

BACKDOOR EUGENICS: THE TROUBLING IMPLICATIONS OF CERTAIN DAMAGES AWARDS IN WRONGFUL BIRTH AND WRONGFUL LIFE CLAIMS

Jillian T. Stein*

I. INTRODUCTION

Wrongful birth and wrongful life actions are unlike other prenatal torts because of such lawsuits' discriminatory treatment of the disabled. When a state recognizes such causes of action without limitation or restrictions on damages awards, the state is engaging in eugenics.¹ In other prenatal torts, such as prenatal-injury tort actions² and wrongful pregnancy (i.e., wrongful conception),³ value judgments are not made by the courts. When a state recognizes prenatal-

* J.D., 2010, Seton Hall University School of Law; B.A., 2004, University of Michigan. I am very grateful to my advisor, Gaia Bernstein, Associate Professor of Law, Seton Hall University School of Law, and to my editors, Keerthi Mundrati, Ashley Ochs, and Charles Wilkes, for the suggestions I received from them before this Comment was even conceived and throughout my research and writing. I also want to thank my family for their continued support, without which none of this would have been possible.

¹ Generally, "eugenics" is defined as "a science that deals with the improvement (as by control of human mating) of hereditary qualities of a race or breed," MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 399 (10th ed. 1998), or "[t]he improvement of the race by scientific controls, based on study of hereditary factors." BALLENTINE'S LAW DICTIONARY 423 (3d ed. 1969); see also GERRY W. BEYER & KENNETH R. REDDEN, MODERN DICTIONARY FOR THE LEGAL PROFESSION 297 (2d ed. 1996) (defining eugenics as the "[d]eliberate manipulation of reproduction with the purpose of creating superior offspring"); *infra* Part IV.

² In prenatal-injury torts, the doctor's negligence causes the fetus to suffer some harm *in utero*—that but for the doctor's negligence, the child would have been born "with a sound mind and body." *Smith v. Brennan*, 157 A.2d 497, 503 (N.J. 1960). In prenatal-injury tort actions, physicians have been held liable for disabilities caused by their negligence connected with the birth itself. *Taylor v. Kurapati*, 600 N.W.2d 670, 674–75 (Mich. Ct. App. 1999). The wrongful birth tort, however, often involves a negligent failure of the physician during the early stages of pregnancy to inform parents of the risks of certain birth defects. *Id.* at 675.

³ In wrongful pregnancy, the doctor's negligent failure to detect a pregnancy leads to the birth of an unwanted but healthy child. See *Taylor*, 600 N.W.2d at 676. In a wrongful pregnancy suit, when a physician negligently fails to detect a pregnancy, he deprives the mother of an opportunity to terminate the pregnancy at an early stage, and "the birth of a *healthy*, but unwanted, baby results." *Id.* (emphasis added).

injury tort actions, the state does not condone the choice that a parent claims that he or she would have made to prevent the birth of a disabled child—in prenatal-injury tort actions, “the intermediate step of parental action”⁴ is not present. In wrongful pregnancy actions, value judgments are not made about which babies should be born but which ones should not. Granting damages in wrongful pregnancy actions (or wrongful conception actions) for the deprivation of the opportunity to not have *any* child *at all* does not share the eugenic implications of wrongful birth and wrongful life actions in that the courts are not making value judgments through the juxtaposition of the lives of disabled children with the lives of nondisabled children.

Courts in wrongful pregnancy actions acknowledge that the parents have lost an opportunity to make an informed decision not to have a child. In wrongful birth and wrongful life cases, however, the fact pattern is different. In wrongful birth cases, courts acknowledge not merely the lost opportunity to choose, but consider parents to be “damaged” as a result of their lost opportunity to choose, *specifically*, not to have a *disabled* child. And in wrongful life actions, courts find disabled children to be “damaged” in having been born because had the parents been given a choice, the pregnancy would have been aborted and that, allegedly, would be preferable to the disabled children. Therefore, by recognizing the torts of wrongful life and wrongful birth, the state condones the value judgments made by parents. This condonation has both discriminatory and eugenic implications.

Discrimination is inherent when a court or legislature chooses to allow certain damages awards when the child is disabled (in wrongful birth and wrongful life suits)⁵ but disallows the same damages when the child is healthy although just as “unwanted” (as in wrongful pregnancy and wrongful conception cases).⁶ This is especially true when the unwanted birth arises from very similar circumstances—when the birth arises out of a prenatal-care physician’s negligence that deprived the parents of their ability to exercise their right to choose. A finding that a parent has been harmed by having a dis-

⁴ *Id.* at 675. The allegation that the negligence of the physician robbed the parents of their opportunity to terminate the pregnancy is not present in prenatal-injury tort actions as it is in wrongful birth. *Id.* Parents in wrongful birth cases have a right to an abortion “but argue that the physician’s negligence deprived them of . . . [their] right under controlling federal precedent to terminate a pregnancy.” *Id.* at 676.

⁵ See *infra* Part III.

⁶ See *supra* note 3.

2010]

COMMENT

1119

abled child she did not want but not so finding when the parent had a healthy child she did not want is, in effect, discriminatory. Granting additional damages to a disabled child in a wrongful-life suit but refusing to grant the same damages when the child is healthy is also inherently discriminatory.

Such discrimination has adverse effects. Initially, it stigmatizes the disabled community by implying that parents and disabled children are harmed by the deprivation of the free exercise of procreative choice when a birth results in a disabled child but not when a birth results in a healthy child. Further, the legal recognition of wrongful birth and wrongful life suits will pressure parents to make the decision not to birth a disabled child and will incentivize prenatal-care doctors to advise against the same.⁷

Although both wrongful birth and wrongful life suits have eugenic implications,⁸ this Comment argues that such suits should nevertheless be permitted. First, parents have a well-recognized right to choose whether or not to terminate a pregnancy.⁹ Second, the law would be an instrument of injustice if it left parents and disabled children with the heavy burden of medical and other costs incurred as a result of the deprivation of the parents' right to choose when that deprivation is the fault of the physician. The eugenic implications of these suits could be combated, however, by changing the type of damages awarded and limiting the extent to which emotional-distress damages can be awarded.

Part II of this Comment describes the right of procreative choice and the motivating factors that form the basis of parents' procreative decisions. The differences between wrongful birth and wrongful life causes of actions and the extent to which each tort has been recognized in this country are explained in Part III. Part IV of this Comment defines eugenics in detail. The eugenic implications of states awarding plaintiffs damages in wrongful birth and wrongful life suits are laid out in Part V. In Part VI this Comment proposes how states can both appreciate the parents' loss of their right to choose and mitigate the eugenic implications of these causes of action through the restriction of damages awards. This Comment argues that, absent an adequate health care system for disabled children and adults, every

⁷ See *infra* Part V.

⁸ See Glenn McGee & David Magnus, *Eugenics, Ethics*, in 1 *ENCYCLOPEDIA OF ETHICAL, LEGAL, AND POLICY ISSUES IN BIOTECHNOLOGY* 199, 203 (Thomas H. Murray & Maxwell J. Mehlman eds., 2000).

⁹ See *Roe v. Wade*, 410 U.S. 113, 153–54 (1973).

state should grant awards of special damages in wrongful birth and wrongful life causes of action and limit damages awards for emotional distress. This Comment also proposes that, even if a proper health care system were in place, the wrongful birth tort should be maintained and nominal damages should be awarded in recognition of the resultant injury to parents when a negligent physician deprives them of the opportunity to exercise their right to terminate a pregnancy. This Comment concludes that wrongful birth and wrongful life suits should thus be remedied to prevent a new eugenics era and ensure that history does not repeat itself in a profoundly negative way.

II. MAKING CHOICES

A. *The Right to Procreative Choice*

The right to choose whether to conceive or to terminate a pregnancy, or even to avoid the birth of a disabled child, is grounded in the right of privacy under the Due Process Clause of the Fourteenth Amendment, which protects every person's right to liberty.¹⁰ Every fundamental right that comprises the broad right to privacy is constitutionally protected from invasion by the states.¹¹ The right to liberty protects a person's decisions from unjustified interference by the government.¹² Such decisions include personal decisions relating to procreation.¹³ The Supreme Court of the United States has intimated that the right to procreative autonomy is constitutionally protected even though it is "not mentioned in the text of the Constitution, [is] not intended by the framers, and [is] not part of tradition stated at the most specific level of abstraction."¹⁴ What must logically follow

¹⁰ In 1965, in *Griswold v. Connecticut*, the Supreme Court of the United States articulated that procreative autonomy is part of a right of privacy. See 381 U.S. 479, 484–85 (1965). Originally, the Supreme Court, in an opinion by Justice Douglas, expressly rejected the contention that the right to privacy was protected in the Due Process Clause of the Fourteenth Amendment. See *id.* at 480–82. Instead, Justice Douglas found the right of privacy in the penumbras of the guarantees specified in the Bill of Rights. See *id.* at 484–85. Subsequent decisions, however, have placed the right of privacy under the Due Process Clause of the Fourteenth Amendment. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

¹¹ See *Casey*, 505 U.S. at 846–47.

¹² See *id.* at 859.

¹³ *Id.*; see also *Roe v. Wade*, 410 U.S. 113, 153–54 (1973).

¹⁴ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 827 (3d ed. 2006).

from the fact that the Supreme Court has recognized the constitutionality of a woman's decision to have an abortion¹⁵ is the acknowledgment of "the right to submit to a procedure designed to give information about that fetus which can then lead to a decision to abort."¹⁶ Arguably, however, choosing and selecting the characteristics and genetic makeup of a child should not be considered an entitlement in light of the eugenic implications in making such choices.

Possibly, a person's access to prenatal screening and abortions should be limited because the use of these procedures may lead to the eradication of one particular group of people—genetically impaired individuals.¹⁷ In a democratic government, however, the "democratic presumption"¹⁸ provides that government should not interfere with a person's freedom absent sufficient justification.¹⁹ The presumption is that every person should be able to live as he or she may choose based on one's own moral code and values regardless of whether such choices and values are mainstream.²⁰ The freedom to do something cannot be limited to the freedom to do what is agreeable to everyone. Reproductive freedom is most important when it is the freedom to do what is disagreeable to others;²¹ otherwise that freedom is meaningless. Only when a person's choice poses serious danger to someone else or to society should the state intercede and limit this freedom of choice.²² Anything that falls short of this justification for interference will kill liberty.²³

Although some risks of harm may warrant interference with procreative choice, whether the risk of stigma to the disabled community warrants such interference is not so clear. Proponents of the demo-

¹⁵ In 1973 Justice Blackmun, writing for the Supreme Court in *Roe v. Wade*, concluded that the "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 . . . 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." 410 U.S. at 153.

¹⁶ LORI B. ANDREWS, *FUTURE PERFECT: CONFRONTING DECISIONS ABOUT GENETICS* 58 (2001) (quoting *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990), *aff'd without opinion sub nom. Scholberg v. Lifchez*, 914 F.2d 260 (7th Cir. 1990)).

¹⁷ See JOHN HARRIS, *ENHANCING EVOLUTION: THE ETHICAL CASE FOR MAKING BETTER PEOPLE* 72 (2007).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 76.

²² *Id.* at 72.

²³ HARRIS, *supra* note 17, at 72.

cratic presumption argue that to rebut this presumption, the risks of harm must be “real and present, not future and speculative.”²⁴ If the risks are speculative in nature, “the presumption in favor of liberty would be at risk whenever imaginative tyrants could postulate possible, but highly unlikely, future harms.”²⁵ The risk of stigma to and the elimination of persons with genetic disabilities is not speculative, but rather is a very real and likely harm.²⁶ Nevertheless, the right to choose whether to have a child is afforded strong protection.

The mere exercise of personal preference²⁷ is distinguishable from the right to reproductive liberty and procreative autonomy.²⁸ Consequently, the former does not deserve as much protection as the latter:

If freedom to choose [a good] is simply something that we all want, like air conditioning or lobsters, then we are not entitled to hang on to these freedoms in the face of what we concede to be the rights of others to an equal share of respect and resources.²⁹

By contrast, courts protect a person’s right to reproductive liberty and procreative autonomy. The person deprived of the right to choose may seek legal redress against the negligent tortfeasor. Wrongful birth and wrongful life suits are two avenues of such relief.

B. *Why Some Parents Make Choices*

Child-rearing is one of the biggest challenges that many adults face. A parent has to make many sacrifices and invest much into a child’s well-being. A new baby requires many years of dedication by its parents to foster the child’s life, protect her from life’s difficulties, and provide her every advantage that the parents can afford.³⁰ Some parents attempt to achieve these goals by taking certain steps before the baby is even born—at conception or even earlier. While it is still impossible to select which of our inheritable traits children should

²⁴ *Id.* at 74.

²⁵ *Id.*

²⁶ See *infra* Part V. For statistics on how many parents choose to abort when they discover that their fetus may be disabled, see *infra* note 34.

²⁷ HARRIS, *supra* note 17, at 75.

²⁸ See *id.*

²⁹ *Id.* (quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 267 (1977)) (alteration in original).

³⁰ Jeffrey R. Botkin, *Genes and Disability: Defining Health and the Goals of Medicine: Prenatal Diagnosis and the Selection of Children*, 30 FLA. ST. U. L. REV. 265, 265 (2003).

have, thanks to advances in prenatal screening and genetic testing,³¹ parents can still choose to accept a fetus that has already been conceived, abort it, or choose not to conceive at all.³²

Reproductive genetic testing leads some prospective parents to decide to prevent either a pregnancy or a birth.³³ In some circumstances, this decision may be based upon a parent's desire to avoid having children who suffer from a genetic disease or condition.³⁴ Advances in medical science have even expanded prenatal testing to late-onset disorders, such as breast cancer, and to characteristics like homosexuality.³⁵

Since the Supreme Court recognized a constitutional right to have an abortion in *Roe v. Wade*,³⁶ the concept of "every-child-a-wanted child"³⁷ has altered societal views and has "elevated the rejection of imperfect children [via abortions] to an enlightened choice."³⁸ Society has started to view with disdain those parents who, armed with information that the child will likely be disabled, still choose to have

³¹ McGee & Magnus, *supra* note 8, at 201 ("Amniocentesis, ultrasonography, and chronic villus sampling (CVS) [make] it possible to look into the womb to check on a fetus's condition.").

³² Botkin, *supra* note 30, at 265.

³³ LORI B. ANDREWS ET AL., GENETICS: ETHICS, LAW AND POLICY 300 (2d ed. 2006).

³⁴ *Id.* As many as eighty or ninety percent of women choose to have an abortion after finding out that they are pregnant with a child who has Down's syndrome, which, like other genetic diseases, is tested by amniocentesis. Christine Rosen, *Taste: A Life Worth Living*, WALL ST. J., June 27, 2008, at W11; see also George Neumayr, *The New Eugenics*, AM. SPECTATOR, July 13, 2005, at 1, available at <http://spectator.org/archives/2005/07/13/the-new-eugenics>; Philip R. Reilly, *Eugenics, Ethics, Sterilization Laws*, in 1 ENCYCLOPEDIA OF ETHICAL, LEGAL, AND POLICY ISSUES IN BIOTECHNOLOGY 204, 213 (Thomas H. Murray & Maxwell J. Mehlman eds., 2000) ("[W]idespread use of prenatal screening coupled with selective abortion is causing a significant decline in the number of children born with Down syndrome."). "Amniocentesis" is a type of prenatal screening whereby the amniotic fluid is withdrawn from the amniotic sac and analyzed. ANDREWS, *supra* note 16, at 59. A high percentage of fetuses that have tested positive for cystic fibrosis are also being aborted. Neumayr, *supra*, at 1.

