264** II. Definitions

Prenatal torts are a constellation of three torts, wrongful conception/pregnancy, wrongful life, and wrongful birth. [FN15] While all three prenatal torts are analyzed under the rubric of tort law, only the wrongful pregnancy and wrongful life causes of action are firmly established torts of birth-related medical malpractice. Wrongful birth is considerably more tenuous. [FN16]

A. Wrongful Pregnancy or Conception

A wrongful pregnancy claim is based in medical malpractice. [FN17] "[The] parents who have taken medical steps to prevent pregnancy bring suit for damages caused by a child nevertheless being born even if that child is born healthy." [FN18] Parents of a healthy child sue the health care provider for failing to prevent the birth of a child by negligent: (1) sterilization; [FN19] (2) contraception; [FN20] (3) missed diagnosis of pregnancy; [FN21] or (4) performance of an abortion. [FN22] The wrongful pregnancy or conception claim is distinguishable from a wrongful birth claim because the pregnancy and delivery are the wrong, not the child. [FN23] Subsequently, the damages are easily assessed because the costs of the birth and care of the parent afterwards are roughly proportional to the harm done. [FN24] Further, the claimed wrong is directly traceable to the health care provider's conduct, satisfying the "but for" and legal causation requirements of tort law.

***1265** B. Wrongful Life

In a wrongful life cause of action, the child, through his parents, brings an action against the physician, claiming that "but for the negligence of the defendants, he would not have been born to suffer with an impaired body." [FN25] Usually the child has severe disabilities and the child asserts that but for the physician's negligence he would not have been born at all. [FN26] Most courts do not allow this cause of action because of the legal problems inherent in deciding that the existence of a person is a legal wrong. [FN27] The Gleitman court found that a compensatory damage analysis required the court to ponder the imponderable by measuring the "difference between . . . life with defects against the utter void of nonexistence." [FN28] The

court stated, "By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages." [FN29]

C. Wrongful Birth

Wrongful birth describes a medical malpractice [FN30] claim brought by the parents of a "wanted" child born with impairments or birth ***1266** defects. [FN31] The parents alleged that they were tortiously injured because they were denied the "option of making a meaningful decision as to whether to abort the fetus." [FN32] The tort gained popularity after the Supreme Court decided Roe v. Wade. [FN33] Many courts find that Roe provides the causation element lacking in previous wrongful birth causes of action. [FN34]

Some courts do not recognize a "new" cause of action because the wrong can be analyzed under current malpractice models. [FN35] Yet, close inspections of those opinions reveal language strongly suggesting that the policy support is derived from the judiciary's interpretation of the Roe decision. [FN36] The opinions invariably rely on the right of a woman to have an abortion, and the ability of science to predict a "defect" in order to place the wrong with the physician for a defect that was "not caused by negligent action or nonaction on the part of the defendant-doctor." [FN37] In the following sections it will become apparent that the application of the traditional negligence analysis to wrongful birth facts can only go so far before it "leaves all tradition behind or begins to break down. In order to allow recovery such courts must then take a step into entirely untraditional analysis by holding that the existence of a human life can constitute an injury cognizable at law." [FN38]

***1267** III. Background

A. Gleitman v. Cosgrove--The Principal Case

Gleitman v. Cosgrove was the groundbreaking case that considered the wrongful birth tort. [FN39] In April of 1959, Sandra Gleitman consulted her obstetrician Dr. Cosgrove and was found to be two months pregnant. [FN40] Mrs. Gleitman told her doctor that she had been diagnosed with German measles in March of that year. [FN41] Dr. Cosgrove told her that German measles would have no effect on her pregnancy. [FN42] On November 25, 1959 Jeffery Gleitman was born. [FN43] Initially, the boy seemed normal; however, a few weeks later Jeffrey's pediatrician found that Jeffery suffered from severe disabilities resulting from his mother's exposure to German measles. [FN44] The Gleitmans subsequently sued Dr. Cosgrove for malpractice. [FN45] Their theory for the suit was that the defendant "negligently failed to inform" Mrs. Gleitman of the effects that German measles might have upon the infant, and had the mother been so informed she "might have" sought an abortion. [FN46] Plaintiffs concede that at no time was Mrs. Gleitman's life or health in jeopardy, and the defendants could not have ordered any curative treatment for the boy's possible defects. [FN47]

The court dismissed the child's cause of action for wrongful life, despite the right of an infant to sue, [FN48] because there were no damages ***1268** cognizable at law. [FN49] The child, to have a cause of action, was "required to say not that he should have been born without defects but that he should not have been born at all." [FN50] The normal compensatory damage analysis in tort would require the court to weigh the value of life with impairments against non-existence, something the court found logically impossible to do. [FN51]

The parents, however, were in a different position because they claimed that an abortion would have relieved Mrs. Gleitman of the emotional problems caused by raising a child with disabilities. [FN52] Further, Mr. Gleitman could assert that it would be less expensive to abort the child than to raise the child. [FN53] The court found that "[i]n order to determine [the Gleitman's] compensatory damages [it] would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries." [FN54] The court stated, "When parents say their child should not have been born, they make it impossible for a court to measure their damages in being the mother and father of a defective child." [FN55]

The Gleitman court announced that "[t]he right to life is inalienable in our society," and based on that public policy the court was prevented from allowing damages for the denial of the opportunity to take an embryonic life. [FN56]

B. Roe v. Wade [FN57]--A Paradigm Shift

The Roe decision created a renewed interest in the wrongful birth tort. Most jurisdictions that recognize the wrongful birth claim base the physician's duty on the "constitutionally secured right to terminate a pregnancy." [FN58] They reason that the Supreme Court created the right ***1269** to prevent the birth of a defective child; therefore, health care providers have a duty correlative to that right. [FN59] This duty requires health care providers to provide parents with information material to the decision of whether to avoid the conception or birth of future defective children. [FN60]

The alleged right violated in a wrongful birth cause of action is the right, given in Roe, to choose an abortion. [FN61] But one must critically examine exactly what the Supreme Court gave women wishing to exercise their procreative choice. Specifically, what right did the Court give?

Wesley Hohfeld states that one of the greatest hindrances to the solution of legal problems is from the erroneous assumption that all legal relationships may be reduced to "rights" and "duties," and that these categories are adequate to analyze even the most complex legal issue. [FN62] For example, it is very common to use the term "right" indiscriminately, even though the legal relationship may be a privilege, immunity, or power. [FN63] Indiscriminate use of these terms leads to confusion and blurred ideas. [FN64] To eliminate the potential for such indiscriminate use, a clarification of such terms through examining their correlatives (and opposites) is useful. [FN65] By exhibiting all the various legal relationships in a scheme of correlatives, one may exemplify their individual scope and application in concrete cases. [FN66] ***1270** Rights, privileges, powers, and immunities constitute general classifications of generic legal rights. [FN67] The four correlative terms or legal reciprocals are right/duty, privilege/no-right, power/liability, and immunity/disability. [FN68] These eight related terms classify the legal burdens that correspond to the legal benefits in all legal conflicts. [FN69] Hohfeld characterized the right in the first reciprocal (right/duty) as an "affirmative claim" against another, like the right to bring a lawsuit. [FN70] The affirmative claim creates a correlative duty in the other party. [FN71] The right in the privilege/no-right reciprocal is the freedom from the right or claim of another; its correlative is "no-right." [FN72] The third category of right is the power/liability reciprocal. [FN73] A power is a situation where another's legal relations will be altered if the power is exercised, creating a correlative of liability. [FN74] Finally, the fourth category of right is the immunity/no-duty reciprocal, which is the freedom from legal liability or an exemption, creating a correlative of no-duty. [FN75]

In James Bopp's work, The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts, Hohfeld's framework is used to analyze the Roe decision to determine what right Roe created. [FN76] Under the facts of Roe, the right is one of freedom from state interference in areas designated as private. [FN77]
***1271** This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. [FN78]

