

EXCUSING BY STATUTE THE MISSING ELEMENTS OF TORTS OF EUGENIC NONDISCLOSURE

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How can there be an opinion at all about nothing? Reflect: when a man has an opinion, has he not an opinion about something?

Plato**

The precepts of physicians and natural philosophers about generation should also be studied by the parents themselves.

Aristotle***

GENERAL INTRODUCTION

This paper concerns eugenic opportunity lost as a consequence of nondisclosure of eugenic information. The two words which make that topic narrower than the collection of wrongful birth and wrongful life claims¹ are the words "eugenic" and "disclosure."

Isolation of the eugenic subset of wrongful birth and wrongful life claims has implications for legal relations,² standards,³ causation,⁴ and damages.⁵ Isolation of nondisclosure⁶ as a ground for action and its separation from other behavior challenged in claims of wrongful life and birth has implications for the same elements as well as the element of breach.⁷ The thesis of this article is that all elements of negligence are missing in wrongful life and wrongful birth complaints alleging nondisclosure of eugenic information. The author will illustrate that the resemblance of the elements of eugenic wrongful birth and wrongful life to classical negligence elements is superficial. Despite case law developments alleging uncaredful therapy as a trespass and childbirth as the consequence, complaints alleging a nondisclosure of eugenic information as a wrong and alleging lost opportunity as the consequence are thoroughly alien to the tort of negligence.

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** *Republic*, Book V.

*** *Politics*, Book VIII, ch. 16.

1. See note 8 *infra* for a collection of recent opinions concerning wrongful life; see note 190 *infra* for recent opinions concerning wrongful birth.

2. See notes 10-15 *infra* and accompanying text.

3. See notes 16-32 *infra* and accompanying text.

4. See notes 75-82 *infra*.

5. See notes 45-46 and 198-230 *infra* and accompanying text.

6. See notes 37-45.

7. *Id.*

PART ONE: EUGENIC WRONGFUL LIFE

Introduction

American law recognizes no tort actionable by an infant on account of his unplanned birth. Although plaintiffs have advanced the tort many times, the highest court of no jurisdiction in the United States has ever created or initiated such a cause of action.⁸ Though lower courts in the State of New York have entertained the tort, the New York Court of Appeals repudiated the tort in *Becker v. Schwartz* and *Park v. Chessin*.⁹ The nearly universal rejection of the tort for wrongful life should be strong authority for rejection of wrongful birth claims based on lost opportunity to obtain eugenic, not therapeutic, abortion. This article will first address the wrongful life tort by examining its elements because of its importance in its own right and because it is a logical premise to this article's later consideration of eugenic wrongful birth.

By definition, eugenic wrongful life alleges a negligent nondisclosure to parents of certain eugenic epidemiological facts and claims a cause of action in this nondisclosure. To analyze the existence of the claim, one must return to the basic elements of a writ invoking the tort of negligence. The plaintiff must plead the various components of duty, breach, damages and causation. Under the heading of duty, the relationship of the parties and the nature of standards of conduct will be discussed. Under the heading of breach, the distinction between misfeasance and nonfeasance and the element of consent to nondisclosure by the victim will be considered. In discussing damages, the classical components of a damages analysis, the interests protected and limitations to the justiciability of damages will be analyzed. In discussing causation, cause in fact and the notion of proximate cause, not literally cause and effect but a second look at liability and damages, will be analyzed. Close examination will demonstrate that these elements cannot realistically be alleged by one claiming eugenic wrongful life and will uncover the policy considerations that oppose creation of such a tort.

8. A very exhaustive annotation at 83 A.L.R.3d 15 (1978 & Supp. 1981) collects the cases asserting torts of wrongful life and wrongful birth. Wrongful life cases decided since the supplement appeared are discussed in notes 155-168 *infra*. Nearly all wrongful life claims are joined with wrongful birth claims made by parents. The exceptions are *Curlender v. Bio-Science Labs, Inc.*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980) and *Turpin v. Sortini*, 119 Cal. App. 3d 690, 174 Cal. Rptr. 128 (1981) *petition for hearing granted*, No. S.F. 24319 (Aug. 6, 1981) (argued Nov. 30, 1981).

For a collection of early American and foreign cases, see Robertson, *Civil Liability Arising From "Wrongful Birth" Following An Unsuccessful Sterilization Operation*, 4 Am. J.L. & Med. 131, 133 n.3 (1978).

Except for *Turpin* and *Anderson*, the infants' wrongful life claims were joined with parents' wrongful birth claims.

For a list of early United States cases and foreign cases, see Robertson, *Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 4 Am. J. L. & Med. 131, 133, n.3 (1978).