³⁵ Lori B. Andrews, *Prenatal Screening and the Culture of Motherhood*, 47 HASTINGS L.J. 967, 970 (1996). Other detectable genetic disorders in addition to Down's syndrome include Tay-Sachs disease, cystic fibrosis, pseudohypertrophic muscular dystrophy, Lesch-Nyhan syndrome, and sickle cell anemia. The Council on Ethical and Judicial Affairs, Am. Med. Ass'n, *Ethical Issues Related to Prenatal Genetic Testing*, 3 ARCHIVES FAM. MED. 633, 635 (1994), available at <http://archfami.ama-assn.org/cgi/reprint/3/7/633.pdf>.

³⁶ 410 U.S. 113, 153-54 (1973).

³⁷ George Neumayr, *The Perfect Child*, AM. SPECTATOR, May 5, 2005, at 1, available at <http://spectator.org/archives/2005/05/05/the-perfect-child>.

³⁸ *Id.*

that child.³⁹ Some doctors may choose to encourage prenatal genetic screening so that parents have sufficient information to engage in “responsible parenthood,” which arguably includes a parent’s responsibility to not knowingly transmit defects to offspring.⁴⁰ Margery Shaw, a geneticist and attorney, goes further—she argues that to knowingly transmit genetic defects to one’s child would be akin to child abuse.⁴¹ “[C]hoice and prevention [have, evidently, begun to] produce a culture that equates disability with irresponsible parenting decisions.”⁴²

The result is peer pressure on parents to abort a child whom they have reason to believe may be disabled.⁴³ Today, parents who could have prevented the birth of a disabled child either by not conceiving or by aborting are asked to justify their actions—why have a disabled child when the opportunity not to exists?⁴⁴ Prenatal screening and the option to abort a fetus upon learning of its defects (coupled with social pressures to have healthy children and possible pressures from the doctor to have an abortion to avoid future liability)⁴⁵ lead parents who would not have otherwise aborted a fetus to choose that route.

In the future, parents opting not to birth a disabled child will likely increase. Modern biotechnology will enlarge the array of genetic testing that can be performed on a person before conception and during pregnancy to determine the likelihood of having a disabled child. Additionally, more people will choose to prevent the

³⁹ Neumayr, *supra* note 34, at 2.

⁴⁰ Paul Ramsey, *Screening: An Ethicist’s View*, in *ETHICAL ISSUES IN HUMAN GENETICS: GENETIC COUNSELING AND THE USE OF GENETIC KNOWLEDGE* 147, 150 (Bruce Hilton et al. eds., 1973).

⁴¹ Botkin, *supra* note 30, at 272.

⁴² Rosen, *supra* note 34.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ The recognition of wrongful birth and wrongful life suits “will place increased pressure upon physicians to take the ‘safe’ course by recommending abortion” to avoid future liability. *Azzolino v. Dingfelder*, 337 S.E.2d 528, 535 (N.C. 1985). The *Azzolino* court indicated that this pressure is best illustrated by this story:

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.”

Id. (citation omitted).

2010]

COMMENT

1125

birth of a disabled child if given the opportunity, in large part due to pure ability to make such choices and because of the social pressures and financial costs of rearing a disabled child.

Although many parents can cope with the birth of a disabled child, the fact is the path is a difficult one and is sufficiently demanding that many people may choose to avoid this kind of challenge.⁴⁶ Some parents can love and support a disabled child without a negative impact on their marriage or family.⁴⁷ There are others, however, who cannot. Time, energy, and sacrifices are needed to successfully cope with a child's disability.⁴⁸ In addition, financial resources are required to deal with the expenses of raising a child with a disability.⁴⁹ Therefore, parents might choose not to have a genetically impaired child to avoid the prohibitive financial costs incurred in raising a child with a severe genetic disease.⁵⁰ Ultimately, "economic and social pressures may create situations where reproductive decision making is constrained as if the situation were legislated."⁵¹ A lack of economic security, insurance, or social support could determine whether parents will choose to prevent the birth of children at risk for a genetic disorder.⁵² The financial concerns, however, could be allayed by proper health care coverage.

C. *An Insufficient Health Care System*

The financial burden on parents to care for disabled children is no small consideration.⁵³ First, many health insurers refuse to cover

⁴⁶ Botkin, *supra* note 30, at 290.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Cf.* The Council on Ethical and Judicial Affairs, *supra* note 35, at 637 ("[L]ack of social and economic support for the disabled might dissuade parents who would otherwise bear and raise an affected child from choosing to reproduce."); *see also infra* Part II.C.

⁵¹ McGee & Magnus, *supra* note 8, at 202.

⁵² *See id.*

⁵³ Paul T. Shattuck & Susan L. Parish, *Financial Burden in Families of Children with Special Health Care Needs: Variability Among States*, 122 PEDIATRICS 13, 13-14 (2008), available at <http://www.pediatrics.org/cgi/content/full/122/1/13> ("The costs of caring for children with special health care needs (CSHCN) are high, relative to those for typically developing children, because of elevated requirements for both primary and specialty medical care, as well as therapeutic and supportive services such as rehabilitation, environmental adaptations, assistive devices, personal assistance, and mental health, home health, and respite care. . . . [M]ean direct out-of-

the costs of necessary treatments for certain disorders.⁵⁴ Certain plans do not cover needed items, such as special formulas and foods, neurodevelopmental assessments, and therapies for children.⁵⁵ Many managed-care plans have restrictions as to what professionals may be consulted (only in-network professionals, for example) and whether specialized services may be used.⁵⁶ Sometimes, the in-network doctors lack sufficient expertise to deal with the problems that some of these children face.⁵⁷ For complex disorders, children should be treated by a team of doctors in several disciplines and various areas of expertise.⁵⁸ Yet getting such a team of doctors together often proves prohibitive and beyond the boundaries of private insurance coverage.⁵⁹ Thus, the inadequacy of insurance coverage and insufficient access to the most qualified doctors prevent many disabled children from receiving optimal care.⁶⁰ Moreover, some children have neither any health care coverage at all nor the means to pay for necessary treatments.⁶¹

Second, having “a child with a significant disability can have an adverse effect on the parents in terms of heartache, worry, time, effort, and money.”⁶² Therefore, aside from the strain on their pockets due to insufficient health care coverage of their disabled children, parents may also have to contend with insufficient funding for psychological and support services for themselves and other family

pocket expenditures for families with CSHCN were more than twice the mean for families with nondisabled children.” (footnotes omitted)).

⁵⁴ See, e.g., AAP Newborn Screening Task Force, American Academy of Pediatrics, *Newborn Screening: A Blueprint for the Future: A Call for a National Agenda on State Newborn Screening Programs*, 106 PEDIATRICS 389, 390 (2000), available at <http://pediatrics.aappublications.org/cgi/reprint/106/2/S1/389> (discussing treatment for phenylketonuria); AZ AUTISM INSURANCE, AUTISM SPEAKS: ARGUMENTS IN SUPPORT OF PRIVATE INSURANCE COVERAGE OF AUTISM-RELATED SERVICES 4 (2007), <http://www.azautisminsurance.org/files/Arguments%20for%20private%20insurance%20coverage%20-%20Autism%20Speaks.pdf> (“Most insurance policies contain specific exclusions for autism . . . , [thus] families must pay for costly treatments out-of-pocket or forego them.”).

⁵⁵ AAP Newborn Screening Task Force, *supra* note 54, at 422.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ AAP Newborn Screening Task Force, *supra* note 54, at 422.

⁶² Botkin, *supra* note 30, at 290.

2010]

COMMENT

1127

members.⁶³ Of course, the parents' interest to be free from these adverse consequences diminishes as the severity of the child's congenital condition decreases.⁶⁴

In addition, despite the provisions in the Health Insurance Portability and Accountability Act, no significant health care coverage is available for infants.⁶⁵ Likewise, state mandates that require private insurance benefit packages to include items such as formula or nutritional supplements to meet the needs of sick children do not apply to self-funded employer-based benefit plans.⁶⁶ This means that twenty-five to fifty percent of individuals covered under such plans will not be protected by the state mandates regarding insurance benefits.⁶⁷ Furthermore, although federal law guarantees Medicaid coverage to newborns for the first year of their lives, many states lack effective measures for the implementation of these guarantees.⁶⁸ In five states, the insurance benefit packages under non-Medicaid State Children's Health Insurance Programs (SCHIP) exclude coverage for the costs of hearing aids, some medical equipment and other devices, and therapies for certain developmental conditions or chronic conditions that are not expected to improve over time.⁶⁹

While the aforementioned limitations on health care coverage pertain only to disabled infants and children and their parents, the problems with health care coverage persist into the disabled child's adult life as well. For many disabled persons, in fact, the problem is *exacerbated* when they become adults because they no longer qualify for Medicaid, SCHIP, and other publicly funded programs.⁷⁰

At least one state, California, has recognized how the lack of financial means to care for a disabled person may persuade parents to avoid the birth of a disabled child.⁷¹ In *Turpin v. Sortini*, the Supreme Court of California discussed California's wrongful life statute,⁷² which permits a cause of action to be brought against physicians but

⁶³ AAP Newborn Screening Task Force, *supra* note 54, at 422.

⁶⁴ Botkin, *supra* note 30, at 290.

⁶⁵ AAP Newborn Screening Task Force, *supra* note 54, at 421.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 422.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *Turpin v. Sortini*, 643 P.2d 954, 959 (Cal. 1982).

⁷² See *id.*; see also CAL. CIV. CODE § 43.6 (West 2007).

not parents.⁷³ The court indicated that that history “suggest[s] that the purpose of the legislation was simply to eliminate any liability or other similar economic pressure which might induce potential parents to abort or decline to conceive a potentially defective child.”⁷⁴ Evidently, the concern that parents might be pressured into aborting disabled children solely on the basis of financial considerations was so compelling that the state was moved to take statutory action; California wanted to ensure that disabled children could never sue their parents for giving birth to them notwithstanding the opportunity to abort or avoid conception. But California, and all other jurisdictions, should go even further to eliminate the economic pressures on “parents to abort or decline to conceive a potentially defective child”⁷⁵ by enacting legislation that provides sufficient health care coverage to children born with genetic defects.

D. Summary

Parents, armed with the right to procreative autonomy, are free to choose whether to have a disabled child without interference from the state. How that choice is made is based upon many factors, one of which is exorbitant health care costs for the disabled individual. With proper health care coverage, however, this critical factor could be eliminated; some parents, comforted by the knowledge that their wallets are adequately protected, may choose to proceed with a pregnancy despite the risks of having a disabled child.

III. LEGAL REDRESS WHEN PARENTS HAVE BEEN DEPRIVED OF THEIR RIGHT TO CHOOSE: THE RISE OF WRONGFUL BIRTH AND WRONGFUL LIFE TORTS

Usually, in wrongful birth and wrongful life suits, the negligence of a prenatal-care physician has led to the birth of a disabled child—a child that allegedly would not have been born at all if the doctor had properly warned the parents of the risks. For example, an obstetrician might negligently fail to advise a thirty-eight-year-old woman in the early stages of pregnancy of the increased risk of a woman that age bearing a child with Down’s syndrome and fail to offer prenatal

⁷³ See *Turpin*, 643 P.2d at 959.

⁷⁴ *Id.*

⁷⁵ *Id.*

testing for this disease⁷⁶ (a technique which has been available to pregnant women for over two decades).⁷⁷ In the event that the thirty-eight-year-old woman gives birth to a child with Down's syndrome,⁷⁸ her obstetrician may be liable to the mother and/or the child—depending on the jurisdiction⁷⁹—for failing to warn of the increased risk and discuss available prenatal screening.

A. *The Claims Made in Each Cause of Action*

While both wrongful birth and wrongful life causes of action arise out of the same set of facts, the claims are slightly different. “Wrongful birth” is a cause of action whereby the parents of a disabled child sue their prenatal-care physician for precluding the parents from making an informed family-planning decision by not disclosing to them either (i) the risk of inheritability of the condition at conception⁸⁰ or (ii) whether the fetus, if already conceived, might be disabled. For instance, if a doctor negligently interprets the results of a prenatal screening, the parents can sue the doctor in a wrongful birth action for not informing them that their fetus is disabled.⁸¹ The wrongful birth action allows the parents to seek damages resulting from having to raise a disabled child, which they would have aborted but for the doctor's negligence.⁸² Similarly, in a “wrongful life” suit, the disabled child sues the negligent physician for damages he or she has suffered from having been born.⁸³ The child argues that but for

⁷⁶ Cf. *Becker v. Schwartz*, 386 N.E.2d 807, 808–09 (N.Y. 1978). In *Becker*, a thirty-seven-year-old pregnant mother was “never advised by [doctors] of the increased risk of Down's Syndrome in children born to women over 35 years of age. Nor [was she] advised . . . of the availability of an amniocentesis test to determine whether the fetus . . . would be born afflicted with Down's Syndrome.” *Id.* (footnote omitted).

⁷⁷ Botkin, *supra* note 30, at 266.

⁷⁸ Cf. *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 11 (Minn. 1986) (noting that at the time the mother became pregnant, she was thirty-four years old, and she alleged that her treating physician did not offer her the option of testing for Down's syndrome despite the increased risk of a thirty-five-year-old woman bearing a Down's syndrome child).

⁷⁹ See *infra* notes 89–99 and accompanying text.

⁸⁰ ANDREWS, *supra* note 16, at 58.

⁸¹ *Id.*

⁸² Neumayr, *supra* note 34, at 2.

⁸³ *Id.* Maine characterizes the injury in wrongful life suits as “not life itself but rather having to live with a disease or defect.” *Anastosopoulos v. Perakis*, No. CV-91-313, 1995 Me. Super. LEXIS 504, at *17 (Me. Super. Ct. Jan. 27, 1995).

the physician's negligence, he or she would never have been born and forced to live a life of pain and suffering.⁸⁴

Furthermore, it is prudent to note the distinction between the injuries that are claimed in wrongful birth and wrongful life actions versus other prenatal tort actions. In wrongful birth and wrongful life suits, the doctor's negligence led to the *birth* of a disabled child—a child that allegedly would not have been born at all if the doctor had properly warned the parents. This is quite distinguishable from the prenatal-injury tort where the doctor's negligence causes the fetus to suffer some harm *in utero*—but for the doctor's negligence, the child would have been born “with a sound mind and body.”⁸⁵ The claimed loss in the wrongful birth tort is lost opportunity—the parents' opportunity to make an informed decision and their opportunity to choose to *not* have a particular child.⁸⁶ Courts that have recognized a cause of action for wrongful birth focus on this lost opportunity: “As the wrongful birth decisions recognize, when a doctor or other medical care provider negligently fails to diagnose an [sic] hereditary problem, parents are deprived of the opportunity to make an informed and meaningful decision whether to conceive and bear a handicapped child.”⁸⁷ It is also possible that the birth of an unwanted disabled child, who generally requires a greater parental investment of time, effort, and money than a healthy child, may impinge on parents' opportunity to have other children in the future—this is further lost opportunity.⁸⁸

⁸⁴ Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 494 (Wash. 1983).

⁸⁵ Smith v. Brennan, 157 A.2d 497, 503 (N.J. 1960). In prenatal-injury tort actions, physicians have been held liable for disabilities caused by their negligence connected with the birth itself. Taylor v. Kurapati, 600 N.W.2d 670, 674–75 (Mich. Ct. App. 1999). The wrongful birth tort, however, often involves a negligent failure during the early stages of pregnancy to inform parents of the risks of certain birth defects. *Id.* at 675.