Bopp reasoned that "Roe did not recognize a right to abort in the sense of an affirmative claim for abortion services with a correlative duty on the part of [the] health care providers to provide those services." [FN79] Further, Roe did not "create a right to abort in the sense of a legal power, with corresponding legal liability," [FN80] requiring the health care providers to facilitate an abortion [FN81] or requiring the state to fund abortions. [FN82]

Roe v. Wade may have created a right in the sense of a privilege in that if a statute requires that the mother give birth, then she is excused from that duty. [FN83] More likely, Roe created an immunity. [FN84] The state has the legal ability to prosecute mothers that seek out an abortion--a power in Hohfeld terms. [FN85] Roe creates a freedom from the legal power while the fetus is non-viable--an immunity. [FN86] Bopp posited that it is very difficult to see where Roe, based on its facts, creates an affirmative duty for the physician. [FN87] Accordingly, a logical reading of Roe characterizes the right given by the Supreme Court as an immunity from prosecution should a mother exercise her choice ***1272** not to carry a pregnancy to term. [FN88]

Unfortunately, after Roe, courts began finding that a physician's interference with the parent's right to abort created a claim for damages, [FN89] thereby re-characterizing the right in Roe from a privilege or immunity into a right with correlative affirmative duties. [FN90] This re- characterization is a corruption of Hohfeld's principles. Assuming arguendo that Roe did create a right with an affirmative correlative duty. To whom does that duty accrue? The Roe Court settled a conflict between a citizen and the State because the State is the only entity with the power to interfere with the citizen's right. Therefore, the correlative duty created in Roe would naturally flow to the State. The courts relying on Roe to provide a foundation for the

duty element of this tort wrongfully extends the correlative duty from the state to a private citizen (with no power to interfere with another citizen's rights). This is an erroneous interpretation of the Court's opinion that dangerously broadens the right to include a physician's duty to warn parents about a fetus's genetic characteristics. [FN91] The only thing given in Roe is the freedom to choose termination, not an affirmative claim for a less than "perfect" child. [FN92]

IV. Legal and Policy Problems with the Wrongful Birth Tort

A. Legal Analysis

The wrongful birth cause of action is based on tort theory. In the Roe analysis the problem with assigning a duty to the physician in a wrongful birth claim was discussed. The next section examines the problems with causation and damage calculation in a wrongful birth claim. The following section analyzes the legal problems with the claim while examining the traditional tort analysis in a typical wrongful birth claim.

1. But For Causation

Courts that recognize wrongful birth claims reason that since the injury is the birth of a child, the claim "is the 'inevitable consequence ***1273** of recognizing the parents' right to avoid the birth of a defective child.'" [FN93] Because the parents allege that but for the doctor's negligence they would have aborted the child, the proximate cause element does not present an obstacle for these courts. [FN94]

Courts give a relatively cursory causation analysis by assuming the defective birth is a consequence of the physician's action and therefore the physician should be liable. [FN95] However, a more circumspect analysis is required. In tort law, the cause-in-fact element requires a direct causal relationship between the defendant's wrongful conduct and the plaintiff's injury: [FN96] not only must there be cause-in-fact, but there also must be legal cause. [FN97]

Professor David Robertson proposes in The Common Sense of Cause in Fact that "[t]he cause-in-fact issue is always tightly confined to whether there is the requisite connection between this victim's particular injuries and this defendant's particular conduct." [FN98] Robertson suggests that framing and answering the but for issue in a case is a complex "mental operation" that can be broken down into a five-step process. [FN99] The first step is to clearly identify the injury for which redress is sought. [FN100] Second, the wrongful conduct must be identified. [FN101] Third, one must create a "counterfactual hypothesis" in which the defendant's conduct is "corrected" only minimally to conform to the law. [FN102] The fourth step asks the question if the conduct had been corrected (to the minimum extent and nothing else changed) ***1274** would the injury have resulted. [FN103] The fifth step is to answer the question. [FN104]

In applying this analysis to the facts of the typical wrongful birth claim, one can easily see that the physician is not the but for cause of the injury. First, what is the injury claimed? In most cases the injury correlates to the damages collected; therefore, the claimed injury is not the child but the defect. However, the parents claim the injury is the missed opportunity to decide about termination. Therefore, the injury is the birth of the child or the parents' missed opportunity to abort. There are only two possible outcomes for this set of facts; the existence of a child (albeit defective), or the non- existence of the child and these are the only forms of injury possible.

Next, the wrongful conduct must be identified. Here, the wrongful conduct is the physician's intentional or negligent withholding of information about the embryo. Now a counter hypothetical must be constructed where the wrongful conduct is corrected to the minimum required by law and no other parties' conduct is changed. In this case the physician would have to tell the parents there was a chance that there would be some form of defect affecting the embryo. If the physician tells the parents about the possibility of the defect and no one else's conduct is changed, the injury still occurs. The child is still born with the defect. Further, if the parents' conduct is unchanged then the opportunity is still missed. Therefore, the physician is not the but for cause of the injury because the injury (the parents' missed opportunity to decide about termination or birth of the defective child) and the wrong (the physician's failure to inform the parents' of possible injury) are not directly related.

If the claimed injury was wrongful death because the physician had negligently dropped the baby at birth, then the counter hypothetical would change the defendant's conduct to not dropping the baby. In this fact pattern, if the wrongful conduct is remedied even to a minimum, the injury does not occur. Therefore, the physician's conduct is the but for cause of the injury.

But for causation requires a direct link between the wrongdoers conduct and the injury complained of by the plaintiff. [FN105] In a wrongful birth claim, such a direct nexus does not exist.

***1275** 2. Alternative Approaches to Cause in Fact/The Missed Opportunity

A plaintiff is normally required to show by a preponderance of the evidence that the injuries would not have occurred but for the negligent act or omission of the defendant. [FN106] Robertson states "all jurisdictions occasionally relax the normal requirement in order to serve the perceived ends of justice." [FN107] In medical malpractice, the relaxed requirement comes in the form of the loss of chance causation first defined in Hamil v. Bashline. [FN108] Under this theory of recovery a plaintiff has the burden of showing that the defendant's conduct deprived the plaintiff of at least a 51% chance of achieving a better result. [FN109] Professor Robertson propounds that this theory of recovery "can arise [in] any type of adverse medical result but is most easily described in the context of fatal illness." [FN110] In applying the missed opportunity claim in a wrongful birth tort, parents must show by a preponderance of the evidence that the physician's failure to advise them of the defect deprived them of a 51% chance or more of achieving a better result. [FN111] In this case, no child is better than a child with defects. Once again the courts will be left trying to put a value on life. Is the death of a child a better result than life with the possibility of disabilities? How disabled must the child be to be better off dead? It is clear from the refusal of the majority of jurisdictions to make these value judgments in wrongful life claims [FN112] that it should not be done in the missed opportunity setting because it requires the same analysis.

***1276** 3. Legal Causation

For want of a nail the shoe was lost
For want of a shoe the horse was lost
For want of a horse the rider was lost
For want of a rider the battle was lost
For want of a battle the kingdom was lost
All for want of a horseshoe-nail [FN113]

"Proximate cause is a doctrine that enables courts and juries to limit the liability of the defendant when certain circumstances exist that make imposition of liability seem unfair." [FN114] The liability limiting function of proximate cause bears a striking resemblance to duty and while the issues of duty, policy, foreseeability, and substantial factor percolate in the complicated analysis, many courts continue to use proximate cause to define the scope of liability. [FN115] In order for the actor to be liable, not only must the actor's conduct be negligent, the negligence must also be the legal cause of the injury. [FN116] Thus, there must be a direct link between the actor's negligent conduct and the plaintiff's injury. Section 431 of the Restatement says that "[t]he actor's negligent conduct is a legal cause of harm to another if . . . his conduct is a substantial factor in bringing about the harm." [FN117] In the wrongful birth cases, the injury claimed is the birth of a "defective" child. [FN118] While the courts insist that the wrong was denying the parents the opportunity to make a procreative decision, [FN119] the damages claimed are the cost of the defective child, [FN120] therefore the logical conclusion is that the real injury is the birth of the defective child.