9. Reported as *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

Eugenics and Duty

The Relationship Between a Physician and the Unborn Child of an Obstetrical Patient: A Middle Ground

In a swift change from earlier doctrine, the prevailing American law allows an infant to sue a physician for injuries the infant has sustained before his birth.¹⁰ This line of cases shows that the relationship between a physician and an unborn child is sensitive and important, ineluctably influencing the relationship between the physician and obstetrical patient. In that obstetricians care for the unborn child in various respects,¹¹ the relationship between the physician and unborn child is a relationship *sui generis*. The New York case of *Shack v. Holland*¹² recognized this relationship in the context of a disclosure dispute. The case held that a physician has an obligation to explain alternate methods of delivery and the risks for the mother and child. The opinion ruled that the baby may sue for selection of a more risky delivery method if the risk materializes. The case implied that the physician must encourage the mother to balance her own interests with those of the infant and suggested that when practicable the physician himself must balance the interests of both patients. The balancing extends to the matter of giving and withholding information as well as to matters of manual skill. The three-way relationship is almost unavoidable as a matter of legal policy. The New York Court of Appeals held in *Becker v. Schwartz*¹³ that even an express contract between the parents and the physician could not completely preoccupy the parties with only the interests of the parents. In that case, the parents specifically contracted with a physician for genetic counselling. The physician gave erroneous advice and the parents were presented with a sick child. The court dismissed the wrongful life count on behalf of the child, implying that even an express contract will not substitute for the infant's consent to his destruction. The implication relevant here is that the relationship is unavoidably tripartite.

The relationships of the parties are a necessary part of the determination of obligations, policies for limiting liability, and interests protected by the tort of negligence.¹⁴ In dealing with the unique relationship among three persons, several positions are possible. There are two extreme positions. One states that a physician has no duty to

10. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, 335-38 (4th ed., 1971).

11. *Berman v. Allan*, 80 N.J. 421, 444, 404 A.2d 8, 20 (1979) (Handler, J., concurring in part and dissenting in part).

12. 89 Misc.2d 78, 389 N.Y.S.2d 988 (1976).

13. *Becker*, 46 N.Y.2d at 419-22, 386 N.E.2d at 817-19, 413 N.Y.S.2d at 905-07. (Wachtler, J., dissenting in part and concurring in part).

14. PROSSER, *supra* note 10, at 324-26.

An illustration of the importance of relationship analysis for ascertainment of liability of physicians and other persons for eugenic nondisclosure is the new conception that a relationship exists between an unborn child and the mother's obstetrician which accompanied development of liability of physicians for physical harm inflicted on infants before their birth. *Id.* at 335-38.

disclose information to parents even when the parents ask for information. The New York Court of Appeals in *Becker v. Schwartz*¹⁵ tended toward this extreme. The opposite extreme proposes that the law impose upon physicians a duty of affirmative action to initiate discussion of eugenic epidemiological data. This extreme, advocated by plaintiffs in eugenic wrongful life cases, implies that physicians have the obligation to ask patients about their racial and ethnic background and to initiate discussions about diseases which have a predilection for persons of that race whether or not the patient asks for such information. In some circumstances this extreme proposal would force a physician to irritate, insult, or humiliate a patient. Between these two extremes, the author proposes a middle course.

The middle ground is this: when a patient asks a physician for information, the law should oblige him to do one of two things. The physician may give full and complete information to the patient. As an alternative, the physician may tell the patient that such information exists and state some other source where the patient may obtain the information if the physician does not wish to discuss the matter. This middle ground avoids both extremes, gives some weight to the interests of the unborn fetus, and avoids the tendency toward acrimony. By placing some obligations on physicians, it honors the rights of privacy, self-determination and reproductive choice of parents and gives consideration to the unique relationship of the parties by balancing their interests. If the plaintiff's extreme view of duty were undertaken, the courts and the medical profession would have to formulate problematic standards of disclosure which shall now be discussed.

Standards of Disclosure

Privilege of Conscience. Exponents of a tort of eugenic wrongful life wish to regulate physicians' exercise of speech, not manual skill or care of patients. Speech is not a typical subject for regulation by the tort of negligence. For a variety of reasons, many persons and physicians prefer not to undertake or initiate discussions on eugenics or eugenic abortions. The courts should recognize an unqualified privilege for the physician to refrain from giving information even where the patient specifically asks for information and, *a fortiori*, where the patient does not bring up the subject. When the end to obtaining information is abortion, the consent clauses¹⁶ in abortion statutes are some authority

15. *Becker*, 46 N.Y.2d at 405-07, 386 N.E.2d at 808-09, 413 N.Y.S.2d at 896-97.

16. As early as *Doe v. Bolton*, 410 U.S. 179, 198 (1973), the companion to *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court sustained a conscience clause allowing any hospital to refuse to admit a patient for abortion. But lower courts did not apply the rule to hospitals receiving Hill-Burton Act money. In response to one such case, *Taylor v. St. Vincent's Hosp.*, 369 F. Supp. 948 (D. Mont. 1973), which had mandatorily enjoined a hospital to receive a patient for sterilization surgery, Congress passed a conscience clause popularly known as the Church Amendment to the Health Programs Extension Act of 1973. Pub. L. 93-45, § 401(b)-(d), 87 Stat. 95 (codified at 42 U.S.C. § 300a-7 (1976)). Submitted, the abortion funding cases, *supra* note 145, in any event undercut rulings like *Taylor*.

for a privilege to remain silent. Such clauses do not specifically create an informational privilege, but a fair construction would support existence of the privilege. Plaintiffs say that the solution is not the creation of a categorical privilege, but a privilege in physicians who declare an objection to abortion, eugenic abortion, or eugenic counselling. This suggestion would be unwholesome. First, it creates a defense based on purely subjective states of mind of particular practitioners. Second, it would create a temptation toward perjury by the defendant. Third, the privilege would be complicated and litigious.