⁸⁶ Prenatal-injury tort actions, unlike wrongful birth actions, do not involve “the intermediate step of parental action.” Taylor, 600 N.W.2d at 675. The allegation that the negligence of the physician robbed the parents of their opportunity to terminate the pregnancy is not present in prenatal-injury tort actions as it is in wrongful birth. *Id.* Parents in wrongful birth cases have this right to an abortion “but argue that the physician's negligence deprived them of . . . [their] right under controlling federal precedent to terminate a pregnancy.” *Id.* at 676.

⁸⁷ Turpin v. Sortini, 643 P.2d 954, 962 (Cal. 1982); *see also, e.g.*, Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979).

⁸⁸ “Parental Investment (P.I.) is defined as any investment by the parent in [a child] that increases [that child]'s chance of surviving . . . at the cost of the parent's ability to invest in other [children].” RICHARD DAWKINS, THE SELFISH GENE 124 (30th anniversary ed. 2006) (internal quotation marks omitted). “[A]ny particular adult

B. The Extent to Which Each Cause of Action Has Been Recognized

Wrongful birth and wrongful life suits have not been given the same breadth of legal recognition, nor have they been received equally by courts and legislatures in the United States. Of the jurisdictions in the United States that have considered the issue, a majority has recognized a cause of action for wrongful birth.⁸⁹ Of those states that recognize the wrongful birth tort, most do not allow recovery for emotional distress,⁹⁰ but some do.⁹¹ Several states, however, have declined to recognize a cause of action for wrongful birth by court decisions: Georgia, Kentucky, Michigan, Missouri, and North Carolina.⁹² In addition, some state legislatures have enacted statutes

individual has, in her whole lifetime, a certain total quantity of P.I. [parental investment] available to invest in children This represents the sum of all the food she can gather or manufacture in a lifetime of work, all the risks she is prepared to take, and all the energy and effort that she is able to put into the welfare of children.” *Id.* For further discussion on parental investment, see *id.* at 124–39.

⁸⁹ See *Keel v. Banach*, 624 So. 2d 1022, 1031 (Ala. 1993); *Lininger v. Eisenbaum*, 764 P.2d 1202, 1208 (Colo. 1988); *Haymon v. Wilkerson*, 535 A.2d 880, 886 (D.C. App. 1987); *Moores v. Lucas*, 405 So. 2d 1022, 1026 (Fla. App. 1981), *overruled by* *Kush v. Lloyd*, 616 So. 2d 415, 423 (Fla. 1992) (refusing to apply impact doctrine in wrongful birth claims but still recognizing wrongful birth claims); *Blake v. Cruz*, 698 P.2d 315, 319 (Idaho 1984); *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 706 (Ill. 1987); *Arche v. United States*, 798 P.2d 477, 481 (Kan. 1990); *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1162 (La. 1988); *Smith v. Cote*, 513 A.2d 341, 348 (N.H. 1986); *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs.*, 844 N.E.2d 1160, 1168 (Ohio 2006); *Speck v. Finegold*, 439 A.2d 110, 114 (Pa. 1981); *Schloss v. Miriam Hosp.*, C.A. No. 98-2076, 1999 R.I. Super. LEXIS 116, at *8 (R.I. Super. Ct. Jan. 11, 1999); *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex. 1975); *Naccash v. Burger*, 290 S.E.2d 825, 830 (Va. 1982); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 488 (Wash. 1983); *James G. v. Caserta*, 332 S.E.2d 872, 881 (W. Va. 1985); *Dumer v. St. Michael’s Hosp.*, 233 N.W.2d 372, 377 (Wis. 1975); see also *Becker v. Schwartz*, 386 N.E.2d 807, 811, 813 (N.Y. 1978). In *Becker*, the court characterized the cause of action for “wrongful birth” as one whereby an “illegitimate, but otherwise healthy child, seeks recovery in his or her own behalf for the injury suffered as a consequence of his or her birth into this world as a stigmatized child,” which seems to be a mischaracterization of the tort. *Id.* The court, however, concluded that the parents had a valid cause of action in negligence or medical malpractice for pecuniary loss, or special damages, “which the parents have borne, and . . . must continue to bear, for the care and treatment of their infants,” which by any other name is in fact the wrongful birth tort. *Id.*

⁹⁰ *Keel v. Banach*, 624 So. 2d 1022, 1029 (Ala. 1993).

⁹¹ See, e.g., *id.* at 1030; *Blake v. Cruz*, 698 P.2d 315, 320 (Idaho 1984); *Naccash v. Burger*, 290 S.E.2d 825, 831 (Va. 1982); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 494 (Wash. 1983).

⁹² See *Etkind v. Suarez*, 519 S.E.2d 210, 212 (Ga. 1999); *Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 689 (Ky. 2003); *Taylor v. Kurapati*, 600 N.W.2d 670, 691 (Mich. Ct. App. 1999); *Wilson v. Kuenzi*, 751 S.W.2d 741, 746 (Mo. 1988); *Azzolino v. Dingfelder*, 337 S.E.2d 528, 537 (N.C. 1985). Missouri also

barring actions for wrongful birth.⁹³ Over twenty states have declined to recognize claims for wrongful life either by the states' courts⁹⁴ or legislatures.⁹⁵ The only states in the United States that recognize a wrongful life cause of action are California, Maine, New Jersey, and Washington.⁹⁶ New Jersey decided to recognize a wrongful life cause

enacted legislation barring the causes of action for wrongful birth and wrongful life. See *infra* notes 94 and 96. In *Wilson*, however, the state judicially declined to recognize these causes of action. *Wilson*, 751 S.W.2d at 746.

⁹³ IDAHO CODE ANN. § 5-334(1) (LEXIS through 2009 Reg. Sess.); IND. CODE ANN. § 34-12-1-1 (LexisNexis, LEXIS through 2009 1st Reg. Sess. and 2009 Special Sess.); MICH. COMP. LAWS SERV. § 600.2971(1) (LexisNexis, LEXIS through P.A. 2 of 2010 Legis. Sess.); MINN. STAT. § 145.424(1) (LEXIS through 2009 Reg. Sess.); MO. ANN. STAT. § 188.130 (West, Westlaw through 95th Gen. Assembly, 1st Reg. Sess.); N.D. CENT. CODE § 32-03-43 (LEXIS through 2009 Legis. Sess.); 42 PA. CONS. STAT. ANN. § 8305(a) (West 2007); S.D. CODIFIED LAWS § 21-55-2 (Westlaw through 2009 Legis. of 84th Sess.); UTAH CODE ANN. § 78B-3-109 (LEXIS through 2009 1st Special Sess.).

⁹⁴ See, e.g., *Elliott v. Brown*, 361 So. 2d 546, 548 (Ala. 1978); *Walker ex rel. Pizano v. Mart*, 790 P.2d 735, 740 (Ariz. 1990); *Linger v. Eisenbaum*, 764 P.2d 1202, 1210 (Colo. 1988); *Garrison ex rel. Garrison v. Med. Ctr. of Del. Inc.*, 581 A.2d 288, 293-94 (Del. 1990); *Kush v. Lloyd*, 616 So. 2d 415, 423-24 (Fla. 1992); *Spiroy v. Kim*, 416 S.E.2d 780, 781-82 (Ga. Ct. App. 1992); *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 702 (Ill. 1987); *Goldberg v. Ruskin*, 499 N.E.2d 406, 410 (Ill. 1986); *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630, 635 (Ind. 1991); *Bruggeman v. Schimke*, 718 P.2d 635, 642 (Kan. 1986); *Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 689-90 (Ky. 2003); *Pitre v. Opelousas Gen. Hosp.*, 517 So. 2d 1019, 1024-25 (La. Ct. App. 1987), *aff'd in part, rev'd in part*, 530 So. 2d 1151, 1163 (La. 1988) (affirming the court of appeal's judgment that sustained the rejection of the wrongful life claim and overruled the rejection of the wrongful birth claim); *Kassama v. Magat*, 792 A.2d 1102, 1123 (Md. 2002); *Viccaro v. Milunsky*, 551 N.E.2d 8, 12-13 (Mass. 1990); *Greco v. United States*, 893 P.2d 345, 347-48 (Nev. 1995); *Smith ex rel. Smith v. Cote*, 513 A.2d 341, 353-55 (N.H. 1986); *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978); *Azzolino v. Dingfelder*, 337 S.E.2d 528, 537 (N.C. 1985); *Hester v. Dwivedi*, 733 N.E.2d 1161, 1165 (Ohio 2000); *Schloss v. Miriam Hosp., C.A. No. 98-2076*, 1999 R.I. Super. LEXIS 116, at *16 (R.I. Super. Ct. Jan. 11, 1999); *Willis v. Wu*, 607 S.E.2d 63, 71 (S.C. 2004); *Nelson v. Krusen*, 678 S.W.2d 918, 924-25 (Tex. 1984); *Glasco v. Laserna*, 30 Va. Cir. 366, 369 (Va. Cir. Ct. 1993); *Barnes v. Head*, 30 Va. Cir. 218, 221-22 (Va. Cir. Ct. 1993); *James G. v. Caserta*, 332 S.E.2d 872, 881 (W. Va. 1985); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372, 376 (Wis. 1975); *Beardsley v. Wierdsma*, 650 P.2d 288, 290 (Wyo. 1982).

⁹⁵ See, e.g., IDAHO CODE ANN. § 5-334(1) (LEXIS through 2009 Reg. Sess.); IND. CODE ANN. § 34-12-1-1 (LexisNexis, LEXIS through 2009 1st Reg. Sess. and 2009 Special Sess.); MICH. COMP. LAWS SERV. § 600.2971(2) (LexisNexis, LEXIS through P.A. 2 of 2010 Legis. Sess.); MINN. STAT. ANN. § 145.424(1) (LEXIS through 2009 Reg. Sess.); MO. ANN. STAT. § 188.130 (West, Westlaw through 95th Gen. Assembly, 1st Reg. Sess.); N.D. CENT. CODE § 32-03-43 (LEXIS through 2009 Legis. Sess.); 42 PA. CONS. STAT. ANN. § 8305(b) (West 2007); S.D. CODIFIED LAWS § 21-55-1 (Westlaw through 2009 Legis. of 84th Sess.); UTAH CODE ANN. § 78B-3-109 (LEXIS through 2009 1st Special Sess.).

⁹⁶ See ME. REV. STAT. ANN. tit. 24, § 2931(3) (Westlaw through 2009 1st Reg. Sess. of 124th Legis.); *Turpin v. Sortini*, 643 P.2d 954 (Cal. 1982); *Procanik v. Cillo*, 478

of action so that the disabled child could recover the extra expenses directly related to the child's disability and avoid an injustice by reason of the parents' wrongful birth claim having been barred by the statute of limitations.⁹⁷ The recovery in all four of the states that recognize the tort for wrongful life, however, is limited to only special damages (extra medical expenses related to the care of the child).⁹⁸ Countries other than the United States have also recognized wrongful life claims.⁹⁹

Most courts that have refused to recognize a cause of action for wrongful life have declined to do so for reasons other than eugenic implications.¹⁰⁰ For instance, courts have declined to recognize

A.2d 755 (N.J. 1984), *remanded to* 502 A.2d 94 (N.J. Super. Ct. Law Div. 1985), *rev'd on other grounds*, 543 A.2d 985, 996 (N.J. Super. Ct. App. Div. 1988) (dismissing only plaintiff's count of legal malpractice against certain defendants); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983).

⁹⁷ *Procanik*, 478 A.2d at 762.

⁹⁸ ME. REV. STAT. ANN. tit. 24, § 2931(3); *Turpin*, 643 P.2d at 966; *Procanik*, 478 A.2d at 762; *Harbeson*, 656 P.2d at 495.

⁹⁹ Although South Africa and most jurisdictions in the world have declined to recognize a cause of action for wrongful life, Israel and Holland have recognized this cause of action. *Stewart & Another v Botha & Another* 2008 (6) SA 310 (SCA) at 316, ¶ 13 (S. Afr.); *see also* CA 512/81 *Zeitsov v. Katz* [1986] IsrSC 40(2) 85; Leids Universitair Medisch Centrum/Kelly Molenaar, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 18 maart 2005, RvdW 2005, 42 (Neth.). France's highest appeals court had held that handicapped children can receive compensation if their mothers had not been given the opportunity to choose to have an abortion. Rod Dreher, *French Abort Law Does Nazis Proud*, N.Y. POST, July 15, 2001, at 022. French courts, however, only recognized this cause of action from 1996 to 2001, because the political pressure resulted in an act being passed on March 4, 2002, prohibiting such claims. *Stewart*, (6) SA at 316, ¶ 13.

¹⁰⁰ Another concern, though one that is beyond the scope of this Comment, which has been raised in support of the argument *against* recognizing a cause of action for wrongful life is that recognizing this cause of action may be a half-step to permitting a child to sue his or her parent(s) for choosing to conceive despite the known risks involved or opting not to terminate a pregnancy despite the positive test results. *See* *Curlender v. Bio-Science Labs.*, 165 Cal. Rptr. 477, 488 (Cal. Ct. App. 1980) ("If a case arose where, despite due care by the medical profession in transmitting the necessary warnings, parents made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born . . . we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring."). In an Illinois case, however, where the state attorney sued a woman for deciding not to have a Cesarean section for religious reasons, the "court held that a woman has no duty to guarantee the physical and mental health of her child." *Andrews, supra* note 35, at 998 (citing *In re Baby Boy Doe*, 632 N.E.2d 326, 326 (Ill. App. Ct. 1994)). A woman should be able to refuse to undergo an abortion or choose to have a child despite high risks of conceiving a child with a genetic disease and raise a child who may be disabled or sick without a concern that her child will turn around

wrongful life claims because “the theory [that the child should not have been born at all] amounts to a repudiation of the value of human life.”¹⁰¹ Courts have focused on the preciousness of life and have had little discussion (if any) of the negative eugenic implications in recognizing this cause of action.¹⁰²

and sue her for having been born. It would be “inconceivable” that a woman who chooses *not* to avail herself of her right to terminate a pregnancy would be deemed to be making an unlawful choice. *Stewart*, (6) SA at 316, ¶ 19. Presumably, if the law recognizes a woman’s right to terminate a pregnancy as a fundamental one based on issues of privacy and autonomy, then these same reasons should substantiate her right *not* to terminate a pregnancy. *See id.*

In further response to this concern—of disabled children suing their parents for choosing to continue with the pregnancy despite their knowledge of the disability—state legislatures can enact provisions to curtail this type of liability. For instance, the California legislature enacted a provision indicating that “[n]o cause of action arises against a parent of a child based upon the claim that the child should not have been conceived, or, if conceived, should not have been allowed to have been born alive.” CAL. CIV. CODE § 43.6 (West 2007). The purpose of enacting this statute was to eliminate the fear of liability or any other economic pressure that may induce parents to abort or to not conceive a potentially disabled child. *Turpin v. Sortini*, 643 P.2d 954, 959 (Cal. 1982).

¹⁰¹ *Blake v. Cruz*, 698 P.2d 315, 321 (Idaho 1984); *see also Willis v. Wu*, 607 S.E.2d 63, 69 (S.C. 2004).