The injury and the negligent conduct simply do not have a direct connection. In other words, the injury and negligent conduct are too remote to support liability. [FN121] For the parents to claim legal cause they ***1277** would have to show that if the doctor had advised them of the potential for a defect, the mother would have consented to the tests, [FN122] the tests would have revealed the defect, the parents would have decided to have an abortion, the abortion would have been successful, and thus the child would not have been forced to lead a life of hardship. [FN123] This retrospective analysis of very difficult decisions is stretched to the breaking point for the courts to find that the defect was the cause (proximate cause) of the child's handicapped life. [FN124] The cause is even more remote when plaintiffs seek to recover for an injury they suffered as a result of an alleged injury to a third party (the child). [FN125]

4. Damages and the Hobson's Choice

The final and most divisive issue to be considered by the courts recognizing a wrongful birth cause of action is that of injury and remedy. Defendants argue that the birth of a child is never an injury. [FN126] "An attempt to fit compensation for the birth of a [defective] child into the traditional framework of tort damages is at best precarious." [FN127] A plaintiff's tort

remedy is compensatory in nature and damages are generally not to punish the defendant but to restore the plaintiff to the position he would have been in had the wrong not occurred. [FN128] Thus, in a wrongful birth case the court is required to measure the value of the infant's injury or life--a job best left to the ***1278** legislature. [FN129]

However, if a court recognizes the wrongful birth claim, it usually finds the wrong "lies not in the life, the birth, [or] the conception . . . but in the negligence of the physician." [FN130] The harm is not the birth but the effects of the defendant's negligence on the parents, resulting from the denial to the parents of the right to decide whether to bear a child with genetic defects. [FN131]

The premise of this damage analysis is that had the mother been told of the defect, she would have terminated the child and subsequently obtained another "normal" child either by adoption or natural birth. Once the court accepts this premise, then a comparison between the defective child and the normal child to calculate damages is easily done. The problem with the logic is that none of the jurisdictions require mitigation of damages. [FN132] Therefore, the parents claim of comparison is flawed, because they had an alternative to accepting the child--adoption.

The parent compares the defective child to the normal child that would be in existence if not for the physician's negligence. However, since the parents do not have to mitigate, what the courts are really comparing is this child with defects to this child without defects. An attempt to make the physician liable for the value of the defect separated from the value of the child. This splitting of the defect from the child is uncertain at best and a slender reed on which to base a damage calculation.

Further, in order to determine the parents' damages "a court would have to evaluate the denial to them of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries." [FN133] The Gleitman court found such a weighing impossible. [FN134]

***1279** Once a court accepts this false premise underlying a wrongful birth claim, it must decide how to compensate the parents. No general scheme of compensation exists. In New Jersey, the courts have changed the rules of recovery three times. [FN135] The majority of courts recognizing this claim either under a "new" cause of action [FN136] or under regular tort analysis [FN137] usually allow for recovery of damages measured by the "extraordinary cost" of supporting the child with severe birth defects as compared to supporting a child that is not so afflicted. [FN138] This means that no general damages are allowed, because the parents intended to have a child and awarding the ordinary costs of raising a ***1280** child would be a windfall to the parents. [FN139] Only one court has allowed all expenses incident to the care of the child, without discounting for expenses of child rearing not due to the defect. [FN140]

The next issue is how to calculate the extent of recovery. Some courts find that parents have a common law obligation to support a child beyond minority when the child is disabled and unable to support himself and therefore allow damages to be measured at life or life expectancy. [FN141] Some courts find that "parent[s] [are] no longer required by law to provide support for an adult incompetent"; therefore, recovery may be for the "period of time of the child's life expectancy or until the child reaches the age of majority, whichever is the shorter period." [FN142]

If a court allows damages for extraordinary costs, it must decide whether the parents may recover damages for emotional distress. Some courts adopt broad guidelines "allowing recovery of intangible damages for alleged emotional injuries, often on grounds that fundamental justice requires this result." [FN143] Other courts limit recoveries of emotional distress damages by using some form of the "impact doctrine" or by policy decisions to limit the scope of negligence liability. [FN144] One court found that the impact doctrine was ***1281** not intended to apply to wrongful birth claims because the emotional damages are an additional consequence of the conduct that itself is a freestanding tort. [FN145] Most courts that recognize a claim for damages for emotional distress "offset [damages] by whatever emotional benefits [the parents] may derive from the existence of their child." [FN146]

Damages are the most difficult issue for courts that allow the wrongful birth cause of action because the underlying premise of harm is faulty. These courts must accept as true that the plaintiff would have aborted her child and then would have "replaced" the child with a non-defective one. This is the only justification that can reconcile how the courts determine the amount of damages as the difference between the defective child and a normal child. The court must assume that somehow the parent could have gotten a normal child. However, this assumption is flawed because the only outcomes possible are, the

birth of a defective child or no child at all. Therefore, if the parents' claim is based on the birth of the child, then they suffered no harm (considering that they wanted a child).

B. Policy Considerations

1. Public Policy Behind the Wrongful Birth Claim--After Roe

Where recognized, the wrongful birth claim hinges on the public policies that courts have to extrapolate from the Supreme Court's decision in Roe v. Wade. [FN147] Roe imbues on women a constitutional right to privacy in certain procreative decisions. [FN148] The judiciary has twisted that decision into a mechanism that ferrets out "defectives" for the good of the parents and the community. [FN149] This judicially ***1282** created policy cannot stand, because it cannot be reconciled with recent legislative policy making it a crime to discriminate against the disabled--the Americans with Disabilities Act of 1990. [FN150]

The public policy support for wrongful birth causes of action, before the ADA, comes from modern science [FN151] and one single judicial decision about privacy. [FN152] The judiciary created this policy because medical science can predict and detect birth defects before a fetus is viable. [FN153] Therefore, imposing liability on physicians for not eradicating the defect "vindicates the societal interest in reducing the incidence of genetic defects." [FN154] Courts that recognize the wrongful birth cause of action read Roe as giving women a constitutional right to an abortion before viability. [FN155] This right is founded in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. [FN156] The right to privacy has never been rigidly defined, [FN157] thus courts allowing the wrongful birth cause of action must stretch the right to include as protected all genetic information relevant to the decision to terminate the pregnancy. [FN158] Second, some courts fear that not allowing a wrongful birth claim would "immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses." [FN159]

The argument is that placing liability on physicians for the ever increasing and barely understood scientific advancements will somehow promote better prenatal care and ensure that doctors exercise due care in prenatal counseling. [FN160] This specious argument disregards the doctor's well- recognized professional duty imposed by the standards of medical practice and the code of medical ethics. [FN161] Further, because of the rapidly increasing scientific body of ***1283** knowledge, placing the burden of understanding each genetic breakthrough on the physician may push the medical profession into practicing safe medicine. By recommending termination, the odds are in the physician's favor that a poor genetic outcome will not occur, and because there are no studies on the aborted fetuses for actual defects, science may never know if the genetic predictions are accurate. This policy pushed to its natural conclusion will lead to a culture of genetic portfolios of embryos where only perfect babies get selected for delivery. But what is perfect; and conversely what is defective?