The alternative to the privilege asserted is formulation of standards. For instance, a majority of physicians practicing in a locale could dictate what matters a physician will or will not suggest to his patient even though such matters are subject to great ethical controversy. Yet, individual conscience and freedom are opposed to formulation of such standards where the sources of the standards are unclear.

The Sources and Nature of Standards. The practical effect of creating an obligation to discuss eugenic counselling and abortion is this: a rough majority of ordinarily competent obstetricians in one area will decide what standards, in this case what non-medical ethical values, other obstetricians must adhere to if they wish to continue to practice obstetrics. The physician not only would have to conform his treatment to group norms, he would also have to adjust his speech and his thoughts on eugenic issues to majority opinions of his profession. This follows from the procedure used to determine negligence standards in a new tort modeled on negligent action of a trade group. The court system delegates to the trade group much power in formulating its own law or policy. When the matters concern technical regulation of manual proficiency and the like, this delegation is not unwholesome if the trade group is well conducted and maintains a high level of skill and education. Where the matters exceed mere manual skill, the delegation invades the province of the legislature. The courts should not allow such a delegation. The trade group or profession may not be capable of the creation, formulation, and promulgation of proper nontechnical standards.¹⁷ To illustrate the results of delegation, a discussion of the extreme positions mentioned above is appropriate. In accord with the position advocating no duty to disclose, physicians in a locale could develop the practice of not answering questions or referring patients. If the unqualified duty standard is adopted, physicians might react by a "defensive medicine" mentality as they have reacted to other aspects of the burgeoning area of medical malpractice litigation. Physicians could heighten public consciousness and fear of the most remote pos-

17. Judge Learned Hand adverted to this possibility in a famous case. *E. Trans. Co. v. N. Badge Co.* (The T.J. Hooper), 60 F.2d 737 (2d Cir. 1932), *cert. denied*, 287 U.S. 662. PROSSER, *supra* note 10, at 167, has also adverted to the unfavorable results which can occur with delegation to a trade group.

sibilities of eugenic disease and suggest abortion of great numbers on remote bases for fear that their patients will criticize them for nondisclosure of such information.¹⁸ Advocates of eugenics would not accept this result either. The courts should not enlarge the tort of negligence to produce a power to legislate within the medical community when legislatures have indicated intense interest in regulating abortion and where formulation of standards is a difficult legislative matter.

Nonjusticiability of Standards. The nonjusticiability of disputed ethical and political controversies surrounding eugenics ought to be apparent to the courts. Later portions of this article will show the genuine debate and the uncertainties surrounding eugenic test reliability, test indications, and epidemiological matters.¹⁹ Given subtleties and contradictions of this nature, determination of disclosure standards is a matter "so bitterly contested as to be, for the moment, incapable of resolution" by a court of law.²⁰ The values of judicial self-restraint, judicial respect for the prerogatives of the legislature, and principles of representative government dictate that creation of novel torts should be left to the legislature.²¹ Standards of disclosure of eugenic information present a political question in the larger sense. These matters are for political departments of government. The classic role of the courts is to implement legislative policies. Even judicial activists claim a privilege to exercise legislative authority only when the legislature is inert for long periods of time. The resultant policies must be within the competence of the courts to devise as extensions of prior settled policies in the jurisdiction. Cardozo, following Holmes and others, referred to such activity as interstitial and incremental policymaking over small gaps in otherwise settled doctrine.²² Senator Moynihan recently formulated the limitation on courts' activity. He suggests that if the courts undertake policy formulation, their ability to perform classic functions of policy implementation, settlement and contract stabilization and decree enforcement will diminish. In his words, if the courts would help to keep the king's peace, they best not formulate the king's wars.²³ If the courts themselves should decline to promulgate new standards of eugenic disclosure, it is less sensible to delegate the matter to the medical community where that community may overreact in various ways in absence of an ethical consensus.

Judicial Gradation of Worth of Lives. If courts are to entertain claims for wrongful life of an imperfect citizen, then by what standards

18. *Becker*, 46 N.Y.2d at 422, 386 N.E.2d at 818-19, 413 N.Y.S.2d at 907 (Wachtler, J., dissenting in part).

19. See notes 180-190 *infra* and accompanying text.

20. Finklestein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344-45 (1924).

21. *Becker*, 46 N.Y.2d at 411-12, 386 N.E.2d at 812, 413 N.Y.S.2d at 900-01.

22. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113-15, 128-29 (1921).

23. Moynihan, *The Courts and Social Science*, 54 PUBLIC INTEREST 12, 17 (1979).

are courts to define imperfections which make birth wrongful and make failure to mention their possibility wrongful?²⁴ Plaintiffs suggest that courts grade qualities of living and create duties of affirmative action by physicians to counsel abortion of some very low quality fetuses. This concept is gruesome to many, is likely to consume judicial resources in drawing capricious cutoffs, and proves too much.