¹⁰² *See, e.g., Elliott v. Brown*, 361 So. 2d 546, 547–48 (Ala. 1978) (declining to recognize a wrongful life cause of action because it is impossible to calculate damages and because there is no legal right not to be born); *Willis*, 607 S.E.2d at 69–70 (indicating that courts have rejected the wrongful life claim because no legally cognizable injury results and for lack of proximate causation). Some courts have questioned the rationale used by other courts in rejecting a cause of action for wrongful life. For example, the Supreme Court of California indicated that it would be “hard to see how an award of damages to a severely handicapped or suffering child would ‘disavow’ the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society.” *Turpin*, 643 P.2d at 961–62. The California court, however, entered dangerous waters when it indicated that there could be cases where the disability of the child is so severe that there could be “societal consensus” that never having been born at all is preferable to life. *Id.* at 962–63.

[Where] the plaintiff’s only affliction is deafness, it seems quite unlikely that a jury would ever conclude that life with such a condition is worse than not being born at all. Other wrongful life cases, however, have involved children with much more serious, debilitating and painful conditions, and the academic literature refers to still other, extremely severe hereditary diseases. Considering the short life span of many of these children and their frequently very limited ability to perceive or enjoy the benefits of life, we cannot assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all.

Id. (footnote omitted).

2010]

COMMENT

1135

C. Summary

When parents are deprived of their opportunity to choose whether to conceive or proceed with a pregnancy of a disabled fetus (because of the negligent conduct of a prenatal-care physician), many states permit the parents to sue the negligent physician for the extraordinary costs they will incur in connection with the rearing of a disabled child and sometimes permit the parents to recover for the emotional distress they endure as a proximate result of the birth of this unwanted disabled child. Very few states allow the child to sue, and those that do only allow recovery for the extra costs the child will incur associated with the disability. A remarkable minority of jurisdictions that have considered either the wrongful birth or wrongful life suit (or both) discussed eugenics despite the eugenic implications in the recognition of these suits.¹⁰³

IV. EUGENICS: A HISTORY

The question of whether eugenics is a thing of the past or is still a part of our culture today depends on how we understand the term “eugenics.”¹⁰⁴ Generally speaking, eugenics “is the ‘science of the improvement of the human race by better breeding.’”¹⁰⁵ The notion “that the human race can be gradually improved and social ills simultaneously eliminated through a program of selective procreation,”¹⁰⁶ is a eugenic premise. In 1883, Francis Galton, a British naturalist and Charles Darwin’s cousin, coined the term “eugenics” from the Greek term *eugenes*, which means “‘good in stock, hereditarily endowed with noble qualities.’”¹⁰⁷ He suggested that we improve the human race more “‘quickly and kindly’” than what nature could do by evolution “‘blindly, slowly, and ruthlessly.’”¹⁰⁸ Eugenics promotes the reproduction of the fit over the unfit and seeks to prevent the birth of the un-

¹⁰³ For a discussion of the jurisdictions that did touch on eugenics, see *infra* notes 166–68 and accompanying text.

¹⁰⁴ McGee & Magnus, *supra* note 8, at 201.

¹⁰⁵ RUTH CLIFFORD ENGS, *THE EUGENICS MOVEMENT: AN ENCYCLOPEDIA*, at xiii (2005).

¹⁰⁶ *Taylor v. Kurapati*, 600 N.W.2d 670, 688 (Mich. Ct. App. 1999).

¹⁰⁷ See ENGS, *supra* note 105, at xiii; see also McGee & Magnus, *supra* note 8, at 199; Neumayr, *supra* note 34, at 3.

¹⁰⁸ Neumayr, *supra* note 34, at 3.

fit.¹⁰⁹ Positive eugenics is the concept of encouraging those persons with more desirable inheritable characteristics to reproduce,¹¹⁰ whereas negative eugenics relates to the means by which those persons with less desirable traits (e.g., criminals, mentally and physically disabled persons, etc.) are discouraged from reproducing.¹¹¹

Often the term “eugenics” conjures memories of Hitler’s regime and the Nazis’ mass murder of certain designated undesirables, including the disabled.¹¹² Few may remember the history of this practice in the United States or know that this country may have inspired the Nazis’ own eugenic practices.¹¹³ In the first half of the twentieth century, some societies moved to reduce unwanted populations from the general population by sterilization, infanticide, euthanasia, and other solutions.¹¹⁴

In the United States, for example, eugenics dates as far back as 1897.¹¹⁵ At the beginning of the twentieth century, eugenics took the form of sterilizing the enfeebled.¹¹⁶ In most states had laws that permitted the involuntary sterilization of people deemed less fit, which resulted in the forced sterilization of at least 60,000 people.¹¹⁷ The eugenic sterilization programs of the early-twentieth century came with public displays at state fairs featuring promotional slogans, such as, “Some people are born to be a burden on the rest,” and “Every 15 seconds \$100 of your money goes for the care of persons with bad heredity such as the insane feeble-minded, criminals [and] other defec-

¹⁰⁹ James E. Bowman, *Genetics and the Law: The Ethical, Legal, and Social Implications of Genetic Technology and Biomedical Ethics: The Road to Eugenics*, 3 U. CHI. L. SCH. ROUNDTABLE 491, 492 (1996).

¹¹⁰ See ENGS, *supra* note 105, at xiii; see also McGee & Magnus, *supra* note 8, at 202 (defining positive eugenics as the promotion of “increased production of ‘geniuses’ and people of great talent, through encouraging more scientific selection of mates, and more breeding by the chosen few”).

¹¹¹ See ENGS, *supra* note 105, at xiii; see also McGee & Magnus, *supra* note 8, at 202 (“[N]egative eugenics’ was concerned with eliminating the least fit individuals through reducing or eliminating their reproduction.”).

¹¹² Neumayr, *supra* note 34, at 1.

¹¹³ See *infra* note 122 and accompanying text.

¹¹⁴ Bowman, *supra* note 109, at 492.

¹¹⁵ Reilly, *supra* note 34, at 206 (“The nation’s first sterilization bill was introduced in the Michigan legislature in 1897.”).

¹¹⁶ Neumayr, *supra* note 34, at 3.

¹¹⁷ McGee & Magnus, *supra* note 8, at 200.

tives.”¹¹⁸ In 1927, in *Buck v. Bell*,¹¹⁹ the U.S. Supreme Court approved the states’ right to sterilize people with intellectual disabilities.¹²⁰ In *Buck*, Justice Oliver Wendell Holmes wrote that “[t]hree generations of imbeciles are enough.”¹²¹

In 1933 Nazi Germany enacted its own law (modeled after California’s sterilization program) that led to the involuntary sterilization of more than 300,000 people, a majority of whom were feeble-minded.¹²² In addition, between 1939 and 1945, Germany euthanized more than 200,000 mentally and physically disabled people.¹²³ During the first half of the twentieth century, the United States and Germany were not alone in implementing sterilization programs for people with disabilities; Denmark sterilized more than 8000 people between 1930 and 1954, and Sweden sterilized more than 2000 people in 1948 alone.¹²⁴

With Nazi Germany having taken the science of eugenics to an unprecedented level, eugenics seems to have fallen to the wayside as a taboo subject. Perhaps the fight against the Nazis in World War II and thwarting their attempt to create a master race made sterilization laws no longer palatable.¹²⁵ The waning of the eugenics movement was reflected in *Skinner v. Oklahoma*,¹²⁶ which although not expressly overruling *Buck v. Bell*, declared unconstitutional a law that would

¹¹⁸ Christina Cogdell, *Smooth Flow: Biological Efficiency and Streamline Design*, in *POPULAR EUGENICS: NATIONAL EFFICIENCY AND AMERICAN MASS CULTURE IN THE 1930S* 217, 221 (Susan Currell & Christina Cogdell eds., 2006).

¹¹⁹ 274 U.S. 200 (1927).

¹²⁰ David Braddock & Susan Parish, *An Institutional History of Disability*, in *DISABILITY AT THE DAWN OF THE 21ST CENTURY AND THE STATE OF THE STATES* 1, 29 (David Braddock ed. 2002).

¹²¹ *Buck*, 274 U.S. at 207. Justice Holmes’s preface to this infamous line is, “We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices [sterilization], often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. 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.”

Id.

¹²² Braddock & Parish, *supra* note 120, at 30; *see also* McGee & Magnus, *supra* note 8, at 201.

¹²³ Braddock & Parish, *supra* note 120, at 30.

Id.

¹²⁵ CHEMERINSKY, *supra* note 14, at 815.

¹²⁶ 316 U.S. 535 (1942).

deprive certain individuals of a basic liberty—the right to procreate.¹²⁷ The Court acknowledged that “[t]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.”¹²⁸ New developments in reproductive technology and the law, however, have reopened the door to eugenics in the United States.

V. NEW DEVELOPMENTS IN EUGENICS THROUGH DAMAGES AWARDS

The courts’ and legislatures’ recognition of the torts of wrongful birth and wrongful life place an impetus behind a new eugenic movement. As a consequence of holding physicians liable for the birth of a disabled child who could never have been born a healthy child, physicians will choose to err on the side of recommending abortions or abstention from conception to avoid potential liability.¹²⁹ This conduct will have the cumulative effect of eliminating the genetically impaired. This effect becomes inevitable as prenatal screening becomes more advanced and more parents take actions to ensure the birth of a normal and healthy child. The government participates in this new eugenic movement in two ways. First, the state engages in eugenics when its judiciary or legislature imposes this type of liability on physicians. Second, a state engages in eugenics when it judicially or legislatively recognizes (i) that a child has been injured by its own birth to a life with a disability (but not injured if born without a disability) and (ii) that parents have been damaged by the birth of their unwanted disabled child (but not by the birth of an unwanted healthy child).

Harriet McBryde Johnson, a disability-rights activist who died in 2008 at fifty years of age from a congenital neuromuscular disease,¹³⁰ was aware of eugenic thinking vis-à-vis the disabled. She wrote that “[t]he peculiar drama of [her] life ha[d] placed [her] in a world that by and large thinks it would be better if people like [her] did not exist.”¹³¹

¹²⁷ CHEMERINSKY, *supra* note 14, at 814–15.

¹²⁸ *Skinner*, 316 U.S. at 541.

¹²⁹ *See supra* note 45.

¹³⁰ Rosen, *supra* note 34.

¹³¹ *Id.*

The efforts of activists like Harriet Johnson have prevented our society from neglecting persons with disabilities.¹³² While her fight was one for accommodation for disabled persons, society seems to now be “in a disturbing situation: As our scientific powers to eliminate disability grow, our acceptance of disability wanes.”¹³³ There is a societal move to prevent the births of disabled children through the tools of prenatal screening and genetic testing and the exercise of one’s right to reproductive choice. In 2005 the head of the American Association of People with Disabilities indicated that the use of prenatal screening to prevent the birth of disabled persons has placed society on a slippery slope toward “a new eugenics, and [he does not] know where it is going to end.”¹³⁴

More subtle hints of contemporary, positive eugenic practices include prenatal-care programs that encourage pregnant women to eat well and abstain from alcohol consumption and tobacco usage to increase the likelihood of having a healthy child.¹³⁵ The cumulative effect of the availability and use of reproductive genetic testing, however, together with awards of damages in wrongful birth and wrongful life suits, is a less subtle form of eugenics.

From exercising choice and acting discriminatorily as a prospective parent to attaching a stigma and involving the state in that individual choice, a backdoor eugenics movement has sprung. Eugenics starts with control and choices—the control of factors that influence reproduction with the view to improving the species and choosing which traits should be inherited and which ones should be eliminated. Discrimination is a natural byproduct of choice. Some types of discrimination, however, are invidious because they involve prejudice and/or stereotyping.¹³⁶ The discrimination involved in parents’ choosing which genetic traits they want their children to inherit is a natural and, currently, legal consequence of a parent’s right to procreative autonomy.¹³⁷ When the state, however, involves itself in the decision-making process—to a point where it legitimizes the disability hierarchy that society and parents have created and incentivizes physicians to recommend abortions or abstentions from conception

¹³² *See id.*

¹³³ *Id.*

¹³⁴ Neumayr, *supra* note 34, at 1.

¹³⁵ ENGS, *supra* note 105, at xvi.

¹³⁶ *See* BLACK’S LAW DICTIONARY 500 (8th ed. 2004) (defining “invidious discrimination”).

¹³⁷ *See supra* Part II.A.

when risks of birthing disabled children exist—then the state is engaging in eugenics, and this is wrong.

The law accelerated a new eugenic movement by awarding damages in wrongful birth and wrongful life suits. For example, damages awards to disabled children and to parents of disabled children in wrongful life and wrongful birth suits, respectively, legitimize the claims that a person is harmed by being born disabled or by having a disabled child. This legitimization is furthered in wrongful conception and wrongful pregnancy cases when a state refuses to award the same types of damages to parents who had unwanted healthy children.

Maine, for instance, has enacted legislation that prohibits damages awards “for the birth or rearing of a healthy child” because the legislature felt “that the birth of a normal, healthy child does not constitute a legally recognizable injury.”¹³⁸ The statute provides that no person may “receive an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to him.”¹³⁹ The same statute, however, permits awards of special damages “for the birth of an unhealthy child” resulting from a physician’s negligence.¹⁴⁰ Most courts in the United States have similarly refused to award the costs of rearing a normal, healthy child in wrongful conception and wrongful pregnancy cases,¹⁴¹ but will award certain costs in the rearing of unhealthy children in wrongful birth cases.¹⁴²

The state should not engage in this kind of discriminatory treatment. The disparate treatment of disabled children and healthy children in similar negligence cases implies that disabled children (1) are to be less cherished than healthy children, (2) are harmful to parents, and (3) cause a legally cognizable injury to their parents. These negative implications are discriminatory, stigmatize the disabled community, and breathe new life into a eugenic movement.

Moreover, eugenics is unconstitutional. “[N]owhere in Articles V and XIV of the U.S. Constitution, [nor] the Declaration of Independence . . . is there any indication that ‘the lives of persons suffering from physical handicaps are to be less cherished than those of

¹³⁸ ME. REV. STAT. ANN. tit. 24, § 2931(1) (Westlaw through 2009 1st Reg. Sess. of 124th Legis.).

¹³⁹ *Id.* § 2931(2).

¹⁴⁰ *Id.* § 2931(3).

¹⁴¹ See *infra* note 227.

¹⁴² See *supra* note 90 and accompanying text.

non-handicapped human beings.”¹⁴³ No one is perfect. “Each of us suffers from some ailments and impairments, whether major or minor, which make impossible participation in all the activities the world has to offer. But our lives are not thereby rendered less precious than those of others whose impairments are less pervasive or less severe.”¹⁴⁴ Because no one can claim perfection, no one can claim that his life is more worthy than another’s.

Furthermore, disabled persons have lives of value. While Harriet Johnson suffered from muscular dystrophy,¹⁴⁵ she did not let her condition become an insurmountable obstacle to living life to its fullest as a lawyer and an activist for disability rights.¹⁴⁶ She fought against the stereotype that disabled people live lives of suffering.¹⁴⁷ As one commentator noted, what really oppresses disabled persons is not their own disability but the discrimination, stereotyping, and lack of accommodation that makes life as a disabled person much more difficult.¹⁴⁸ And Johnson recognized that while “many things may be entirely foreclosed or more trouble than they’re worth, the possibilities that remain are so numerous, so varied, so far beyond the capacity of one person to experience, so marvelous—that they might just as well be infinite.”¹⁴⁹

To have a preference for nondisabled children over disabled children deprives the latter of the same respect and protection that is accorded the former.¹⁵⁰ Such a preference implies that disabled children are not equal to nondisabled children because they are valued less.¹⁵¹ Many people hope that when they have a child, the child will not be disabled. Whether this hope means that parents are devaluing and discriminating against children with disabilities, however, is *not* the issue. The issue is the courts’ and state legislatures’ intention-

¹⁴³ Allan H. Macurdy, Commentary, *Disability Ideology and the Law School Curriculum*, 4 B.U. PUB. INT. L.J. 443, 453 (1995).