2. Policy Arguments After the Americans with Disabilities Act

This section discusses the conflict between the policy enunciated in the ADA which embraces life even with disabilities [FN162] and the policies judicially created which seek to root out disabled people. [FN163] The public policy prior to Roe, clearly espoused in Gleitman, is that society respects the sanctity of human life. [FN164] The Gleitman court states that "[t]he right to life is inalienable in our society." [FN165] "One of the most deeply held beliefs of our society is that life--whether experienced with or without a major physical handicap--is more precious than non-life." [FN166] The Constitution is replete with language indicating the Framers' respect for human life where life is characterized as one of the three fundamental rights of which no man may be deprived. [FN167] The Declaration of Independence states that man's right to life is an unalienable and a self- evident truth. [FN168] These documents do not discriminate in imbuing these rights only to those without defects. The policy in preserving the sanctity of life is reflected in state legislatures by the severe penalties for murder, which can range from life in prison to death. [FN169]

Congress speaks through its legislation; and the policies derived from the ADA indicate that society still respects a human life, even if defective. Congress found there were approximately forty-three ***1284** million disabled persons in the United States and that number was likely to increase as the population ages. [FN170] Congress also found that individuals with disabilities faced persistent discrimination in several areas of life, including health care. [FN171] The nations' proper goals regarding the disabled are to assure equal opportunity, full participation, independent living, and economic self-sufficiency.

[FN172] The purpose of the ADA is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." [FN173] The policy that can be inferred from the ADA is that Americans with disabilities should be integrated and accepted into society, thereby reaffirming the value of their existence. How can society, on the one hand, offer the open arms of acceptance and, on the other hand, encourage the eradication of the disabled? Now that the legislature is embracing the disabled, how can any court decide what defects should prevent an embryo from being allowed life so that denial of the opportunity to terminate the existence of a defective embryonic child can support a cause of action? [FN174]

3. Eugenics: the Anathema of Legal Jurisprudence

The most frightening policy reason espoused by the courts for recognizing the wrongful birth cause of action is that it "vindicates societal interest in reducing the incidence of birth defects." [FN175] This familiar argument dates back to the early twentieth century when Justice Holmes pronounced, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." [FN176] If one accepts the ***1285** policy that the birth of defective children should be prevented for the benefit of the parents and society as a whole, then one believes in the operating principles of eugenics. [FN177]

Our society has a history of flirting with the idea of eugenics. "During the early 1900s, social reformers advocated eugenic sterilization as a solution to such problems as mental retardation." [FN178] After the Buck decision, thirty states enacted statutes authorizing compulsory sterilization. [FN179] Eugenic sterilization theories have largely been discarded and many states have repealed their statutes after the Supreme Court's decision in Skinner v. Oklahoma. [FN180] Ironically, it can now be argued that science is allowing a more acceptable, "non-coercive version of eugenics practised [sic] by caring parents as opposed to a racist state." [FN181]

Considering that Buck v. Bell has never been overruled, society certainly could decide that the idea of genetic testing to discover and discard genetic defectives is a good one. Assuming the majority of society decides it wants genetic testing, it is faced with some grueling decisions. For example, who will pay for the expensive and novel genetic testing? If testing is not covered by insurance, then only the wealthy will have access to testing, which creates the potential for a genetic caste society. This society will burden the poor and the taxpayers that are forced to support the indigent parents' disabled child. This may create a reason to make genetic testing, and subsequent abortion, mandatory by the government based on reducing governmental expenses and preventing defective births.

On the other hand, if insurance companies are forced to cover genetic testing, what happens if a parent refuses testing? Can the companies or the state make it mandatory? If a parent gets the testing and is found to be carrying a retarded child and refuses to abort, can the insurance company deny coverage of the child's condition as a pre-existing condition? These vexing questions, and more, follow in the wake of non-regulated genetic testing, regardless of the physician's liability.

***1286** V. Conclusion

The judiciary should not make a physician responsible for genetic abnormalities that occur in a child without clear legislative policy. The tort analysis that must be done by the courts is specious and distorts the law beyond recognition. It bears repeating that the parents in these causes of action allege that the defendants negligently caused or permitted an already conceived and defective fetus not to be aborted. The plaintiffs do not allege that the doctor in any way caused the defect. Therefore, the injury is the birth of a child. It is clear that there is no but for causation because the plaintiffs must concede that the physician did not cause the defect of which they complain. The legal causation is too remote to support a viable cause of action. All of these ideas were clearly cited in the Gleitman decision. [FN182]

The decision the courts rely on as the bedrock of their opinions, Roe v. Wade, has subsequently been used to supply everything from duty to damages and is not applicable in the wrongful birth fact pattern. After a critical examination of the right actually given in Roe --the right to be free from criminal prosecution--one can easily see that there is no correspondent duty created. There simply is no legal theory to support a parent's cause of action for the birth of a planned but defective child. Many courts operate on the "because we can we should" principle; however, where the crux of the issue is-- the value of a life--a more circumspect and specific law should prevail. The fact that a child is born is not a legal wrong. [FN183]

Further, Congress has established public policy that clearly conflicts with the policy espoused by the judiciary. The ADA has the clear purpose of removing barriers from the disabled. How can courts continue to give parents the right to discriminate against the disabled when the people, through Congress, have found that practice repugnant? Because judicial opinions are the thoughts of a few and legislation is the thoughts of many, on particularly decisive issues like the meaning of defect and the sanctity of life, the judiciary should remain silent until the people speak through their elected officials. The judiciary should hold that absent a clear mandate from the legislature, claims for wrongful birth of defective children should not be recognized.

When the human genome is more completely analyzed, a parent may be able to get a catalog of genetic characteristics while the ***1287** embryo is non-viable. The parents could pick and choose which embryo will live and which will not live based on that list of potential characteristics. A parent could terminate a child because it has the potential to be afflicted with Huntington's, Parkinson's, or many other predictable adult diseases. Currently, the medical profession frowns on using amniocentesis for eugenic selection. [FN184] But with the rapid advance of genetic characteristic (or defects) detection, should this be the basis of an abortion? As a society, we must decide if we will go down the path of eugenic selection, encumbered as it is with all of its inherent prejudice, or allow nature to take its course. This decision can be made only by the legislature through public policy and not through the judiciary in a patchwork of case law.

[FN1]. Human Genome Project Information: Human Genome Project Progress, at http://www.ornl.gov/hgmis/projects/progress.html (last modified Feb. 13, 2002).

[FN2]. Human Genome Project Information: Medicine and the New Genetics, at http://www.ornl.gov/hgmmis/medicine.html (last modified June 14, 2001).

[FN3]. Id.

[FN4]. Id.

[FN5]. Currently tests are available to determine the probability a fetus has a genetic defect without the information from the Human Genome Project. See Medicine and the New Genetics: Gene Testing, at http:// www.ornl.gov/hgmis/medicine/genetest.html (last updated February 18, 2002). For example, doctors routinely offer screening for genetically based diseases such as Down's Syndrome and open neural tube defects; even hospital facilities offer cytogeneic-screening services that can detect other genetically based diseases. See Medical Genetics, Testing for Birth Defects, at http:// www.musckids.com/health_library/genetics/testing.htm (last visited July 31, 2002). However, it is expected that the complete human DNA sequence will enable scientists to craft new tests as well as better and more accurate tests. Human Genome Project Information: Medicine and the New Genetics, at http:// www.ornl.gov/hgmmis/medicine.html (last modified June 14, 2001).

[FN6]. Current Medical Diagnosis & Treatment 1588-89 (Lawrence M. Tierney, Jr. et al. eds., 39th ed. McGraw-Hill 2000) (stating "some couples only want to know the sex of the fetus and plan to terminate the pregnancy if the undesired sex is detected. Virtually no centers in the United States consider sex selection to be an appropriate indication for prenatal diagnosis."). Gender selection is offered as a service to potential parents, not in the form of prenatal diagnosis, but as a means to prevent X chromosome linked diseases and family balancing. MicroSort® Sperm Separation, at http://www.microsort.net/ (last visited August 17, 2002).

[FN7]. See supra note 5.

[FN8]. The term defective is not meant in a pejorative sense; the term is taken from the language used by courts.

[FN9]. Jacobs v. Theimer, 519 S.W.2d 846, 847, 850 (Tex. 1975) (finding that the parents have a cause of action in wrongful birth).