If obstetricians must suggest non-conception or abortion of low quality fetuses, the logical sequitur imposes an obligation to foster the begetting of not-so-low quality lives that exceed some judicially invented standard of minimum positive value. It is no more unreal for a "worthwhile" life to sue an obstetrician for nonexistence than for an ill infant to sue on the hypothesis that nonexistence would be better than life. The companion parental tort would be a suit by a eugenically superior couple with given fertility for failure of a physician to suggest fertility-enhancing drugs. If this implication seems alarmist, the reader must reflect upon the similarity of proposed duties to avoid very low quality life and proposed duties to foster production of lives worth more.²⁵

Authors like Glover and Bayles concede that they are not willing to grade qualities of life. They argue that gradation requires evaluation of many factors; happiness in the ordinary sense is not determinative. They expressly state that such gradation is a legislative task of balancing group interests.²⁶ While not theoretically rejecting obligations to avoid existence of some infants, they reject basing such obligations on rules designed to proscribe infliction of harm on an individual because nobody can posit that existence affects one at all, much less that it harms him.²⁷ Judges and ethicists define harm comparatively as making the victim "worse off."²⁸ Defining harm as giving personhood problematically differs from positing an existing person's right to implement a preference for death. The existing person has an actual constitutional substratum and an actual life history making choice and comparison real.²⁹ A claim that one would rather not exist or achieve legal personhood hypothesizes a situation before birth which annihilates any possibility of preference at any time.³⁰ The only solution is to assign a value to nonexistence by fiat. This is a legislative function. Even if nonexistence be so valued, the practical measurement problem persists. If nonexistence be valued as neutral or ambivalent existence, it is problematic in the extreme to measure what life is worse than ambivalent life.³¹ Without attempting definition, Glover and Bayles con-

24. *Becker*, 46 N.Y.2d at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900 (1978).

25. J. GLOVER, CAUSING DEATH AND SAVING LIVES 66-67, 70-71 (1973); Bayles, *Harm to the Unconceived*, 5 PHILOSOPHY & PUB. AFF. 292, 294, 298-300.

26. J. GLOVER, *supra* note 25, at 50-59, 70-71; Bayles, *supra* note 25, at 301-04.

27. J. GLOVER, *supra* note 25, at 66-69.

28. Bayles, *supra* note 25, at 293.

29. Englehardt, *The Ontology of Abortion*, 84 ETHICS 217 (1974).

30. Bayles, *supra* note 25, at 295.

31. *Id.* at 295; J. GLOVER, *supra* note 25, at 51-59.

cede that instances of such lives by any index must be few.³² The general value of life and the ineluctable difficulty in measuring loss without prior existence render such valuation nonjusticiable by the courts. But were the proposed new torts of eugenic wrongful life and wrongful birth legislable by the courts, they have little to recommend them as policy.

Costs and Benefits of a Tort of Eugenic Wrongful Life

By any guideline, the costs of the proposed new torts will be great and the benefits few, small and doubtful. Later³³ the costs and benefits will be carefully articulated to illustrate that the torts should be rejected on principles neutral to the quality of life and preciousness of life ideologies. Yet, one cost specific to recognition of a eugenic "wrongful life" tort is a tendency to produce bitter suits by infants against their progenitors.³⁴ In dicta, *Curlender v. Bio-Science Labs, Inc.*³⁵ authorizes such litigation. The bitterness of such lawsuits should be calculated as a great enough cost itself to persuade courts to reject a tort of eugenic wrongful life. The constitutional infirmity of such litigation will be discussed later.³⁶

Having examined the labile and problematical nature of standards implicated by the torts of eugenic wrongful birth and wrongful life, the paper will next analyze the nature of breach of such standards.

Breach

Nonfeasance

Nonfeasance is a ground for action much less often than misfeasance. An especially attenuated case of nonfeasance is nondisclosure of information as opposed to misinformation or deceit. Nondisclosure of information rarely creates liability.³⁷ Affirmative duties to disclose information arise only in special relationships of trust. Some argue that the physician-patient relationship is one of trust, but the cases so characterizing the relationship usually discuss or adjudicate property claims between a physician and patient transacting business other than medical treatment.³⁸ The present clinical organization of medicine makes the physician-patient relationship one between a skillful provider of bodily care and one seeking such bodily care. The relationship is analagous to a promisee and an artisan dealing in a matter where skill in execution of the trade is contemplated.³⁹ The relationship does not

32. *Id.* at 57-59; Bayles, *supra* note 25, at 297.

33. See notes 180-194 *supra* and accompanying text.

34. See notes 144-154 *supra* and accompanying text.

35. 106 Cal. App.3d 811, —, 165 Cal. Rptr. 477, 488 (1980).

36. See *Curlender*, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

37. PROSSER, *supra* note 10, at 339-40; RESTATEMENT (SECOND) OF TORTS §§ 550-51 (1965).

38. 6 AM. JUR. 2D *Physicians and Surgeons* § 100 (1972).