¹⁴⁴ *Id.* at 454.

¹⁴⁵ HARRIET MCBRYDE JOHNSON, TOO LATE TO DIE YOUNG: NEARLY TRUE TALES FROM A LIFE 7 (2005).

¹⁴⁶ *See generally id.*

¹⁴⁷ *See id.* at 253.

¹⁴⁸ Marsha Saxton, *Disability Rights and Selective Abortion*, in ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000, at 374 (Solinger ed., 1998), *reprinted in* THE REPRODUCTIVE RIGHTS READER: LAW, MEDICINE, AND THE CONSTRUCTION OF MOTHERHOOD 231, 233 (Nancy Ehrenreich ed., 2008).

¹⁴⁹ JOHNSON, *supra* note 145, at 257–58.

¹⁵⁰ *See* HARRIS, *supra* note 17, at 88.

¹⁵¹ *See id.*

al or inadvertent condonation and encouragement of these parental preferences. It well may be that when parents *act* on the hope that their children will not be disabled, it is a form of possibly invidious discrimination against the disabled community. On the other hand, who can say it is wrong for deaf parents to want to have a similarly disabled child?¹⁵² Nevertheless, it is when government becomes involved in these parental choices that there is cause for concern.

While parents may legally discriminate in their exercise of the right to choose,¹⁵³ when a state chooses to discriminate against the disabled, it must have a rational basis for such discrimination.¹⁵⁴ Bias is not a permissible basis for discrimination by the state.¹⁵⁵ Consequently, the state may not treat disabled children differently from nondisabled children solely to “defer[] to the wishes or objections of some fraction of the body politic.”¹⁵⁶ Private biases are outside the jurisdiction of the law, and so are parents’ procreative choices. Indeed, “the law cannot, directly or indirectly, give [these biases] effect.”¹⁵⁷ Thus, states’ awards of damages in wrongful birth and wrongful life actions are a rubberstamp of, and an impetus behind, society’s move toward a new eugenics.

Although women in the United States are neither prohibited by law from conceiving when a risk of conceiving a genetically impaired child exists¹⁵⁸ nor compelled to abort genetically impaired fetuses, tomorrow’s eugenic, discriminatory, and stigmatic effects of today’s damages awards are a very real threat. Physicians, fearful of incurring liability in wrongful birth or wrongful life suits, will likely be more proactive in prenatal screening and recommending abortions.¹⁵⁹ Compulsory prenatal screening (or abortions), therefore, could “equally occur in the absence of [state] compulsion, if widespread genetic screening becomes accepted . . . as part of routine medical

¹⁵² See *id.* at 89 (“[Some] deaf people do in fact wish their children to be deaf like them . . . [because] there is a distinctive deaf culture which is in some senses better than that available to those with hearing.”).

¹⁵³ See *supra* Part II.A.

¹⁵⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (“[L]egislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.”).

¹⁵⁵ See *id.* at 448.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

¹⁵⁸ Cf. *infra* note 226 and accompanying text.

¹⁵⁹ See *supra* note 45.

2010]

COMMENT

1143

practice.”¹⁶⁰ The cumulative effect of this practice will have the same eugenic effect as if the law had directly compelled the abortions of genetically disabled fetuses in utero.

The state may have a legitimate interest in ensuring that parents and disabled children recover the extraordinary costs of raising a child with a disability and living with that disability through adulthood, respectively. The state, however, would rather these costs fall on doctors and their insurance providers, if not the families of disabled children, as opposed to the state itself.¹⁶¹ The state does not want to support its disabled community.¹⁶² Thus, instead of enacting proper health care legislation to remedy the insufficiency of health care coverage for disabled children, the judiciary and the legislature seek to award damages against negligent doctors in wrongful birth and wrongful life cases to reduce the financial burden on parents and their children.

The state’s inaction in redressing the inadequacies of the health care system has a domino effect. The lack of coverage compels parents to sue for costs to ease their burdens. The lack of coverage then motivates the courts and state legislatures to ease the strain on the parents through awards of special damages. This potential for liability then incentivizes doctors to be proactive in preventing the births of disabled children. The end result is the deliberate manipulation of reproduction by eliminating the births of genetically disabled children.¹⁶³ And this becomes backdoor eugenics. Thus, states should expand health care coverage for genetically disabled children so that the path to eugenics is effectively blocked.

A. *Damages in Wrongful Birth*

American jurisprudence vis-à-vis wrongful birth actions directs the value choices of parents by granting damages awards to a parent for the harm of having an unwanted disabled child. Here, states are influencing, or implicitly dictating, a particular choice or result through their judiciary or legislative branches. This jurisprudence

¹⁶⁰ Ramsey, *supra* note 40, at 163.

¹⁶¹ See 42 U.S.C. § 12101(a)(7)–(8) (2000). In enacting the Americans with Disabilities Act, Congress sought to assure the economic self-sufficiency for disabled individuals and expressed its displeasure in having to spend “billions of dollars in unnecessary expenses resulting from dependency and nonproductivity” of disabled persons. *Id.*

¹⁶² See *supra* note 161.

¹⁶³ See *supra* note 1.

travels the same path that American courts paved in the early twentieth century when they recognized and condoned sterilization laws targeting the enfeebled.¹⁶⁴

In 1967, when the Supreme Court of New Jersey first broached the issue of whether it would recognize a cause of action for either wrongful birth or wrongful life, the court, in refusing to recognize either tort, nonetheless gave short shrift to any possible eugenic implications of allowing such claims: “Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle.”¹⁶⁵

The Michigan Court of Appeals, however, refused to recognize a cause of action for wrongful birth because it resounded in eugenics:

The very phrase “wrongful birth” suggests that the birth of the disabled child was wrong and should have been prevented. If one accepts the premise that the birth of one “defective” child should have been prevented, then it is but a short step to accepting the premise that the births of classes of “defective” children should be similarly prevented, not just for the benefit of the parents but also for the benefit of society as a whole through the protection of the “public welfare.” This is the operating principle of eugenics.¹⁶⁶

The Michigan Court of Appeals further expressed concern about following the pattern of the early twentieth century, when courts (and jurists as respected as Justice Oliver Wendell Holmes) did not have a problem authorizing forced sterilization.¹⁶⁷ In reaching its decision to uphold the sterilization laws in 1927, in *Buck v. Bell*,¹⁶⁸ the U.S. Supreme Court relied on the expert testimony of Dr. Joseph DeJarnette.¹⁶⁹ Referring to the nefarious experiments of the Third Reich, Dr. DeJarnette said, “No person unable to support himself on account of his inherited mental condition has a right to be born.”¹⁷⁰ That jurisprudential history implies that the judicial system is susceptible to the views and biases of society. The law, therefore, should take care to ensure that it does not affirm parents’ efforts, and possibly physicians’ efforts as well, to achieve the “betterment” of mankind at the expense of a minority group through wrongful discrimination.

¹⁶⁴ See *supra* notes 113–121 and accompanying text.

¹⁶⁵ *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (N.J. 1967).

¹⁶⁶ *Taylor v. Kurapati*, 600 N.W.2d 670, 688 (Mich. Ct. App. 1999).

¹⁶⁷ See *id.* at 689.

¹⁶⁸ 274 U.S. 200 (1927).

¹⁶⁹ See *Taylor*, 600 N.W.2d at 690.

¹⁷⁰ *Id.* at 689.

“The goal of reducing the incidence of genetic conditions is not acceptable, since this aim is explicitly eugenic; [medical] professionals should not present any reproductive decisions as ‘correct’ or advantageous for a person or society.”¹⁷¹ Similarly, the legal system should not award damages to parents in a wrongful birth action on the premise that they have been injured by the birth of a disabled child. Doing so would affirm and condone the parents’ professed choice to have aborted the disabled fetus if they had been properly presented with the opportunity.

Awarding parents damages for emotional distress in wrongful birth suits stigmatizes disabled persons. Although recovery for emotional distress is permitted and is appropriate in other tort actions, allowing it in wrongful birth actions sends the wrong message and is not an appropriate remedy. In granting emotional damages to parents in a wrongful birth suit, “courts assume all parents will experience ‘emotional anguish’ caused by the ‘apparent’ complete tragedy of living with a child with a disability.”¹⁷² Both causes of action, and wrongful life in particular,¹⁷³ seem to follow this same distasteful logic. The irrebuttable presumption of the law, however, should be that a parent loves his or her child unconditionally, regardless of the state of that child’s health. Nevertheless, “[f]or all of this culture’s talk about ‘unconditional love’ of children, its tolerance of them is baldly conditional: It permits them to live on the condition that they possess wanted traits.”¹⁷⁴

As the Michigan Court of Appeals indicated, “a child should not be considered a ‘harm’ to its parents.”¹⁷⁵ Disabled persons are still very capable of experiencing and providing love and affection to their family and living “full” lives.¹⁷⁶ Any damages awarded to parents

¹⁷¹ COMM. ON ASSESSING GENETIC RISKS, INST. OF MED., ASSESSING GENETIC RISKS: IMPLICATIONS FOR HEALTH & SOCIAL POLICY 15 (Lori B. Andrews et al. eds., 1994).

¹⁷² Macurdy, *supra* note 143, at 451.

¹⁷³ See *infra* Part V.B.

¹⁷⁴ Neumayr, *supra* note 37, at 2.

¹⁷⁵ *Taylor*, 600 N.W.2d at 681 (emphasis omitted). For this reason, the court refused to allow recovery even of “the customary cost of raising the child,” let alone an award of emotional damages. *Id.* This Comment, while in line with the premise behind the Court of Appeals of Michigan decision, abstains from agreeing with the court’s view that no such special damages should be awarded because the health care system remains unable to address the financial needs of disabled children and their families. See *supra* Part II.C.

¹⁷⁶ See COMM. ON ASSESSING GENETIC RISKS, *supra* note 171, at 54 (“[M]any people with disabilities lead full and productive lives and that society’s negative view of disabilities is sometimes of greater harm to them than the disabilities themselves.” (cita-

because they have been “harmed” by the birth of their disabled child echoes in eugenics. A limited damage award would dispel those eugenic implications by ensuring that states are not legitimizing the claim that parents are harmed for being forced to rear a disabled child—their child.¹⁷⁷

B. Damages in Wrongful Life

The eugenic implications are stronger in wrongful life than in wrongful birth suits. At least in wrongful birth there is a loss of opportunity—the lost opportunity to exercise one’s right to terminate a pregnancy, which one cannot exercise without having all of the facts on which to base a decision. One of the impetuses behind the physician’s duty to make full disclosure to the patient is a patient’s right of self-determination whereby “it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie.”¹⁷⁸ Thus, while the plaintiff-parent in wrongful birth causes of action can, at least, claim the loss of a well-recognized right, the plaintiff-child in wrongful life cases cannot, since there is no recognized right not to be born.¹⁷⁹ Like the wrongful birth tort, awards of damages in the wrongful life tort have eugenic implications because the damages are awarded for having to live as a disabled person.

To award damages in wrongful life gives legitimacy to the claim, “I should never have been born.” It reflects negatively on disabled people to say that they have been damaged somehow or that they have suffered a harm in having been born. To award a disabled child damages for pain and suffering for having been born is evidence of society’s inability to see value in the lives of people who have a disability.¹⁸⁰

Disabled people have a history of being marginalized and devalued in society.¹⁸¹ The legal system, by recognizing the wrongful life (and wrongful birth) suit, draws a distinction between healthy child-

tion omitted)); *see also* McGee & Magnus, *supra* note 8, at 203 (“Some patients with [late-onset] Huntington’s disease feel that the several healthy decades of life that they have is what really matters.”).

¹⁷⁷ *See* proposal *infra* Part VI.

¹⁷⁸ *Largey v. Rothman*, 540 A.2d 504, 509 (N.J. 1988) (quoting *Canterbury v. Spence*, 464 F.2d 772, 781 (D.C. Cir. 1972)).

¹⁷⁹ *See Elliott v. Brown*, 361 So. 2d 546, 548 (Ala. 1978).

¹⁸⁰ *See Macurdy*, *supra* note 143, at 450.

¹⁸¹ *See id.*

ren and genetically disabled children; this furthers the marginalization and devaluation. These legal distinctions add fuel to the fire outside the courtroom because such distinctions are “then advanced to justify treating individuals with disabilities differently, [and] are assumed to be natural ones, and, therefore, unquestionable.”¹⁸² The law thereby validates the disability hierarchy that society and parents have created and makes abstention from conception or abortion of fetuses with genetic impairments seem like the “right” thing to do when exercising procreative autonomy.¹⁸³ The state’s endorsement of this disability hierarchy is a form of discrimination and results in eugenics.

The Supreme Court of California intimated that “a reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights.”¹⁸⁴ Ironically, the plaintiff-child would not have such rights if she was never conceived or if she was aborted. In *Turpin*, California correctly denied the child’s claim for general damages, including pain and suffering, in part because “it is simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born [at all].”¹⁸⁵ In a wrongful life case, the child did not suffer the loss of “a life without hereditary elements” because this is something a genetically disabled child could never have.¹⁸⁶ The child would claim that had the doctor not been negligent, his parents would never have conceived, or if he had already been conceived, his parents would have terminated the pregnancy.¹⁸⁷ Thus the only conceivable injury to the plaintiff in wrongful life actions is the opportunity to not be alive at all.¹⁸⁸ What many jurisdictions fail to consider in awarding general damages in wrongful life actions is that “the plaintiff has in fact obtained a physical existence with the capacity both to receive and give love and pleasure as well as to experience pain and

¹⁸² *Id.* at 451.

¹⁸³ *See id.*

¹⁸⁴ *Turpin v. Sortini*, 643 P.2d 954, 958 (Cal. 1982) (internal quotation marks and citation omitted).

¹⁸⁵ *Id.* at 963.

¹⁸⁶ *Contra supra* note 86 and accompanying text (discussing prenatal-tort injuries where the child, but for the physician’s negligence, could have been born a healthy child).

¹⁸⁷ *See supra* note 83–84 and accompanying text.

¹⁸⁸ *See Turpin*, 643 P.2d at 964.

suffering.”¹⁸⁹ And thus, a disabled child’s pain and suffering may be more than offset by the benefits of being alive in the world.¹⁹⁰

The recognition of wrongful birth and wrongful life claims is similar in some respects to Germany’s compulsory sterilization laws, which were enacted “for the prevention of progeny with hereditary defects.”¹⁹¹ The Nazis called a handicapped person a “[l]ife not worth living.”¹⁹² The Nazis conducted their 1930s eugenics program by not only sterilizing undesirables but also killing about 150,000 mentally and physically disabled innocent people—people whom the Nazi regime considered a burden on society.¹⁹³ Granting damages in wrongful birth and wrongful life suits relays a similar message—that the birth of a disabled child has somehow *damaged* his parents and constitutes an injury to the child because allegedly a life with a disability may be a life not worth living.¹⁹⁴ While Americans would be appalled by a comparison of their modern society to that of the Nazis, the pre-birth screening and subsequent enforcement of wrongful birth and wrongful life actions evidences that some jurisdictions are sliding back into a eugenic abyss and going down a somewhat similar path as Hitler.¹⁹⁵

C. Summary

Because eugenics occurs when a public or private entity attempts to improve or alter the physical or mental qualities of future generations, the courts’ current form of recognition of either of these causes of action is a “less open and more subtle” expression, but nonetheless an expression, of our “intolerance for those who don’t fit the norm.”¹⁹⁶ By awarding damages in wrongful birth and wrongful life suits to parents for their unwanted disabled child or awarding damages to the disabled children themselves, the government lends support to the claim that “disability is a fate worse than death.”¹⁹⁷

¹⁸⁹ *Id.*

¹⁹⁰ *Cf. id.* (suggesting that pain and suffering “must be offset by the benefits incidentally conferred by the defendant’s conduct”).