[FN10]. See, e.g., Keel v. Banach, 624 So. 2d 1022 (Ala. 1993); Univ. of Ariz. Health Scis. Ctr. v. Superior Court, 667 P.2d 1294 (Ariz. 1983); Turpin v. Sortini, 643 P.2d 954 (Cal. 1982); Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988); Haymon v. Wilkerson, 535 A.2d 880 (D.C. 1987); Garrison v. Med. Ctr. of Del., Inc., 581 A.2d 288 (Del. 1989); Kush v. Lloyd, 616

So. 2d 415 (Fla. 1992); Goldberg v. Ruskin, 471 N.E.2d 530 (Ill. App. Ct. 1984); Arche v. United States Dep't of the Army, 798 P.2d 477 (Kan. 1990); Reed v. Campagnolo, 630 A.2d 1145 (Md. 1993); Viccaro v. Milunsky, 551 N.E.2d 8 (Mass. 1990); Greco v. United States, 893 P.2d 345 (Nev. 1995); Smith v. Cote, 513 A.2d 341 (N.H. 1986); Schroeder v. Perkel, 432 A.2d 834 (N.J. 1981); Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978); Flanagan v. Williams, 623 N.E.2d 185 (Ohio Ct. App. 1993); Owens v. Foote, 773 S.W.2d 911 (Tenn. 1989); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Naccash v. Burger, 290 S.E.2d 825 (Va. 1982); Harbeson v. Parke- Davis, Inc., 656 P.2d 483 (Wash. 1983); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975).

[FN11]. Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557 (Ga. 1990); Taylor v. Kurapati, 600 N.W.2d 670 (Mich. Ct. App. 1999); Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985); Taylor v. Kurapati, 600 N.W.2d 670 (Mich. Ct. App. 1999).

[FN12]. Idaho Code § 5-334 (Michie 1998); Mich. Comp. Laws Ann. § 600.2971 (West 2001); Minn. Stat. § 145.424 (West 1998); Mo. Ann. Stat. § 188.130 (West 1996); 42 Pa. Cons. Stat. Ann. § 8305 (West 1998); S.D. Codified Laws § 21-55-2 (Michie 1987); Utah Code Ann. § 78-11-24 (1996); cf. Me. Rev. Stat. Ann. tit. 24, § 2931(3) (West 2000) (allowing a cause of action for wrongful birth but limiting the damages).

[FN13]. 42 U.S.C. § 12101 (Supp. II 1989-1991) (stating that persons with disabilities are discrete and insular minorities, historically and unfairly treated unequally due to stereotypical assumptions that do not reflect the ability of a disabled person to contribute to society).

[FN14]. 410 U.S. 113 (1973).

[FN15]. Taylor v. Kurapati, 600 N.W.2d 670, 674 (Mich. Ct. App. 1999).

[FN16]. Id.

[FN17]. James Bopp, Jr. et al., The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts, 27 Duq. L. Rev. 461, 466 (1989).

[FN18]. Arche v. United States Dep't of the Army, 798 P.2d 477, 478 (Kan. 1990) (citing Bruggeman v. Schimke, 718 P.2d 635 (Kan. 1986)).

[FN19]. Jones v. Malinowski, 473 A.2d 429 (Md. 1984) (finding a cause of action in negligence for a negligently performed tubal ligation).

[FN20]. Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971) (finding a wrongful conception cause of action because a pharmacist negligently filled plaintiff's birth control prescription with tranquilizers resulting in the birth of a healthy, but unplanned, child).

[FN21]. Rinard v. Biczak, 441 N.W.2d 441 (Mich. Ct. App. 1989) (recognizing a cause of action for failure to diagnose pregnancy, thereby denying the patient's right to terminate).

[FN22]. Miller v. Johnson, 343 S.E.2d 301 (Va. 1986) (finding a physician negligently performed a termination that resulted in a healthy, but unwanted, child).

[FN23]. Bopp, supra note 17, at 514.

[FN24]. See id. at 465.

[FN25]. Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967). In a wrongful life claim, the child usually has severe disabilities and the child asserts that but for the physician's negligence she would not have been born at all. Berman v. Allan, 404 A.2d 8, 11 (N.J. 1979); see also Gleitman, 227 A.2d at 691-92; Bopp, supra note 17, at 462.

[FN26]. Berman v. Allan, 404 A.2d 8, 11 (N.J. 1979); see also Gleitman, 227 A.2d at 691-92; Bopp, supra note 17, at 462.

[FN27]. Berman, 404 A.2d at 11; Gleitman, 227 A.2d at 692.

[FN28]. Gleitman, 227 A.2d at 692.

[FN29]. Id.

[FN30]. The courts that considered wrongful birth tort cases have seldom mentioned the doctrine of informed consent; only two opinions mention it: Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 490-91 (Wash. 1983); and Reed v. Campagnolo, 630 A.2d 1145, 1152-53 (Md. 1993). The Harbeson court used the doctrine to bolster its finding that the court should place "a duty correlative to [the] parents' right to prevent the birth of defective children." Harbeson, 656 A.2d at 491. The Reed court dismissed the use of the doctrine because it found a cause of action based on the informed consent doctrine "'exists only where the injury suffered arises from an affirmative violation of the patient's physical integrity and, where nondisclosure of risks is concerned, these risks are directly related to such affirmative treatment.'" Reed, 630 A.2d at 1153 (quoting Karlsons v. Guerinot, 57 A.D.2d 73, 82 (N.Y. App. Div. 1977)). In Canterbury v. Spence, the court changed the physician's duty to disclose to extend to what the "reasonable person" would want to know about the proposed therapy. Canterbury, 464 F.2d 772, 787 (D.C. Cir. 1972). In the same opinion, the causation standard used is greatly narrowed. Id. at 790-91. Liability does not attach unless a "prudent person" in the plaintiff's position, given the requisite information, would have decided against undergoing the therapy actually undertaken. Id. Under this doctrine, the plaintiff would need to show that the prudent person would have decided to abort the child. This may be the reason why the informed consent doctrine is not used in these cases as a basis for tort liability.

[FN31]. Lininger v. Eisenbaum, 764 P.2d 1202, 1204 (Colo. 1988).

[FN32]. Berman v. Allan, 404 A.2d 8, 13 (N.J. 1979) (citing Gleitman v. Cosgrove, 227 A.2d 689, 707-12 (N.J. 1979) (Weintraub, C.J., dissenting in part)); see also Note, Wrongful Birth Actions: The Case Against Legislative Curtailment, 100 Harv. L. Rev. 2017, 2017 (1987) [hereinafter Wrongful Birth Actions].

[FN33]. See generally Wrongful Birth Actions, supra note 32, at 2017-19 (summarizing the judicial decisions after Roe).

[FN34]. "A physician whose negligence has deprived a woman of the opportunity to make an informed decision whether her fetus should be aborted should be required to compensate her for the damage he has proximately caused." Blake v. Cruz, 698 P.2d 315, 318-19 (Idaho 1984). The court mentions two concerns. First, that by not holding the physician liable the effect would be to immunize physicians from malpractice claims. Id. (citing Berman, 404 A.2d at 14). Second, because "society has a vested interest in reducing and preventing birth defects," wrongdoers should "redress the natural and probable consequences of every substantial breach of the applicable duty of care." Id. at 319.

[FN35]. Greco v. United States, 893 P.2d 345, 348 (Nev. 1995) (finding that there is "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 giving it the new name of 'wrongful birth.'").

[FN36]. Id. at 349 ("Those who do not wish to undertake the many burdens associated with the birth and continued care of [a severely deformed] child have the legal right, under Roe v. Wade... to terminate their pregnancies.").

[FN37]. Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 376 (Wis. 1975).

[FN38]. Azzolino v. Dingfelder, 337 S.E.2d 528, 533-34 (N.C. 1985).