39. Halligan, *Standards of Disclosure by Physicians to Patients: Competing Models of Informed Consent*, 61 LA. L. REV. 9, 26-27, 35-36 (1980).

create an affirmative duty to disclose facts. Patients go to physicians for scientific and manual skill in the treatment of disease. If a different service is expected, it must be demanded. The courts usually conclude that a physician has some obligation to disclose risks of proposed bodily therapy, the information being incidental to touching.⁴⁰ The duty to disclose risk does not arise from a relationship of trust or confidence, but from the clinical process of proposing treatment, obtaining consent and cooperation and laying skilled hands on the patient in order to perform treatment.⁴¹ The obligation of treating physicians to disclose risk is an obligation to disclose risk collateral to proposed treatment and no more. Eugenic wrongful birth and wrongful life torts do not involve want of information about some collateral effect of treatment or the manual skill of the physician. There is no claim that any side effect of treatment materialized. The importance of the informed consent cases is this: there is nothing found in the nature of the relationship between physician and patient which ought to create an expectation in patients that physicians will come forward with information about matters which are not implicated in the drugs, operations and treatment used. Patients should ask for more information if they want it. Nondisclosure of information should not be a ground for action. This argument logically follows from the corpus juris making nonfeasance, especially the subset of nondisclosure, especially rare as a ground for action in negligence.

The policy against creating duties of affirmative action enforceable in negligence has barred many attractive claims alleging want of action by defendants to protect plaintiffs at no cost or risk.⁴² And liability even for negligent interference with efforts by third persons to assist plaintiff exists only when the defendant actually knows that a third person was imminently about to aid the plaintiff and the defendant negligently "disables" the third person.⁴³ Prosser says that liability in such cases rests on misfeasance.⁴⁴

Only by strained and sanguinary reasoning could one say that parents who might have chosen to abort a child were about to aid him. Only by equally strained reasoning could one say that silence by obstetricians disables such parents. The true import of complaints advancing eugenic wrongful life is that obstetricians should take affirmative action to benefit the parents and, remotely, to "benefit the fetus." Such complaints postulate an obligation to take affirmative action to stimulate yet more affirmative action by others to "benefit" certain plaintiffs by aborting them before they become legal persons. This proposal founders once in wrongful birth counts and twice in wrongful life

40. *Id.* at 11.

41. *Id.* at 11-12.

42. RESTATEMENT (SECOND) OF TORTS § 314.

43. *Id.* at § 327.

44. PROSSER, *supra* note 10, at 348.

counts on the distinction between misfeasance and nonfeasance. But it collides with more than that.

The Consent of the Unborn Infant

The unstated major premise of a eugenic wrongful life tort is that a futurable child while in cellular development would choose nonexistence were he to contemplate future sickness, disease, or handicap. The New York Court of Appeals expressed the obvious point that no one can say that a child would choose nonexistence if informed of some sickness it would have.⁴⁵ Assuming that an immature being would choose to continue existence if informed of future sickness, then the supposed victim would prefer inaction by the physician. The author believes that this assumption about the prepossessions of a fetus is the more probable of the two possible assumptions. This assumption takes a protective, conservative view of the interests and self-determination of the fetus. Besides objecting to creation of obligations of verbal affirmative action, one must also question if inaction of the physician and inaction of the parents by failure to request information are one combined event which harms the potential child. This leads to the issue of damages.

Cognizability of Damages

Interests Protected

Identity of Interested Parties. In a eugenic wrongful life case, a sick infant allegedly prefers nonexistence as an alternative to diseased life. But whose interest or preference is it? In no sense can the nonexistence frustrated be his if by he we mean the now existing plaintiff minor citizen. Tort law requires identification of some individual on whose rights defendant has trespassed at the time of the misconduct.⁴⁶ An allegation of wrongful life raises genuine doubt about the identity of the victim of the wrong. The objection is strongest when the parents allege that they would not have conceived the child who says his life is wrongful. The objection persists when the parents allege that they would have destroyed the being before it became a legal person.

Existence and Nonexistence. The law has no definite position on broad questions involving goodness of a particular existence, but leaves such questions to "theologians and philosophers." Engaging in such determinations leads to judicial "Hobson's Choices" between impaired existence and nonexistence.⁴⁷ Still, weak indications of policy favoring more existence illustrate the weak nature of a wrongful life tort.

The policy that existence be valued is suggested by criminal law

45. *Becker*, 46 N.Y.2d at 416, 386 N.E.2d at 815, 413 N.Y.S.2d at 903.

46. *Id.* at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 903 (Fuchsberg, J., concurring).

47. *Id.* at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

definitions of crimes against persons and crimes against property. Unlawful taking of any item of another is theft in some degree, and any person, howsoever ill or near death, may be a victim of battery or homicide.⁴⁸ In some jurisdictions there are more specific expressions of policy preferring existence.⁴⁹ The policy is also manifest in presumptions against suicide.⁵⁰

Another indication of policy valuing existence is the comparative methodology of damage measurement.⁵¹ The comparative method is pervasive in law manifesting tendencies in humankind toward the view that nothing which exists can be completely bad. Common law and jurisprudence partake of this propensity toward affirmation. Intuitively, the courts sometimes suppose that affected beings affirm the same.⁵²

The intuition of judges that no ill child would choose nonexistence draws on these same predilections to value existence. Unreal harm and unreal fetal consent are companion barriers to the unreal tort of wrongful life. The tenacious attachment of living things to life leads to public affirmation of the greater value in existence over nonexistence.