¹⁹¹ McGee & Magnus, *supra* note 8, at 200 (internal quotation marks omitted).

¹⁹² Dreher, *supra* note 99, at 022.

¹⁹³ *Id.*

¹⁹⁴ See discussion *supra* note 102.

¹⁹⁵ *See id.*

¹⁹⁶ Neumayr, *supra* note 34, at 1.

¹⁹⁷ *Id.* at 2.

Contemporary attitudes indicate that despite recent efforts to accommodate those with disabilities, society continues to be unaccepting of such individuals.¹⁹⁸ The Americans with Disabilities Act, “arguably the most important civil rights legislation enacted in the United States since the 1960s, reifies a national commitment to treat disabled persons as equals.”¹⁹⁹ Society has witnessed increased concern for the well-being and rights of disabled persons in the past decades.²⁰⁰ Yet society’s progressive movement of accommodation for disabled persons has regressed to the point where society and the law evidently indicate that a disabled person is better off not having been born at all. This is not much different from saying that “a disabled person is better off dead.”²⁰¹ While it seems unlikely that state-supported sterilization programs will be revived against disabled people in this country, eugenic thinking has nevertheless manifested itself in the context of prenatal diagnosis *and* the recognition of wrongful birth and wrongful life claims.²⁰²

VI. MITIGATING THE EUGENIC IMPLICATIONS OF WRONGFUL BIRTH AND WRONGFUL LIFE SUITS

Many states have replaced the eugenic sterilization programs of the early twentieth century in the United States with eugenic abortions at the end of the twentieth and the beginning of the twenty-first centuries.²⁰³ Obviously, the same state-directed eugenic programs of the nineteenth and twentieth centuries—through which the legislatures were authorizing involuntary sterilizations—are not in place today, but the same values are equally present in this new “backdoor” eugenics.²⁰⁴ The eugenic implications can thus be mitigated by re-evaluating the damages awards in wrongful birth and wrongful life causes of action.

Society encourages responsible parenting.²⁰⁵ Some argue that so long as reproductive decisions are left to “responsible” parents who are trying to do what is best for their children and best for their fami-

¹⁹⁸ See Rosen, *supra* note 34.

¹⁹⁹ Reilly, *supra* note 34, at 213.

²⁰⁰ See *id.*

²⁰¹ Neumayr, *supra* note 34, at 2.

²⁰² See Reilly, *supra* note 34, at 213.

²⁰³ See Neumayr, *supra* note 34, at 2.

²⁰⁴ See McGee & Magnus, *supra* note 8, at 203.

²⁰⁵ See *supra* notes 39–42 and accompanying text.

ly, eugenics is inevitable.²⁰⁶ If the costs of a disabled child's health care are not covered by other means, then parents who learn that they are going to have a child who will likely cost them substantially more money than they expected may choose to terminate the pregnancy. But if parents are assured that their child will be taken care of financially, they may choose to proceed with the pregnancy despite the additional emotional anxiety that may accompany the rearing of a disabled child.²⁰⁷ Furthermore, if adequate health care coverage were available for disabled persons during both their childhood and adulthood, huge damages awards in wrongful birth or wrongful life causes of action would be unnecessary. Without those huge damages awards against physicians looming over the horizon, physicians would likely feel less inclined to engage in negative eugenics by recommending abortions and abstention from conception for "at risk" couples.

Yet even with a proper health care system in place to address the financial costs of living with a disability, the courts could and should award nominal damages to parents in wrongful birth actions. Such damages will act as proper acknowledgment of what the parent has lost—the right to make an informed decision about whether to have a child. Further, they may also serve to deter further negligent behavior. Most importantly, since awards of nominal damages will be considerably less²⁰⁸ than awards for special damages and emotional-distress damages, they will not incentivize doctors to excessively recommend abortions.²⁰⁹

²⁰⁶ McGee & Magnus, *supra* note 8, at 203.

²⁰⁷ See *supra* notes 50–52 and accompanying text.

²⁰⁸ Typically, nominal damages are one dollar. 1 JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS § 2.04 (2009). Some courts, however, have chosen not to limit awards of nominal damages to one dollar and have let juries award plaintiffs as much as \$735 or \$3000 as the circumstance of each case may dictate. *Id.*

²⁰⁹ Other positive effects of such a result include increased proportionality to the level of culpability of the negligent physician, less of a windfall to the parents, and elimination of what would otherwise be an unreasonable financial burden for prenatal-care physicians. *Cf. Naccash v. Burger*, 290 S.E.2d 825, 828 (Va. 1982) (discussing the drawbacks of larger awards to parents). Moreover, removing the extra potential for liability for doctors should lower their insurance premiums, the costs of which would otherwise pass to the consumer-patient. This should increase access to prenatal-care physicians.

2010]

COMMENT

1151

A. *Even Absent Legislative Action, These Torts Should Be Considered by the Courts*

There are competing interests in wrongful birth and wrongful life claims—the interest of autonomy in procreative decision making and the public’s interest in protecting disabled persons from discrimination and a new eugenic movement. Courts and legislatures have tried to negotiate a line that provides remuneration to parents who are saddled with the expenses of a disabled child but does not disparage the value of persons who are disabled. Some courts have felt constrained from recognizing a particular cause of action without a clear mandate from the legislature.²¹⁰ But this self-imposed constraint is unwarranted. Courts that have refused to recognize a cause of action because of a dearth of legislative authority are mistaken because wrongful birth and wrongful life are negligence torts, which is a common-law doctrine.²¹¹ As such, the determination of the scope of this doctrine is within the province of the courts.²¹² Courts need not defer to state legislatures to decide to what extent these causes of action should be recognized.²¹³ Moreover, courts *should not* wait for the legislature to resolve the issue because in the interim of waiting for legislative action there will be no resolution and no redress for those persons clearly wronged by the negligence of prenatal-care physicians.²¹⁴

B. *Issues in Line Drawing*

The legal challenge is where to draw the line to balance the interest of “social obligations [to prevent a new eugenic era, in this case,] as against individual rights, and reproductive freedom and privacy as against the requirements of public health and welfare.”²¹⁵ Some courts have decided to tackle the difficulty of whether to recognize these causes of action and, in so doing, have considered the

²¹⁰ See, e.g., *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978) (“Recognition of so novel a cause of action requiring, as it must, creation of a hypothetical formula for the measurement of an infant’s damages is best reserved for legislative, rather than judicial, attention.” (citations omitted)).

²¹¹ *Naccash*, 290 S.E.2d at 829.

²¹² *Id.*; see also *Gildiner v. Thomas Jefferson Univ. Hosp.*, 451 F. Supp. 692, 696 (E.D. Pa. 1978).

²¹³ *Naccash*, 290 S.E.2d at 829.

²¹⁴ See *Schloss v. Miriam Hosp.*, C.A. No. 98-2076, 1999 R.I. Super. LEXIS 116, at *8 (R.I. Super. Ct. Jan. 11, 1999).

²¹⁵ ENGS, *supra* note 105, at xvi–xvii.

relevant aspects of public policy.²¹⁶ But with very few exceptions, these courts have not touched on the eugenic implications of recognizing these causes of action.²¹⁷ The judiciary and the legislatures should focus on these implications for the sake of public policy.

While this Comment focuses on the impact that the recognition of wrongful birth and wrongful life suits has on the disabled community, the arguments herein can also be extended to some extent to other types of discrimination, such as sex discrimination. For instance, perhaps in the future, parents who were seeking to have a boy and were told that they were having a boy but, in fact, had a girl will want to have the right to sue their doctor for wrongful birth.²¹⁸ The question about whether the state has a sufficiently compelling interest to prevent discrimination and a new eugenic movement against the genetically disabled is related to the question of whether a state's interest in preventing a sexual imbalance in the population²¹⁹ or gender bias²²⁰ is sufficiently compelling to either warrant interference with the constitutional right²²¹ to decide whether to conceive and

²¹⁶ See, e.g., *Becker v. Schwartz*, 386 N.E.2d 807, 810 (N.Y. 1978) (noting that any resolution of the wrongful life cause of action debate must consider public policy).

²¹⁷ For those courts that have touched on this issue, see *supra* notes 165–167 and accompanying text.

²¹⁸ See *ANDREWS ET AL.*, *supra* note 33, at 362. This may be a concern because “[b]oth prenatal testing during gestation and in vitro analysis of preimplantation embryos identify the sex of the fetus in most cases, thus creating the possibility of aborting fetuses of the undesired sex.” The Council on Ethical and Judicial Affairs, *supra* note 35, at 634.

²¹⁹ See *McGee & Magnus*, *supra* note 8, at 203 (“In several developing nations amniocentesis is used to determine the sex of the fetus, with the goal of terminating unwanted females. This has resulted in skewed sex ratios in India and China, just one example of what can happen if genetic testing and reproductive technologies are utilized in unregulated or poorly structured ways.”); see also *Reilly*, *supra* note 34, at 212–13 (“[T]here are states in India and provinces in China where it is relatively common practice to use medical technology and selective abortion to avoid the births of girls. This, together with the once not uncommon practice in China of denying lifesaving treatments to infant girls who are ill, has led to claims that as many as 100 million girls are missing from the Asian continent.”).

²²⁰ The Council on Ethical and Judicial Affairs, *supra* note 35, at 636 (“Sex selection is problematic because it implicitly fosters the value of one sex over the other, it confirms that sex is a governing factor in human behavior, and it treats gender, a genetic trait, as a disease.” (footnotes omitted)).

²²¹ Note that the governments of India and China have officially forbidden the use of medical technology and selective abortion to prevent the births of girls. *Reilly*, *supra* note 34, at 212–13.

2010]

COMMENT

1153

raise a child or limit the application of wrongful birth and wrongful life suits.²²²

The Supreme Court intimated in *Planned Parenthood v. Casey* that without *Roe's* recognition of the woman's interest in procreative choice, the government "might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example."²²³ The state should have a sufficiently compelling interest in *preventing* a new eugenic movement directed against genetically disabled people to warrant a reevaluation of the judicial and legislative roles in wrongful birth and wrongful life suits.²²⁴

When will parents . . . be allowed to decide that their child is so 'defective' that given a chance they would have aborted it while still a fetus and, as a result, then be allowed to hold their physi-

²²² The Committee on Assessing Genetic Risks of the Institute of Medicine would think so. "The committee felt strongly that the use of fetal diagnosis for determination of fetal sex and the subsequent use of abortion for the purpose of preferential selection of the sex of the fetus represents a misuse of genetic services that is inappropriate and should be discouraged." COMM. ON ASSESSING GENETIC RISKS, *supra* note 171, at 8. The Committee also intimated that "reproductive genetic services should not be used to pursue eugenic goals," *id.*, and it recommended that "prenatal diagnosis not be used for minor conditions or characteristics." *Id.* at 105. The American Medical Association's Council on Ethical and Judicial Affairs also wants to limit the use of prenatal screening to serious conditions:

[A]bortion or discard [of embryos] based on non-disease-related traits would be inappropriate. Selective practices, such as sex selection, may result in lasting social harms Recognizing the potential for social harms, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research strongly discouraged the use of prenatal testing for sex selection

Selection to avoid genetic disorders would not always be appropriate. Abortion because of genetic disease is most understandable when the disease would have serious manifestations, such as with Tay-Sachs disease or Huntington's chorea. Conversely, selection becomes more problematic as the effects of the disease become milder and as they become manifest later in life.

The Council on Ethical and Judicial Affairs, *supra* note 35, at 638–39 (footnotes omitted). Thus, if such guidelines prove effective and parents are not entitled to prenatal screening for sex or minor conditions, then wrongful birth and wrongful life suits would not be available to them.

²²³ 505 U.S. 833, 859 (1992).

²²⁴ Interestingly, while China has prohibited prenatal sex selection, *see supra* note 221, in 1994, China enacted a Maternal and Infant Health Care Law, which contains "language [that] has been interpreted to require sterilization or the monitored use of long-term contraception as a precondition of marriage if a person is determined by a doctor to be at risk for parenting [disabled] children." Reilly, *supra* note 34, at 213.

cian civilly liable? When a fetus is only the carrier of a deliterious [sic] gene and not itself impaired? . . . Should such issues be left exclusively to the parents with doctors being found liable for breaching their duty to inform parents of any fetal conditions to which they know or should know the parents may object?²²⁵

While courts think they need to grapple with such questions, the discussion may be moot. Although eighty-nine percent of Americans would support prenatal screening for severe genetic diseases, most Americans would not support genetic testing for minor defects or cosmetic reasons.²²⁶

C. *Drawing the Line Without Health Care Reform*

Even without sufficient health care coverage for disabled persons and their families, the eugenic implications of recognizing wrongful birth and wrongful life suits can be mitigated by reevaluating the damages that are awarded. In wrongful birth actions, the damages that may be awarded should be limited to (i) general damages for emotional suffering *only* where the child suffers from an imminently fatal disease and (ii) special damages—damages in the amount of medical and hospital expenses incurred in connection with the birth and rearing of the child that are in *excess* of what the costs would have been to the parents if the child had been healthy.²²⁷ In addition, spe-

²²⁵ *Azzolino v. Dingfelder*, 337 S.E.2d 528, 535 (N.C. 1985).

²²⁶ ANDREWS, *supra* note 16, at 57. Some, however, go a step further and argue that the State should interfere in a parent's procreative autonomy to make sure that severely disabled children are *not* born:

[Parents'] freedom of decision in this area should have presumptive priority in our moral and legal thinking. Only in extreme cases are we warranted as a society in denying them access to the professional services they need to realize their choices or in preventing them from exercising those choices. These extreme cases are characterized by the following two features: (1) the likelihood that, relative to others in the birth cohort, the child will experience significant pain, disability or limitations in life options as a result of avoidable genetic factors; and (2) the parents' reasons for bringing the child into the world in this condition do not constitute reasonable or compelling grounds for respecting their choice.

Ronald M. Green, *Parental Autonomy and the Obligation Not to Harm One's Child Genetically*, 25 J.L. MED. & ETHICS 5, 13 (1997) (footnote omitted).

²²⁷ The special damages should be granted only in the amount that exceeds the cost of a normal birth or rearing of a healthy child because in wrongful birth actions, parents do not allege lost opportunity to choose not to have a child at all but instead allege lost opportunity to choose not to have *this disabled* child. It should be noted that in wrongful conception and wrongful pregnancy actions, most courts do not allow parents to recover the costs incurred in raising a normal, healthy child to majori-

2010]

COMMENT

1155

cial damages could and ought to be awarded in wrongful birth and wrongful life causes of action for the costs of living with the disability *once the child reaches majority*. In wrongful life, if costs of living with the disability through the age of minority were not already recovered by the parents in a wrongful birth suit, then these should also be awarded in the wrongful life suit.