[FN39]. 227 A.2d 689, 692 (N.J. 1967). It is of some interest to note that the wrongful birth claim has been used by illegitimate children in some jurisdictions to collect damages from putative fathers for "mental pain and anguish and...public humiliation and embarrassment." Slawek v. Stroh, 215 N.W.2d 9, 21 (Wis. 1974). Most courts find this use of the cause of action untenable because of the public policy favoring existence over non-existence and never allowing the birth of a child to be the basis of damages. Id. at 21-22 (citing Zepeda v. Zepeda, 190 N.E.2d 849, 858-59 (Ill. App. Ct. 1963)).

[FN40]. Gleitman, 227 A.2d at 690.

[FN41]. Id.

[FN42]. Id.

[FN43]. Id.

[FN44]. Id.

[FN45]. Id.at 689.

[FN46]. Id.at 691.

[FN47]. Id. at 691-92.

[FN48]. In an earlier decision, where a child was injured in utero due to a car accident, the court recognized the right of an infant to sue. Smith v. Brennan, 157 A.2d 497 (N.J. 1960). The court found that there was "no question that conception sets in motion biological processes which if [left] undisturbed will produce...a person." Id. at 503. As a result, children damaged while in gestation can have a cause of action if but for the action or omission what would otherwise be a normal healthy child was impaired. See id.

[FN49]. Gleitman, 227 A.2d at 692.

[FN50]. Id.

[FN51]. Id.

[FN52]. Id.at 693.

[FN53]. Id.

[FN54]. Id.

[FN55]. Id.

[FN56]. Id.

[FN57]. 410 U.S. 113 (1973).

[FN58]. Smith v. Cote, 513 A.2d 341, 344-45 (N.H. 1986) (citing Roe v. Wade, 410 U.S. 113 (1973)); accord Keel v. Banach, 624 So. 2d 1022, 1024 (Ala. 1993); Walker v. Mart, 790 P.2d 735, 737 (Ariz. 1990); Haymon v. Wilkerson, 535 A.2d 880, 882 (D.C. 1987); Blake v. Cruz, 698 P.2d 315, 318- 19 (Idaho 1984); Bader v. Johnson 675 N.E.2d 1119, 1124 (Ind. Ct. App. 1997); Arche v. United States Dep't of the Army, 798 P.2d 477, 480 (Kan. 1990); Eisbrenner v. Stanley, 308 N.W.2d 209, 212-13 (Mich. Ct. App. 1981); Greco v. United States, 893 P.2d 345, 349 (Nev. 1995); Schroeder v. Perkel, 432 A.2d 834, 840 (N.J. 1981); Berman v. Allan, 404 A.2d 8, 13 (N.J. 1979); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 491 (Wash. 1983); see also cases cited supra note 10 (jurisdictions that recognize wrongful birth claim).

[FN59]. Harbeson, 656 P.2d at 491.

[FN60]. Id.

[FN61]. See cases cited supra note 58.

[FN62]. Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning 35 (Walter Wheeler

Cook ed., 1919).

[FN63]. Id. at 36.

[FN64]. Id.at 40. Hohfeld states that fundamental legal relationships are sui generis and so attempts at formal definitions are always unsatisfactory and seldom useful. Id.at 36.

[FN65]. In Hohfeld's scheme, correlatives "merely describe the situation viewed first from the point of view of one person and then from that of the other." Walter Wheeler Cook, Introduction to Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning 3, 10 (Walter Wheeler Cook ed., 1919). The scheme of relationships articulated by Hohfeld are categorized as "opposites" and "correlatives" as follows:

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See id.

[FN66]. Hohfeld, supra note 62, at 36. Hohfeld finds that fundamental jural relationships contrast one another. Id. The distinction between different rights is critical and to differentiate one need only look to its correlative to determine its scope. Id.at 38. The schema of jural correlatives is as follows: a right has a correlative duty; a privilege has no correlative right; a power has a correlative liability; and an immunity has a correlative disability. Id. at 36.

[FN67]. Id. at 36.

[FN68]. Id.

[FN69]. Id. Hohfeld found that what is often deemed a right may be in reality any one of the four distinct legal relationships: a claim for damages, a privilege, a power, or an immunity. Id.

[FN70]. Id. at 60. Hohfeld's example is that if X has a right against Y that Y shall stay off his land, then Y has a correlative duty to X to stay off his land. Id. at 38.

[FN71]. Id. at 60.

[FN72]. Id. at 39. Hohfeld finds it critical to distinguish between a right and a privilege; therefore, one must look to the correlatives--a right gives rise to a duty; where a privilege gives no right. Id.

[FN73]. Id. at 50-51. An example of a power or a legal ability is when a landowner has the right of alienability or the legal power to transfer his land. Id.

[FN74]. Id. at 7.

[FN75]. Id. at 60-62.

[FN76]. Bopp, supra note 17, at 470.

[FN77]. Roe v. Wade, 410 U.S. 113, 153, 159 (1973). The Roe Court found that the state's criminal laws against abortion violated the Due Process Clause of the Fourteenth Amendment, which protects an individual from state interference in the right of privacy. Id. at 166.

[FN78]. Id. at 153.

[FN79]. Bopp, supra note 17, at 471. While some of the amici briefs propose that the right to do whatever one wants with ones body is protected by the right of privacy, the Court "refused to recognize an unlimited right of this kind." Id. at 471 n.57; Roe, 410 U.S. at 153. But see supra note 58 and accompanying text (illustrating that lower courts recognized Roe as granting a constitutionally secured right to abort).

[FN80]. Bopp, supra note 17, at 471.

[FN81]. Id. at 471 n.57 (quoting Roe, 410 U.S. at 154).

[FN82]. Id. at 471 & n.58 (citing Maher v. Roe, 432 U.S. 464, 469 (1977) (holding that the state is not constitutionally required to fund non- therapeutic abortions); Harris v. McRae, 448 U.S. 297, 311 (1980) (holding that the state is not required to fund medically necessary abortions); Williams v. Zbaraz, 448 U.S. 358, 369 (1980) (finding the state is not required to pay for abortions for those poor who could not afford them privately)).

[FN83]. This is similar to the witness's duty to testify, i.e., under some circumstances the witness has no duty to testify because of a privilege such as the privilege against self-incrimination. Cook, supra note 65, at 7. In some occasions, there exists a privilege or an absence of a duty and the correlative of no right. Id.

[FN84]. Bopp, supra note 17, at 471 (citing Hohfeld, supra note 62, at 60).

[FN85]. Id. at 468, 471 (citing Hohfeld, supra note 62, at 50-51, 60-62).

[FN86]. Id. (citing Hohfeld, supra note 62, at 60-62).

[FN87]. See id. at 471-72 ("Roe merely extended the 'right' of personal privacy--the constitutional protections or immunities from state interference in private matters--to include the abortion decision....").

[FN88]. Id. at 470-72.

[FN89]. See cases cited supra note 58.

[FN90]. Bopp, supra note 17, at 470.

[FN91]. See id. at 472.

[FN92]. Id. at 470.

[FN93]. Blake v. Cruz, 698 P.2d 315, 319 (Idaho 1984) (quoting Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 492 (Wash. 1983)).

[FN94]. Blake, 698 P.2d at 319-20; see, e.g., Lininger v. Eisenbaum, 764 P.2d 1202, 1204 (Colo. 1988); Schroeder v. Perkel, 432 A.2d 834, 840 (N.J. 1981) (citing Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979)); Becker v. Schwartz, 386 N.E.2d 807, 813 (N.Y. 1978); Speck v. Finegold, 439 A.2d 110, 115 (Penn. 1981); Jacobs v. Theimer, 519 S.W.2d 846, 848 (Tex. 1975); Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 375-76 (Wis. 1975) (citing Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967)).

[FN95]. See, e.g., Turpin v. Sortini, 643 P.2d 954, 965 (Cal. 1982).

[FN96]. SeePalsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928) ("Negligence, like risk, is thus a term of relation.").

[FN97]. See generally Restatement (Second) of Torts § 430 (1979) ("In order that a negligent actor shall be liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the other's harm.").

[FN98]. David W. Robertson, The Common Sense of Cause in Fact, 75 Tex. L. Rev. 1765, 1769 (1997).