Public Policy. The law does not recognize an interest in nonexistence. In the *Becker* case,⁵³ the New York Court of Appeals correctly stated that there is no right to be born perfect or not to be born. To recognize such an interest as protected at law would contradict established values of Anglo-American law.

Self-destruction is condemned by Anglo-American jurisprudence. The proposition that a court ought to award an infant damages because his desire to be destroyed was frustrated by an obstetrician is very close to saying that freedom of self-destruction should be a protected liberty. But the law does not protect, much less foster, any right to commit suicide. At common law, suicide was punishable by collection of fines from the estate of the deceased. In this country, many jurisdictions retain the crime of attempted suicide on the grounds that suicide attempts disrupt the peace and damage a citizen. Aiding and abetting the at-

48. In the English speaking world "mercy-killing" is homicide and not a reduced form, but plain murder: good motive, ill victim, and consent are irrelevant. R. PERKINS, CRIMINAL LAW 721 (1957); 25 A.L.R. 1007 (1923). Though only one country creates a complete defense for a motive of mercy coupled with consent of the ill person, several provide for reduced culpability and mitigation of sentence. Silving, *Euthanasia: A Study In Comparative Law*, 103 U. PA. L. REV. 350, 386-89 (1954).

49. Abetment of suicide is a common law crime and is arguably indictable under a general accessory responsibility statute in a modern code but one giant of criminal law scholarship thinks that "unselfish abetment" of suicide ought to be decriminalized. G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 310 (1957).

50. See note 56 *infra*.

51. See notes 47-50 *supra* and notes 52 and 66-74 *infra* and accompanying text.

52. *Becker*, 46 N.Y.2d at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 903. (Fuchsberg, J., concurring in relevant part). The concurrence notes the curious nature of interests supposedly affected and of the identity of their owner in a case alleging wrongful life.

53. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

temptor is also a crime.⁵⁴ For purposes of most litigation, most jurisdictions presume against suicide,⁵⁵ and an attempt to commit suicide is often grounds for involuntary confinement.⁵⁶ Jailers and hospital staff have an obligation in many jurisdictions to prevent suicides by persons confined in their institution.⁵⁷ Underlying all of these assurances against self-destruction is the evaluation of life as valuable.⁵⁸ One opinion reasons that personal existence is precious because it allows one to experience something of love which will outweigh suffering.⁵⁹ The same opinion reasons that attitudes of "inalienable" life found in early American state papers imply that existence is so valuable as to be inexchangeable with other things.⁶⁰

The policy valuing life should operate in a case of a person who will be sick. Refusing to recognize a right to be obliterated implements policy generally applicable. Nonrecognition also conforms to the probable wishes of the unborn creature.⁶¹ To determine wishes of the unborn, one must draw inferences from persons who do communicate. Almost all persons cling to life tenaciously until their very last moments.⁶² Dr. Nolan states that, excepting persons near in time to expiring, he has not had a patient who truly did not want to live, nor have his colleagues reported such a patient. In articulating policy, the courts must remember the general probability that few persons truly do not want to be.

Reality of Harm

Arbitrary Distinctions. In the *Becker* case,⁶³ the New York Court of Appeals, citing *Howard v. Lecher*,⁶⁴ states that torts of wrongful life involve courts in drawing arbitrary lines between health and illness, serious disease and less serious disease, and great imperfections and small imperfections. This the courts should not do.

Everyone has some imperfection. Some defects are severe and pervasive; some are mild and narrow. Whether life with one defect is less precious than life with another⁶⁵ is not a medical but a normative, legislative question. Definition and gradation of health and illness or gradation of the quality of life are matters surely beyond the competence

54. W. R. LaFAVE & A. W. SCOTT, CRIMINAL LAW 568-71 (1972). See note 49 *supra*.

55. See Annot., 85 A.L.R.2d 722 (1962). McCORMICK ON EVIDENCE 811 (2d ed., 1972) says that the sources of the presumption against suicide as a cause of death are improbability and revulsion against suicide.

56. 41 AM. JUR. 2D *Incompetent Persons* § 146 (1968).

57. 60 AM. JUR. 2D *Penal Institutions* § 29 (1972); 40 AM. JUR. 2D *Hospitals* § 33, n. 17 (1972).

58. *Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 391 N.E.2d 479 (1951). The Illinois court sustains the dismissal of an action alleging negligently unsuccessful abortion and breach of warranty. The court found it unnecessary to discuss what interests are protected by the law of warranty, although that issue was raised on appeal.

59. *Berman*, 80 N.J. at 430, 404 A.2d at 13.

60. *Id.* at 429, 404 A.2d at 12.

61. *Becker*, 46 N.Y.2d at 416, 386 N.E.2d at 815, 413 N.Y.S.2d at 903.

62. E.g., W. NOLAN, A SURGEON'S WORLD 280 (1972).

63. *Becker*, 46 N.Y.2d at 413-14, 386 N.E.2d at 813, 413 N.Y.S.2d at 901-02.