1. Special Damages Should Be Awarded in Both Wrongful Birth and Wrongful Life

Since health care in the United States is still far from adequate, courts should continue to award special damages in wrongful birth and wrongful life causes of action to compensate the disabled child during both the age of minority and majority. In the interest of fairness, these onerous expenses should be recovered by the parents who may have wanted to abort the child for no other reason than the fact they could not afford a child with a disability. Therefore, absent sufficient health care reform, courts and state legislatures should adhere to good public policy and follow such jurisdictions as California and New Jersey in awarding special damages to parents and the children themselves for the costs of living with their disability beyond the age of minority, i.e., throughout their lives.

Because health coverage for disabled persons still remains largely inadequate, it is not surprising that parents sue in wrongful birth, seeking special damages for the substantial costs incurred in caring for a disabled child.²²⁸ “Some courts have been willing to overlook [the eugenics] problem in search of [financial] support for a disabled plaintiff when adequate support for medical expenses is not otherwise available.”²²⁹ The rationale that courts have used to allow special damages is premised on “the conclusion that the mother

ty. See, e.g., *Taylor v. Kurapati*, 600 N.W.2d 670, 679 (Mich. Ct. App. 1999); *Morris v. Sanchez*, 746 P.2d 184, 188 (Okla. 1987). The premise behind this disallowance is that “whatever damage plaintiffs suffered was more than offset by the benefit to them of having a healthy child.” *Troppe v. Scarf*, 187 N.W.2d 511, 513 (Mich. Ct. App. 1971). This is called the “benefits rule.” RESTATEMENT (SECOND) OF TORTS § 920 (1979). The Court of Appeals of Michigan held that the benefits rule is inapplicable in a wrongful conception case because “the value of the life of a child will always outweigh the customary cost of raising that child to majority.” *Taylor*, 600 N.W.2d at 681 (citing *Rouse v. Wesley*, 494 N.W.2d 7, 10 (Mich. Ct. App. 1992)). The court also intimated that it would have the same presumption of value of the child’s life in wrongful birth cases, as well, because it would not “endorse the view that the life of a disabled child is worth less than the life of a healthy child.” *Id.*

²²⁸ See *supra* notes 53–61 and accompanying text.

²²⁹ Botkin, *supra* note 30, at 273 (footnote omitted).

would have aborted the fetus and would thus not have had to encounter these expenses.”²³⁰ The courts that have recognized wrongful life claims have limited the damages awards to special damages for the same rationale. For instance, California sought to follow what it considered to be good public policy in alleviating one’s financial burdens,²³¹ and New Jersey, in recognizing the wrongful life tort, sought to “respond to the call of the living for help in bearing the burden of their affliction.”²³² Thus, a court’s impetus behind an award of special damages is “not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living.”²³³ Courts will continue to feel this pressure so long as the uninsured and underinsured lack a sufficiently comprehensive health care program to help parents raise their disabled children or the genetically disabled to live comfortably with their disabilities.²³⁴ The legislature is in a far better position to remedy this issue because the legislature can create a better health care system for disabled persons and their families. Such state action has “substantial influence over whether children with conditions . . . have health coverage and how adequate that coverage will be to meet their care and treatment needs.”²³⁵

Absent adequate health care, however, special damages for the additional medical and care expenses to be incurred by the parents during their child’s age of minority should be awarded to parents in a wrongful birth action. The court must identify and compensate for only those damages “that flow from the denial of parental choice.”²³⁶ If damages could be awarded on the basis of loss of parental investment,²³⁷ then this Comment would propose it, but such a calculation would likely be far too subjective. A damages award to parents that is limited to special damages should act as sufficient deterrence to phy-

²³⁰ Margaret A. Berger & Aaron D. Twerski, *Uncertainty and Informed Choice: Unmasking Daubert*, 104 MICH. L. REV. 257, 284 (2005).

²³¹ See *Turpin v. Sortini*, 643 P.2d 954, 965 (Cal. 1982).

²³² *Procanik v. Cillo*, 478 A.2d 755, 763 (N.J. 1984), *remanded to* 502 A.2d 94 (N.J. Super. Ct. Law Div. 1985), *rev’d on other grounds*, 543 A.2d 985, 996 (N.J. Super. Ct. App. Div. 1988) (dismissing only plaintiff’s legal malpractice count against certain defendants).

²³³ *Id.*

²³⁴ Botkin, *supra* note 30, at 273–74.

²³⁵ AAP Newborn Screening Task Force, *supra* note 54, at 421.

²³⁶ See *Procanik*, 478 A.2d at 770 (Handler, J., dissenting).

²³⁷ See *supra* note 88 and accompanying text.

sicians while simultaneously addressing and mitigating the eugenic concerns implicit in recognizing the wrongful birth suit.

Of course, large damages awards for the extra costs incurred by caring for a child with a particular disability may breed unfairness among parents similarly situated and is something that should be remedied by each state legislature. The unfairness results when the costs of raising a disabled child are awarded to one set of parents who maintain that they never would have conceived or would have aborted the child had they had the opportunity but are not awarded to parents who had a meaningful opportunity to make a decision and decided to proceed with the pregnancy—both sets of parents are still similarly burdened with heavy financial costs. Again, this imbalance would be remedied with a proper health care system, which would cover the necessary costs for parents in either situation.

Because it is illogical and unfair to permit only the parents to recover the medical costs of the disabled child's care and not the child, wrongful life actions should also be permitted so long as the health care system remains inadequate. This will ensure that the disabled child may recover the expenses of his or her medical care upon reaching majority.²³⁸ After all, the child's medical and other expenses related to his or her disability do not disappear when the child reaches adulthood.²³⁹ If the costs of medical care and other additional expenses are recovered by the parents in a wrongful birth suit, such costs, of course, should not be recovered a second time by the child in a wrongful life suit;²⁴⁰ if the parents made such a recovery in a wrongful birth suit, the child, therefore, should only recover special damages limited to costs incurred during his or her adulthood through a wrongful life suit.²⁴¹

2. A General Bar on Damages for Emotional Distress

Generally, damages should not be granted for emotional distress to either parents or the disabled child as a proximate result of the prenatal-care physician's negligence in either wrongful birth or wrongful life causes of action. This should be the rule even though "caring for children with severe disorders is often psychologically

²³⁸ See *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495 (Wash. 1983); see also *Procanik*, 478 A.2d at 762.

²³⁹ *Harbeson*, 656 P.2d at 495.

²⁴⁰ *Id.*

²⁴¹ *Id.*; see also *Turpin v. Sortini*, 643 P.2d 954, 958–59 (Cal. 1982).

draining on parents.”²⁴² Prohibiting damages for emotional distress would help mitigate the eugenic implications underlying a court’s recognition that a parent has been harmed by the birth of a disabled child. Further, awarding any damages to an infant plaintiff for pain and suffering in a wrongful life claim is, in fact, eugenics; general damages, therefore, should not be awarded to a plaintiff in either suit.

A court affirms the notion that disabled children constitute harm to their parents when it holds that parents who gave birth to a disabled child are consequently emotionally damaged and not merely economically injured. One of the purposes in awarding damages in tort actions is to “give compensation, indemnity or restitution for harms.”²⁴³ As a result, awarding damages indicates that someone has been harmed. Because harms should generally be prevented, awarding damages is akin to judiciaries holding that the birth of these children should have been prevented. This is a eugenic goal—seeking to prevent the birth of the unfit and to encourage the “[d]eliberate manipulation of reproduction with the purpose of creating superior offspring.”²⁴⁴

The Supreme Court of Washington’s decision in *Harbeson v. Parke-Davis*²⁴⁵ is a great example of how a court may choose to consider a disabled child to be a harm to his parents. The court asked, “Are these developments [in medical science] the first steps towards a Fascist-Orwellian societal attitude of genetic purity, or Huxley’s brave new world? Or do they provide positive benefits to individual families and to all society by avoiding the vast emotional and economic cost of defective children?”²⁴⁶ The court then chose to engage in eugenics by forthwith choosing to “recognize the benefits of these medical developments” and holding that “parents have a right to prevent the birth of a defective child.”²⁴⁷ The court also indicated that the legislature had previously adopted a policy to compensate a parent not only for economic losses but also for emotional distress.²⁴⁸ Then the court intimated that “[t]here appears to be no compelling reason that policy

²⁴² The Council on Ethical and Judicial Affairs, *supra* note 35, at 635.

²⁴³ I NATES ET AL., *supra* note 208, § 1.01, at ¶ 2 (quoting RESTATEMENT (SECOND) OF TORTS § 901 (1979)).

²⁴⁴ BEYER & REDDEN, *supra* note 1, at 297.

²⁴⁵ *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983).

²⁴⁶ *Id.* at 491 (internal quotation marks and citation omitted).

²⁴⁷ *Id.*

²⁴⁸ *See id.* at 493.

2010]

COMMENT

1159

should not apply in wrongful birth actions.”²⁴⁹ Clearly, the court failed to perceive how the prevention of eugenics could be that compelling reason.

Tort law limits recovery for mental distress to those cases where a plaintiff suffers a legally cognizable harm.²⁵⁰ Since no cognizable harm has actually taken place in wrongful birth suits (except in cases where a parent has to watch his or her child die due to the congenital disorder),²⁵¹ no recovery for emotional distress should be allowed in wrongful birth actions. Arguably, the parent who was denied the opportunity to choose because the treating physician did not sufficiently inform the parent “suffers from the very harm not warned against.”²⁵² This statement implies that the harm that physicians fail to warn against in wrongful birth cases is the “harm” of having a child with a disability. The court is making a value judgment by legally recognizing that parents who have a child with a disability are emotionally harmed while parents who have a healthy child are not (even if these latter parents did not want a child at all). “A court has no business declaring that among the living are people who never should have been born.”²⁵³

3. Exception: Damages for Emotional Distress Should Be Awarded to Parents in Cases of Imminently Fatal Disease

In recognizing the harm and emotional distress that a parent has to endure in watching one’s child die, this Comment proposes that an exception be made in certain wrongful birth cases. The emotional distress damages that should be permitted in wrongful birth actions are not meant to redress the emotional distress suffered by parents in having a disabled child they did not want. Rather, they are meant to redress the emotional distress that parents will suffer as bystanders—the emotional distress that results from having to watch one’s child die.

This approach is synonymous with jurisdictions that have rejected the zone-of-danger limitation in bystander-recovery cases for emotional distress and have instead adopted the *Dillon* rule of fore-

²⁴⁹ *Id.*

²⁵⁰ Berger & Twerski, *supra* note 230, at 285 n.137.

²⁵¹ See *infra* Part VI.C.3.

²⁵² Berger & Twerski, *supra* note 230, at 286.

²⁵³ Taylor v. Kurapati, 600 N.W.2d 670, 680 (Mich. Ct. App. 1999) (internal quotation marks and footnote omitted).

seeability.²⁵⁴ The various formulations of the *Dillon* rule among the jurisdictions would require the following findings in a wrongful birth suit: a family relationship, death to the child, serious or severe emotional distress to the plaintiff, and the death of the child being witnessed by the parent.²⁵⁵

Arguably, if the law permits an award of damages in cases of intentional or negligent infliction of emotional distress, then it could similarly extend this award to wrongful birth cases. To provide context for this issue, consider the following hypothetical: Amanda and Aaron are recently married and want to have a child. Because they are of Ashkenazi Jewish decent, they are aware of the increased likelihood that they could have a child with Tay-Sachs,²⁵⁶ which is characterized by, inter alia, loss of vision, mental underdevelopment, convulsions, and a very reduced life span.²⁵⁷ They consult a geneticist to determine whether either or both of them are carriers for this inheritable disease. The geneticist conducts the genetic tests and sends them to the laboratory for testing. The lab technician, after working eleven hours straight, accidentally switches Amanda's sample with someone else's sample. This mistake causes the test results to indicate that Aaron is a carrier for the Tay-Sachs gene but not Amanda. Accordingly, the couple decides to proceed to have a child. Amanda conceives and gives birth to a child with Tay-Sachs. Further testing reveals that Amanda is also a carrier of the genetic mutation, and the parents file suit against the lab technician who was at fault.²⁵⁸

If one of the foreseeable consequences of a physician's negligence in failing to diagnose a fetus with Tay-Sachs disease (a fatal disease) is that the parents will have to watch their young child die, then this is not necessarily distinguishable from a mother recovering dam-

²⁵⁴ See DAN B. DOBBS, THE LAW OF TORTS § 309 (2000).

²⁵⁵ See *id.*

²⁵⁶ Botkin, *supra* note 30, at 276.

²⁵⁷ Turpin v. Sortini, 643 P.2d 954, 958 (Cal. 1982).

²⁵⁸ Cf. *Naccash v. Burger*, 290 S.E.2d 825, 827 (Va. 1982) (stating that because the plaintiff-father's sample to be tested for Tay-Sachs was mislabeled and mixed up with another father's sample, the plaintiff-father's test results were incorrectly reported as negative). In *Naccash*, the court decided to recognize the tort of wrongful birth in Virginia and found the treating physician liable for the lab technician's negligence based upon a theory of respondeat superior and awarded the parents damages for the costs of care and treatment of the disabled child, as well as damages for emotional distress. *Id.* at 827, 830-33. The court did not decide the issue of wrongful life in *Naccash*. See *id.* Virginia, however, has refused to recognize a tort for wrongful life. *Barnes v. Head*, 30 Va. Cir. 218, 221-22 (Va. Cir. Ct. 1993).

2010]

COMMENT

1161

ages for the emotional distress she endured because a negligent driver fatally ran over her child in the street right in front of her. While it is true that some parents, regrettably, will watch their children die as a result of accidents and late-onset diseases, these scenarios are distinguishable from wrongful birth situations. The fact remains that parents in the wrongful birth fact scenario suffer by reason of the negligence of their prenatal-care physician. The underlying premise in wrongful birth is that *but for* the physician's negligence, these parents would not have to suffer through the death of their child. Thus, parents should be allowed to recover for emotional distress in wrongful birth suits *only where the genetic disease will cause the child to die at a very young age*. The rationale behind permitting an award of damages for emotional distress where the child suffers from imminently fatal conditions is that the emotional suffering clearly arises out of having to watch one's child die and less from the inconvenience and disappointment of having to raise a disabled child.²⁵⁹

To provide further context for this issue, consider these two additional scenarios:

In the first scenario, Carrie and Carl are having their first child. They both have family members who have developed breast or ovarian cancer later on in life. Unbeknownst to them, genetic testing is available for the genetic mutations of BRCA1 and BRCA2, each of which have been connected with up to an eighty-five percent risk of later development of breast or ovarian cancer.²⁶⁰ If the child is a girl with either of these mutations, she will have this risk of developing cancer, but a boy who is a carrier for either of these mutations can transmit them to his own children.²⁶¹ Their prenatal-care physician, unaware of the couple's family history, neither discusses these risks nor offers any testing of the fetus for these genetic mutations. The couple has a healthy baby girl.

²⁵⁹ Furthermore, consideration must also be given to the concern that if the law permits recovery to parents for emotional distress, what would stop parents from suing for loss of consortium from each other. Claims for loss of consortium may be too far removed to be considered within the realm of foreseeability. The only permissible form of emotional distress that should be recoverable in wrongful birth claims is, as aforementioned, the distress in having to watch one's child die at a young age; emotional distress, such as emotional strain on the marriage relationship that may ultimately result in the dissolution of a marriage, is too far removed from the doctor's negligence to be considered proximate. Prenatal doctors cannot be responsible for failed interpersonal relationships between married couples.

²⁶⁰ Botkin, *supra* note 30, at 267.