[FN99]. Id. at 1770-71.

[FN100]. Id.

[FN101]. Id.

[FN102]. Id. Only the defendant's conduct is changed on the theory that the defendant is the wrongdoer. Id.

[FN103]. Id.

[FN104]. Id.

[FN105]. Id. at 1769.

[FN106]. See W. Page Keeton et al., Prosser and Keeton on The Law of Torts § 41, at 270 (W. Page Keeton et al. eds., 5th ed. 1984) ("If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists.").

[FN107]. Robertson, supra note 98, at 1775.

[FN108]. 392 A.2d 1280 (Pa. 1978) (holding that expert testimony that the defendant's medical negligence "terminated" the patient's 75% chance of surviving could be taken to mean that the medical negligence was more probable than not a cause in fact of the death).

[FN109]. SeeHerskovits v. Group Health Coop., 664 P.2d 474 (Wash. 1983) (finding that recovery was proper on behalf of the deceased patient whose chances of surviving cancer, according to the experts, had been reduced from 39% to 25% as a result of the defendant's medical malpractice).

[FN110]. Robertson, supra note 98, at 1786.

[FN111]. See Herskovits, 664 P.2d at 479.

[FN112]. SeeBerman v. Allan, 404 A.2d 8, 11 (N.J. 1979).

[FN113]. Benjamin Franklin, Poor Richard's Almanac (1752), reprinted in A Torts Anthology 309 (Julie A. Davies et al. eds., 2d ed. 1999).

[FN114]. A Torts Anthology, supra note 113, at 309.

[FN115]. Id.

[FN116]. Restatement (Second) of Torts § 430 (1965).

[FN117]. Id. § 431.

[FN118]. Blake v. Cruz, 698 P.2d 315, 317 (Idaho 1984) ("[The] premise is that but for the negligence of the defendant, the child would not have been born."); see also Gregory G. Sarno, J.D., Annotation, Tort Liability for Wrongful Birth, 83 A.L.R.3d 15 (1978).

[FN119]. See supra note 58 (providing a list of the courts that use this reasoning to create the duty).

[FN120]. See infra section IV.A.4.

[FN121]. Proof of "'negligence in the air'" will not do. Palsgraf v. Long Island R.R. Co., 162 N.E.2d 99, 100 (N.Y. 1928) (quoting Sir Frederick Pollock, Bart., Pollock's Law of Torts: A Treatise on the Principle of Obligations Arising from Civil Wrongs in the Common Law 345 (by P.A. Landon, 15th ed. 1951) (1887)).

[FN122]. The tests are not without risk, collaborative studies have shown a 0.5% risk of fetal loss from an amniocentesis; in

chorionic villus sampling the loss rate (spontaneous abortions) was 0.6%. The Merck Manual of Diagnosis and Therapy 1845-49 (16th ed. 1992).

[FN123]. Becker v. Schwartz, 386 N.E.2d 807, 816 (N.Y. 1978) (Wachler, J. dissenting in part).

[FN124]. Id.

[FN125]. Id.

[FN126]. SeeWalker v. Mart, 790 P.2d 735, 740 (Ariz. 1990).

[FN127]. Dennis J. McCann, Comment, Liability for Negligent Prenatal Diagnosis: Parents' Right to a "Perfect" Child?, 42 Ohio St. L.J. 551, 567 (1981).

[FN128]. Turpin v. Sortini, 643 P.2d 954, 961 (Cal. 1982) (citing Restatement (Second) of Torts § 901 cmt. a (1979)). The Turpin Rule allows the child as well as the parents to "recover special damages for the extraordinary expenses necessary to treat the hereditary ailment." Turpin, 643 P.2d at 966. The Turpin court found that if only the parents recovered damages, then an illogical anomaly is created in that only children with parents available to sue could recover for their expenses. Id.at 965. The court created a novel solution that allows the child to recover damages despite having no cause of action--special damages. Id. at 965-66 & n.15.

[FN129]. Azzolino v. Dingfelder, 337 S.E.2d 528, 533 (N.C. 1985).

[FN130]. Viccaro v. Milunsky, 551 N.E.2d 8, 10 (Mass. 1990); see also Reed v. Campagnolo, 630 A.2d 1145, 1152 (Md. 1993) (finding the alleged negligence of the physicians could be a substantial factor in the legal harm of the parents of a child born with birth defects); Greco v. United States, 893 P.2d 345, 348 (Nev. 1995) (finding that unlike the birth of a normal child, the birth of a disabled child is necessarily an unpleasant and aversive event and the cause of inordinate financial burden that would not attend the birth of a normal child).

[FN131]. See Reed, 630 A.2d at 1152.

[FN132]. Smith v. Cote, 513 A.2d 341, 349 (N.H. 1986) (refusing to apply the "avoidable consequences" rule in wrongful birth which would require the parents to place the child up for adoption because it violates the public policy that respects the sanctity of the family, but conceding that if the rule is not applied then the family receives a windfall); see also Haymon v. Wilkerson, 535 A.2d 880, 884 (D.C. 1987) (questioning the merit of applying the avoidable consequences doctrine).

[FN133]. Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967).

[FN134]. Id. ("We are not talking here about the breeding of prize cattle.").

[FN135]. Schroeder v. Perkel, 432 A.2d 834, 842 (N.J. 1981) (allowing not only a monetary award for the past and future emotional distress suffered by the parents, but also for the costs of the defect); Berman v. Allan, 404 A.2d 8, 15 (N.J. 1979) (recognizing the claim of wrongful birth but allowing only recovery for emotional distress to the parents and declining to allow recovery for the expenses of raising a child as wholly disproportionate to the wrong); Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967) (denying recovery for medical expenses to the parents of a disabled child because life, even with disabilities, could not be weighed against non-life, and therefore damages were impossible to calculate).

[FN136]. The wrongful birth cause of action was unknown at common law. Azzolino v. Dingfelder, 322 S.E.2d 567, 573 (N.C. Ct. App. 1984). The claim is unique because although it is rooted in medical malpractice, it is not a claim of physical injury but of economic and emotional harm. Smith v. Cote, 513 A.2d 341, 348 (N.H. 1986).

[FN137]. Many courts found that the wrongful birth claims need not be characterized as a new tort because they fall within the realm of traditional tort analysis, recognizing a cause of action for negligent performance or delay in genetic testing for birth defects. Garrison v. Med. Ctr. of Del., Inc., 581 A.2d 288, 290-91 (Del. 1989); see, e.g., Lininger v. Eisenbaum, 764

P.2d 1202 (Colo. 1988) (finding a cause of action under the common law of negligence where the defendants failed to detect a genetic defect in the plaintiff's first child, and the plaintiff's second child was born with the same defect); Haymon v. Wilkerson, 535 A.2d 880 (D.C. 1987) (finding a cause of action under the common law of negligence where the defendant physician failed to properly advise plaintiff about amniocenteses); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987) (finding a cause of action for parents of a hemophiliac child against the hospital and physicians for failing to warn about the risk of hemophilia); Viccaro v. Milunsky, 551 N.E.2d 8 (Mass. 1990) (finding that parents have a cause of action for negligent preconception genetic counseling that lead to the birth of a second child with the same genetic defects as the first); Reed v. Campagnolo, 630 A.2d 1145 (Md. 1993) (finding a cause of action in traditional tort where the defendant failed to inform a patient of the need for routine alpha fetoprotien testing); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983) (finding that health care providers have a duty to warn parents of the possible effects of anti-convulsant drugs on a fetus).

[FN138]. See Liniger, 764 P.2d at 1206-07; Garrison, 581 A.2d at 290; Haymon, 535 A.2d at 886; Kush v. Lloyd, 616 So. 2d 415, 424 (Fla. 1992); Arche v. United States Dep't of the Army, 798 P.2d 477, 481 (Kan. 1990); Viccaro, 551 N.E.2d at 11; Cote, 513 A.2d at 349-50; Jacobs v. Theimer, 519 S.W.2d 846, 849-50 (Tex. 1975); Naccash v. Burger, 290 S.E.2d 825, 830 (Va. 1982); Harbeson, 656 P.2d at 493; Dumer v. St. Michael's Hosp., 233 N.W.2d 372, 377 (Wis. 1975).