64. *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977).

65. *Berman*, 80 N.J. at 430, 404 A.2d at 13.

of courts if they be within the competence of anyone. If separation and sorting of relative degrees of health is impossible, how much greater is the problem of comparing two things which are fundamentally incommutable: ill existence versus nonexistence.

Justiciability and Relative Valuation of Diseased Existence and Non-existence. There is genuine doubt that birth constitutes harm to one born in any circumstance. The doubt lies in a reformulation of the damage paradox discussed above.⁶⁶ Damage is usually a comparative notion presupposing changes from earlier to later conditions of the victim. The supposition fails in wrongful life claims and comparison of the usual sort is "literally impossible."⁶⁷ The *Berman* opinion notes that courts have no knowledge of nothingness and no experience in pricing it.⁶⁸ Citing its earlier opinion in *Gleitman v. Cosgrove*,⁶⁹ *Berman* reaffirms the observation that nothingness is unmeasurable and incomparable to any existing thing.⁷⁰

The propensity to define harm as loss of another quality and not as a quality itself is not peculiar to law. Evil is usually conceived as the absence of good; defect is unfitness. To speak of improvement of life by way of its destruction is a contradiction.⁷¹ In legal thought, the loss of nonexistence differs from the hardship of ill existence. These two states are not susceptible to comparison. The *Becker* case states that such comparisons must not be taken up by the courts because they are not within the competence of courts, judges and juries.⁷² The literal immeasurability of damages and incommutability of ill existence and nonexistence in wrongful life cases is the almost universally voiced rationale for disallowance of the tort. Several opinions also state that the law should categorically rule that diseased existence is always preferable to nonexistence as a matter of policy.⁷³ For example, the rationale of *Berman v. Allan*⁷⁴ seems to be that life in general is good, and wrongful life cases should be rejected as contradictions in terms even if in some special case a particular plaintiff might persuade a particular jury

66. See notes 24-32 *supra*.

67. *Berman*, 80 N.J. at 427, 404 A.2d at 11-12 (citing PROSSER, *supra* note 10, § 55, at 335-38).

68. *Berman*, 80 N.J. at 427, 404 A.2d at 11-12.

69. 49 N.J. 22, 227 A.2d 689 (1967).

70. *Berman*, 80 N.J. at 427, 404 A.2d at 11-12.

71. The most famous exposition of the tendency in such proposals toward internal contradiction is I. Kant, *Metaphysics of Morals*, in CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON ETHICS 39 (T. Abbot, trans. 1873).

72. *Becker*, 46 N.Y.2d at 411-12, 386 N.E.2d at 812, 413 N.Y.S.2d at 901-02.

73. The leading example of the latter approach is case law development in New Jersey. Initially, in *Gleitman v. Cosgrove*, 49 N.J. at 28, 227 A.2d at 692, the court expressed the immeasurability of damages as its principal rationale. Several years later, in *Berman v. Allan*, 80 N.J. at 427-30, 404 A.2d at 12-13, the court reordered its rationale. The court restated the continuing immeasurability of damages but speculated what should be the judicial response to the case of a convincing plaintiff testifying to his preference for nonexistence if some advances in psychology and judicial procedure enabled a comparison which is not now feasible. The court held that a tort for wrongful life would still be rejected.

74. 80 N.J. 421, 404 A.2d 8 (1979).

that, subjectively, there is no contradiction. The right not to be is not and should not be a protected interest.

Causation in Fact

Necessary and Sufficient Preconditions to Causation in Fact

The nature of causation in fact is human reliance by the adult patients on nondisclosure by the physician. The causation stems from the decisional processes of the parents who claim that had they known, they would have decided not to conceive or to have a eugenic abortion. Plaintiff parents suppose that they need establish nothing about reliance or decisional processes of the third hypothetical decision maker involved in the three party relationship and may avoid an allegation of consent by the infant.⁷⁵ But, again, who can say that a child would choose not to be if he were advised early in his cellular development that he is likely to be ill, imperfect, or handicapped.⁷⁶ This is not the only problematical aspect of causation in such cases.

Availability of Eugenic Abortion

Availability of eugenic abortion applies to many allegations of wrongful life where a plaintiff's mother alleges an "absolute right" to an abortion as part of the chain of causation.⁷⁷ These cases involve not a therapeutic need but a eugenic desire for abortion. Absent a state created right to eugenic abortion, the Federal Constitution as interpreted gives an absolute right to obtain abortion only during certain periods and not thereafter.⁷⁸ The combination of statutory law and the processes of biochemistry itself will often combine so that the parental plaintiffs will not have had available the choice they say they would have made. The want of disclosure by the physician will not in fact have caused any loss of opportunity. It follows that a sick infant likewise cannot state a cause of action because the nondisclosure will often have been no cause in fact of his existence.⁷⁹

Proximate Causation

Intervening Causes

Proximate causation is a second look at liability, standards and damages in order to ascertain if the liability produced by the usual

75. See notes 46-62 and accompanying text.

76. See note 52 *supra*.

77. See note 170 *infra*. Cases collected there include failed attempts at sterilization and failure to advise of risks or to counsel abortion. When plaintiff parents allege a fault of defendant occurring before conception, they need not allege a lost opportunity to abort in order to allege consequences.