²⁶¹ *See id.*

Soon after the birth, Carrie and Carl are informed about the possible inheritability of these genetic mutations that are linked to breast or ovarian cancer. The couple is tested for the mutations. They also have their newborn daughter tested. The results show that both Carrie and Carl are carriers for one of the two mutations, and their daughter also tests positive for that mutation. Carrie and Carl dread the future prospect of having to watch their daughter suffer with, and possibly die from, cancer. Carrie and Carl say that they would have terminated the pregnancy had they been given the opportunity to test the fetus for this genetic mutation and the results were positive.²⁶²

In the second scenario, Dana missed her menstrual period and consulted her obstetrician to determine whether she was pregnant. After a urinalysis determined that Dana was not pregnant, the doctor prescribed Provera to her to induce menstruation. He did not inform Dana about the potential side effects of the drug despite the fact that the *Physicians' Desk Reference (PDR)*²⁶³ contained warnings that Provera could cause a fetus to suffer from congenital abnormalities, inter alia, if the drug were ingested by a pregnant woman. A subsequent test indicated Dana was pregnant. After she expressed concern to her doctor about any effects the drug could have had on her pregnancy, the doctor told her not to worry. Despite the warnings in the *PDR* and other "maternal indicators,"²⁶⁴ such as spotting, Dana's doc-

²⁶² Cf. *id.* at 293 ("No cases have been brought as of yet to explicitly raise this issue [of whether physicians must take a family history of cancer during prenatal care]. . . . [T]here is a general consensus that BRCA1 / BRCA2 testing should not be offered in the context of prenatal diagnosis.").

²⁶³ PHYSICIAN'S DESK REFERENCE 2010 (64th ed. 2009); see also Physician's Desk Reference Bookstore, Physician's Desk Reference 2010, <https://www.pdrbookstore.com/ProdDetails.asp?ID=9781563637483&PG=1&Type=BL&PCS=PDR> (last visited Mar. 21, 2010) (stating that the *PDR*, which is now in its sixty-fourth edition, "provides the most accurate FDA-regulated information on more than 2,400 prescription drugs").

²⁶⁴ Maternal indicators are risk factors that act as red flags that indicate to the prenatal-care physician that he should disclose a risk to his patient:

Accepted maternal indicators include exposure to drugs, irradiation, or infection; diabetes, mental retardation, or PKU; a familial pattern of inherited disorders; metabolic or biochemical disorders; known or suspected chromosomal abnormalities; multiple miscarriages or still births; infertility; consanguinity or incest; previous child with any kind of genetic abnormality; age over 35; possession of a recessive gene; and membership in an ethnic group at risk for a certain defect (*i.e.*, African-Americans and sickle cell anemia; Ashkenazi Jews and Tay Sachs Syndrome).

Canesi v. Wilson, 730 A.2d 805, 816 n.5 (N.J. 1999).

tor did not apprise her of the availability of certain diagnostic tests nor administer such tests during her pregnancy. Dana gave birth to a son with bilateral limb reduction.²⁶⁵

In both of these scenarios, damages for emotional distress should not be granted because the parents will not necessarily have to watch their child die. Opponents may argue that drawing the line in this manner is arbitrary and that the law is ill-equipped to make such determinations. This argument, however, is unpersuasive due to the fact that the law draws lines all the time. The line here would be drawn at those children who are born with fatal diseases—such as Tay-Sachs (for which no treatment is yet available, and even with the best care, infected children die by age four)²⁶⁶ and polycystic kidney disease (also untreatable and incurable “and often causes significant mortality in the first month of life”).²⁶⁷ Deaf children and children

²⁶⁵ In a similar case, the Supreme Court of California recognized a tort for wrongful life but refused to award general damages to the plaintiff-child for pain and suffering—even if the plaintiff’s condition would have been more serious than deafness, the court indicated that it would not grant such an award. *Turpin v. Sortini*, 643 P.2d 954, 962 (Cal. 1982) (“In this case, in which the plaintiff’s only affliction is deafness, it seems quite unlikely that a jury would ever conclude that life with such a condition is worse than not being born at all.”). The court, however, did permit an award to the plaintiff-child for special damages to recover “the extraordinary expenses necessary to treat the hereditary ailment.” *Id.* at 966.

The Supreme Court of New Jersey permitted a wrongful birth action to go forward for the parents of a child who was born with bilateral limb reduction, which is arguably not a severe disorder. *Canesi*, 730 A.2d at 810. New Jersey frames the wrongful birth issue not in terms of serious defects but *any* birth defects: “The violation of the interest in self-determination that undergirds a wrongful birth cause of action consists of the parents’ lost opportunity to make the personal decision of whether or not to give birth to a child who might have birth defects.” *Id.* (citation omitted). The damages that are recoverable in wrongful life claims (as well as wrongful birth claims) “consist of the medical expenses attributable to the child’s birth defects.” *Id.* (internal quotation marks and citation omitted). Thus, presumably, if the medical expenses attributable to the defect in a wrongful birth or wrongful life suit are insignificant, then the award will reflect that fact in those jurisdictions (like New Jersey) that would permit suits for minor defects. Note that the court affirmed the lower court’s grant of summary judgment on the wrongful life claim because the “plaintiffs presented insufficient proof of a causal relationship between the drug and the defect that afflicts their son.” *Id.* at 814.

²⁶⁶ Nat’l Inst. of Neurological Disorders, Tay-Sachs Disease Information Page, <http://www.ninds.nih.gov/disorders/taysachs/taysachs.htm> (last visited Mar. 21, 2010).

²⁶⁷ PKD Found., About PKD, <http://www.pkdcure.org/AboutPKD/AboutPKDPage/tabid/869/Default.aspx> (last visited Mar. 21, 2010); *see also* *Becker v. Schwartz*, 386 N.E.2d 807, 809 (N.Y. 1978) (noting that the parents’ first child affected with PKD died five hours after birth and second child died at the age of two and a half).

with bilateral limb reduction or late-onset diseases would not fall into this carve-out for damages for emotional distress.²⁶⁸

D. Drawing the Line Under an Adequate Health Care System: In Lieu of Special Damages, Nominal Damages Should Be Awarded to Parents in Wrongful Birth

If a proper health care system were in place, the need for wrongful life actions would dissipate, and only awards to parents for nominal damages would be necessary in the wrongful birth cause of action. The Scots' legal concept of *damnum* is instructive here since it necessitates the recognition of wrongful birth actions even if a proper health care system were in place.²⁶⁹ *Damnum* is "the deprivation of an interest that the law recognizes as a legal interest."²⁷⁰ The invasion of a legal right and the loss that results is called *injuria*.²⁷¹ Here, the *injuria* is "the failure to advise that the fetus is unhealthy and, by extension, to imply that termination is not indicated; the *damnum* lies in being deprived of a legal right—that is, a[n] . . . opportunity for termination of a pregnancy."²⁷² Thus, a parent clearly loses something and suffers an injury by being deprived of her ability to exercise her constitutionally protected right to choose.

As long as the law protects a woman's right to choose whether to have an abortion and also recognizes parents' autonomy in deciding what type of child they want to raise,²⁷³ then parents should be able to sue physicians for their negligence in either not conducting or negligently conducting appropriate genetic testing, resulting in the parents' lost opportunity to make an informed decision.²⁷⁴ "If the moth-

²⁶⁸ See *supra* note 265.

²⁶⁹ J.K. MASON, THE TROUBLED PREGNANCY: LEGAL WRONGS AND RIGHTS IN REPRODUCTION 86 (2007).

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ The Constitution provides,

Parents . . . have a liberty interest in the type of children that they conceive and raise. In U.S. Supreme Court cases involving child-rearing decisions, the Court has held that the determination of a child's social traits is a matter for the parents to decide (even if state control arguably could produce a better child). A strong argument similarly could be made that a child's genetic traits should be determined by the parents rather than the state.

Andrews, *supra* note 35, at 999 (footnote omitted).

²⁷⁴ See *Schloss v. Miriam Hosp.*, C.A. No. 98-2076, 1999 R.I. Super. LEXIS 116, at *9 (R.I. Super. Ct. Jan. 11, 1999) ("For those who can accept that abortion is a legal

er was . . . entitled to have her pregnancy terminated, and if she would have exercised that right, but was deprived of the opportunity to do so as a result of clinical negligence, those facts should found a sufficient foundation for her claim.”²⁷⁵

To establish a cause of action in negligence, the plaintiff must establish that the defendant breached a legal duty that the defendant owed to the plaintiff, which caused the plaintiff to suffer a direct injury.²⁷⁶ In the typical wrongful birth case, the physician has breached the duty of reasonable care that he owed to the parents.²⁷⁷ This duty necessarily includes the duty to inform the parents of certain genetic risks and the obligation to provide parents with reasonably accurate and complete information with which the parents could make an informed decision regarding procreative choice.²⁷⁸ The right to have an abortion would be meaningless without sufficient information to make such a decision. The breach occurs, for example, when lab tests are negligently mislabeled or test results are negligently interpreted incorrectly.²⁷⁹ When this breach causes parents to make a decision to continue with a pregnancy rather than abstain from conception or have an abortion, as the case may be, the third element is satisfied.²⁸⁰ The parents have an actionable injury in that the physician’s breach of his duty to the parents deprived the parents of the opportunity to exercise their procreative choice—their right to choose.²⁸¹ This is the direct injury in wrongful birth.²⁸²

Injury is distinct from damages.²⁸³ “Injury” is the violation of some legal right, whereas “damage” is the harm sustained as a result of the injury.²⁸⁴ “Damages,” *plural*, refers to the amount awarded to

choice for pregnant parents at pertinent times, there is no difficulty in finding room in the common law tort of negligence for claims of wrongful birth.”).

²⁷⁵ MASON, *supra* note 269, at 86 (internal quotation marks omitted).

²⁷⁶ *Naccash v. Burger*, 290 S.E.2d 825, 829 (Va. 1982).

²⁷⁷ *Id.*; *cf. Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 488 (Wash. 1983) (holding that the duty of a physician to provide sufficient information to parents during prenatal care is that of *due care*).

²⁷⁸ *Naccash*, 290 S.E.2d at 829; *Harbeson*, 656 P.2d at 487–88 (“The parents’ right to prevent a defective child and the correlative duty flowing from that right [to preserve that right] is the heart of the wrongful birth action.”).

²⁷⁹ *See, e.g., Naccash*, 290 S.E.2d at 829.

²⁸⁰ *See id.*

²⁸¹ *Id.* at 829–30.

²⁸² *Id.* at 830.

²⁸³ I NATES ET AL., *supra* note 208, § 1.01.

²⁸⁴ *Id.*

compensate for this harm.²⁸⁵ Generally, when the injury produces no damage (*injuria sine damno*) there is no cause of action in tort.²⁸⁶ There is an exception to this rule, however. Nominal damages may still be awarded where the commission of a wrong causes an injury but no actual damage or harm has been sustained by the victim.²⁸⁷ While a plaintiff may indeed suffer some anguish from being deprived of her meaningful choice to have or not have the child (and such emotional distress is related to the conduct of the physician responsible for the deprivation),²⁸⁸ the emotional hurt and anguish that a parent suffers for having lost the opportunity *to choose* is nevertheless an injury that does not result in any real damage to the parent.

Parents have been economically harmed when they have a disabled child that they could have and would have aborted but for the physician's negligence. This economic harm, though, is the direct result of the state's failure to properly enact adequate health care legislation. If the parents could recover the extra costs of caring for the disabled child during his or her minority, and the child could recover the same once the age of majority is reached, then neither party would suffer economic harm or loss as a result of the defendant's negligence. Thus, until proper health care is provided for disabled persons, courts would be wrong to turn a blind eye to the economic harm that has been caused by the negligent prenatal-care physician. Even in cases where there is no need to award economic damages, courts should still award nominal damages to vindicate the violation of the parents' right to choose. This award of nominal damages would serve the purpose of acknowledging that there was an infraction of the parents' rights and that the doctor committed a wrong.²⁸⁹

Despite the utility of nominal damages, several jurisdictions have refused to award nominal damages in negligence cases where the injury is a technical one and no actual loss resulted.²⁹⁰ These jurisdictions maintain that "[i]n a negligence action the right to be protected is the right not to be injured, if one is not actually injured no right has been infringed upon."²⁹¹ This argument, however, can be applied in wrongful birth suits to bar nominal damages because the

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ Berger & Twerski, *supra* note 230, at 285.

²⁸⁹ *Cf.* 1 NATES ET AL., *supra* note 208, § 2.01.

²⁹⁰ *See id.* § 2.03.

²⁹¹ *Id.*

2010]

COMMENT

1167

deprivation of the free exercise of one's right to choose is the true injury in such cases. The issue is the difficulty in finding that someone has been damaged as a result of that injury. Some jurisdictions do allow an award of nominal damages in negligence cases when "the dispute is not as to the fact of injury, but rather to the extent of that injury or difficulty in proving the damage caused thereby."²⁹² Courts should follow this latter form of reasoning and grant nominal damages to parents in wrongful birth suits, thereby striking the proper balance between individual interests in reproductive freedom and society's obligations to protect the disabled population from a new eugenic movement.

E. Summary

Although some courts are hesitant to recognize either the wrongful birth or wrongful life tort without a clear mandate from the legislature, the judiciary is well equipped to make such a decision without legislative guidance. While drawing the line in these causes of action can be difficult, it should still be done to thwart this new backdoor eugenic movement. The eugenic implications of wrongful birth and wrongful life causes of action can be best impeded through the enactment of proper health care legislation that would cover the costs of living with a disability through a person's childhood and adulthood. If there were coverage, there would no longer be a need for the wrongful life suit at all and only nominal damages would need to be awarded in a wrongful birth suit to parents in recognition of their lost opportunity to exercise their reproductive liberty. Yet even without such health care reform, the eugenic implications can be mitigated by barring damages awards for emotional distress damages except in cases of fatal disabilities.

VII. CONCLUSION

While there is a constitutional right to choose to terminate a particular pregnancy, each and every state should consider the eugenic implications in recognizing wrongful birth and wrongful life claims. If state or federal legislatures continue to avoid addressing the inadequacy of the health care system for disabled children and adults, parents should have the legal right to recover the costs of rearing disabled children through wrongful birth claims and children should have the legal right to recover the costs that they will incur af-

²⁹² *Id.*

ter they reach the age of majority through wrongful life claims. The recovery of these costs is better public policy than the alternative—i.e., saddling parents who tried to engage in responsible parenting with the huge financial burden of rearing a disabled child. Until legislatures redress the inadequacies of the current health care system for the disabled, both wrongful birth and wrongful life suits should be allowed and special damages should be permitted. Further, a limited damages award for emotional distress may be permitted in wrongful birth suits only in cases where the parents have to suffer by watching their child die at a young age.

This approach is not the best solution because the recognition of these lawsuits stigmatizes the disabled community, legitimizes parental biases, and will likely encourage doctors to err on the side of recommending abortions to avoid potential lawsuits—thus throwing the eugenic movement into full throttle. It also leaves both the parents, who, after being properly informed of the risks of having a genetically disabled child, chose to proceed with the pregnancy, and the child himself without means of compensation for their similarly extraordinary and burdensome costs. These problems can be remedied if the legislatures correct the inadequacies of the health care system. The doctors' incentive to recommend abortions will largely be removed if the lawsuits are rendered unnecessary by a health care system that allows both parents and child to recover the full costs of caring for their disabled child and living a life with a disability. Moreover, the government will have removed itself from legitimizing the discriminatory practices in which parents engage while making reproductive decisions. The government can still acknowledge any deprivation of the parents' right to choose arising out of the negligence of the physician by awarding nominal damages. This result achieves the best balance between the interests of procreative autonomy and closing the door to the government's participation in this new eugenics movement.