[FN139]. See Cote, 513 A.2d at 349. The Cote court described the "extraordinary costs" rule as dividing the plaintiff's pecuniary losses into two categories, ordinary costs and extraordinary costs, and treats the latter category as compensable while ignoring the former category. Id.The bifurcation is justified by reference to the rule requiring mitigation of damages. Id. "[A] plaintiff may not recover damages for any 'harm that he could have avoided by the use of reasonable effort or expenditure' after the occurrence of the tort." Id. (quoting Restatement (Second) of Torts § 918 (1979)). The Cote court reasoned that rigid application of the rule would mean the wrongful birth plaintiffs would have to put their child up for adoption. Id. Because of the court's "profound respect for the sanctity of the family," the rule of mitigation was not applied in wrongful birth claims. Id.Therefore, the damage award had to be limited in order to prevent a windfall to the parents. Id. The limitation is the "'extraordinary costs' rule." Id.

[FN140]. Robak v. United States, 658 F.2d 471, 478-79 (7th Cir. 1981) (concluding that all the expenses resulting from the wrongful birth include the costs of raising a normal child).

[FN141]. Walker v. Mart, 790 P.2d 735, 741 (Ariz. 1990) (citing Blake v. Cruz, 698 P.2d 315, 320-21 (Idaho 1984) (holding that expenses for the support and maintenance beyond the age of majority are recoverable)); see also Cote, 513 A.2d at 350 (deciding parents can recover expenses incurred before and after the age of majority).

[FN142]. Arche v. United States Dep't of the Army, 798 P.2d 477, 486 (Kan. 1990); see also Bani-Esraili v. Lerman, 505 N.E.2d 947, 948 (N.Y. 1987) (mem.) ("Under New York law, a parent has no legal obligation to continue the support of a child after majority."); cf. Bader v. Johnson, 675 N.E.2d 1119, 1125 & n.2 (Ind. Ct. App. 1997) (noting most courts allow recovery of expenses while a child is a minor but not deciding the issue because the child died as a minor).

[FN143]. Kush v. Lloyd, 616 So. 2d 415, 422 (Fla. 1992); see Naccash v. Burger, 290 S.E.2d 825, 831 (Va. 1982).

[FN144]. See Arche, 798 P.2d at 482; cf Cote, 513 A.2d at 350 (finding that emotional distress damages are not recoverable once shown a protected interest is invaded). The Arche court held that "visibility of results as opposed to visibility of the tortious act does not give rise to a claim for emotional damages." Arche, 798 P.2d at 482. In this case the child's injury "occurred without human fault during development of the fetus [and] the parents were not aware of the injury at the time." Id.

[FN145]. Kush, 616 So. 2d at 422 (citing Keeton et al., supra note 106, § 54, at 361-65). The Kush court also argued that the impact doctrine does not apply where the damages are predominantly emotional, like defamation or invasion of privacy. Id. (citing Restatement (Second) of Torts §§ 569, 570, 652H cmt. b (1977)).

[FN146]. Vicarro v. Milunsky, 551 N.E.2d 8, 11-12 (Mass. 1990); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 493 (Wash. 1983).

[FN147]. 410 U.S. 113 (1973); see cases cited supra notes 10 & 58.

[FN148]. Roe, 410 U.S. at 153.

[FN149]. See Blake v. Cruz, 698 P.2d 315, 318 (Idaho 1984) (noting how public policy against abortions is less pervasive in light of technological advances that allow physicians to detect and predict birth defects coupled with the social interest in reducing the number of genetic defects).

[FN150]. 42 U.S.C. §§ 12101-12213 (Supp. II 1989-1991).

[FN151]. See infra note 153 and accompanying text.

[FN152]. See Roe v. Wade, 410 U.S. 113 (1973).

[FN153]. See Note, Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling, 87 Yale L.J. 1488, 1493 & nn. 21- 22 (1978) [hereinafter Father and Mother Know Best] (discussing the two most advanced methods for detecting defects of a child in utero, amniocentesis and ultrasonography).

[FN154]. Blake, 698 P.2d at 318 (citing Father and Mother Know Best, supra note 153).

[FN155]. See cases cited supra note 58.

[FN156]. Roe, 410 U.S. at 152.

[FN157]. Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 18 (Minn. 1986) (Amdahl, C. J., dissenting).

[FN158]. Blake, 698 P.2d at 317 (finding that the physician's negligence precluded the parents from making an informed decision about termination).

[FN159]. Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979).

[FN160]. Wrongful Birth Actions, supra note 32, at 2022 & n.34.

[FN161]. Hickman, 396 N.W.2d at 16 (Simonett, J. concurring).

[FN162]. 42 U.S.C. § 12101 (Supp. II 1989-1991).

[FN163]. E.g., Blake, 698 P.2d at 318.

[FN164]. Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967).

[FN165]. Id.

[FN166]. Berman v. Allan, 404 A.2d 8, 12 (N.J. 1979).

[FN167]. U.S. Const. amends. V, XIV, § 1.

[FN168]. The Declaration of Independence para. 2 (U.S. 1776).

[FN169]. E.g., Tex. Penal Code § 12.31(a) (West 2000) ("An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by imprisonment in the institutional division for life or by death.").

[FN170]. 42 U.S.C. § 12101(a)(1) (Supp. II 1989-1991).

[FN171]. Id.§ 12101(a)(3).

[FN172]. Id.§ 12101(a)(8).

[FN173]. Id.§ 12101(b)(1).

[FN174]. See Gleitman v. Cosgrove, 227 A.2d 689, 693 (N.J. 1967).
A clinical instructor asks his students to advise an expectant mother on the fate of a fetus whose father has chronic syphilis. Early siblings were born with a collection of defects such as deafness, blindness, and retardation. The usual response of the students is: "Abort!" The teacher then calmly replies: "Congratulations, you have just aborted Beethoven."
Michael A. Feinman, Getting Along with the Genetic Genie, Legal Aspects of Med. Prac., Mar. 1979, at 37-38.

[FN175]. Walker v. Mart, 790 P.2d 735, 737 n.3 (Ariz. 1990) (citing Father and Mother Know Best, supra note 153); see also Harbeson v. Parke- Davis, Inc., 656 P.2d 483, 491 (Wash. 1983) (stating that creating a duty for the health care provider to counsel the patient about possible defects will promote society's interest in genetic counseling).

[FN176]. Buck v. Bell, 274 U.S. 200, 207 (1927).

[FN177]. Taylor v. Kurapati, 600 N.W.2d 670, 688 (Mich. Ct. App. 1999). Eugenics is the science of improving the qualities of the human race by the careful selection of parents. American Heritage Dictionary 613 (4th ed. 2000).

[FN178]. In re Romero, 790 P.2d 819, 821 (Colo. 1990) (footnote omitted).

[FN179]. Id.

[FN180]. 316 U.S. 535 (1942) (holding an individual's right to procreate is fundamental).

[FN181]. The Politics of Genes: America's Next Ethical War, Economist, Apr. 14, 2001, at 21-22.

[FN182]. Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967).

[FN183]. See Gleitman, 227 A.2d at 693.

[FN184]. Current Medical Diagnosis & Treatment, supra note 6, at 1588-99.

[FNa1]. Candidate J.D., May 2003. The Author thanks her husband Tom and family for the much needed love and support during the preparation and production of this piece. Further, I want to thank Charles Weigel II, Val Ricks, Shelby Moore, and Dr. Mark Steiner for sharing their knowledge of the law and providing me with sound principles with which I face my legal career. I would like to extend a special thanks to Teresa Collett who helped me clarify my ideas. Finally, I would like to thank Robert Riddle for his tireless efforts and Blue Book prowess.

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