78. *Infra* notes 270-174 and accompanying text.

79. *Id.*

calculus of other elements promotes the ends of justice.⁸⁰ The chain of causation in fact in a eugenic wrongful life or wrongful birth case is behavioral, dealing with decisional effects and reliance by patients on information disclosed or not disclosed by physicians. The influence of the doctrine of proximate causation and its operation in such cases ought to be apparent. Where the causation in fact is the decision of another person, then predictability of the consequence is uncertain.⁸¹ In a eugenic wrongful life case, the decisions of more than one person are or should be involved. One is unable to say with any confidence what might have been or would have been the decision of the creature had he known what his circumstances in life would be. Since human and difficult decisions of persons other than the defendant intervene, any consequence caused by the nonfeasance or nondisclosure of the physician is not a proximate cause, but a very remote factor. It would not be just to impose liability for the consequence. The justice of imposing liability raises the point of foreseeability.

Foreseeability

Also relevant to determining proximate causation is the concept of foreseeability.⁸² Foreseeable consequences does not mean scientific prediction as does causation in fact. The notion of foreseeability is a mixture of probability of consequence in a factual sense and the likelihood of its precontemplation by the defendant. Foreseeability is often weak as to literal predictability of delivery of a disabled baby and as to damages. On the other component of foreseeability, how likely is an obstetrician to consider the possibility of having to pay child support for a slightly handicapped child of his patient because he did not provide her with information which might prompt her to destroy the infant? The answer must be not likely. The imposition of child support liability is not within the likely contemplation of a person practicing obstetrics. Proximate causation is strained in eugenic wrongful birth and wrongful life cases.

The *Curlender* Case

In *Curlender v. Bio-Science Lab*,⁸³ the second appellate district court in California reversed a dismissal of a sick infant's complaint⁸⁴ against a laboratory alleging fraud and negligence.⁸⁵ The defendant laboratory had analyzed blood specimens of the parents to determine disease carrier status (not amniocentesis).⁸⁶ The co-defendant physi-

80. PROSSER, *supra* note 10, at 246, says the confusion of proximate cause with other elements obscures its real office of limiting liability on an independent ground of fairness.

81. *Id.* at 263-67 (indirect cause), 270-89 (intervening use).

82. *Id.* at 250-70.

83. 106 Cal. App.3d 811, 165 Cal. Rptr. 477 (1980).

84. *Id.* at 832, 165 Cal. Rptr. at 490.

85. *Id.* at 814, 165 Cal. Rptr. at 479.

86. *Id.* at 815, 165 Cal. Rptr. at 480.

cian did not participate in the appeal.⁸⁷ The issue was one of first impression in California.⁸⁸

To establish causation, plaintiff alleged reliance by her parents on false negative tests, but did not allege whether the reliance was conception, failure to test amniotic fluid, or failure to abort.⁸⁹ The court was certain that the reliance was "eugenic" in nature, distinguishing eugenic from therapeutic medical intervention.⁹⁰ As consequences, plaintiff claimed costs of care and compensation for enduring Tay-Sachs disease for the life expectancy of a healthy infant.⁹¹ Plaintiff also alleged "guilty knowledge" by the laboratory that their test method was inaccurate and would often produce false negative findings.⁹²

The reversal instructed the trial court to assess damages to compensate plaintiff for "enduring" her condition during the four year life expectancy of one with Tay-Sachs disease and for any "special pecuniary loss" resulting from the condition.⁹³ It also instructed the trial court to assess damages for "costs of care," apparently meaning costs beyond those of rearing a healthy baby for four years, and urged the trial court to consolidate the case filed by the parents to prevent double recovery.⁹⁴

Before stating its rationale, the court reviewed precedent and defined terms. It stated that the case was a sub-specie of "wrongful life" claims brought by an infant alleging negligence and birth as a consequence.⁹⁵ The opinion⁹⁶ showed particular interest in *Gleitman v. Cosgrove*⁹⁷ where the defendant had affirmatively misrepresented the potential for defects in the child after the mother specifically asked for the information. *Curlender* correctly stated that the *Gleitman* rationale was based on the tradition that compensatory damages "are measured by comparing the condition plaintiff would have been in" but for the negligence to his "condition produced by the negligence."⁹⁸ The literal impossibility of making the comparison precludes adjudication of wrongful life claims. *Curlender* expressed sympathy for the punitive rationale of the *Gleitman* dissent, noting that the comparative methodology of the majority had been adopted by every other jurisdiction,

87. *Id.* at 814, 165 Cal. Rptr. at 479.

88. *Id.* at 814-15, 165 Cal. Rptr. at 479-80.

89. *Id.* at 815, 165 Cal. Rptr. at 480.

90. *Id.*

91. *Id.* at 816, 165 Cal. Rptr. at 480-81.

92. *Id.* The court was advised that the parents had sued in their own right in a parallel case not before the court. *Id.* at 817, 165 Cal. Rptr. at 481.

93. *Id.* at 830-31, 165 Cal. Rptr. at 489.

94. *Id.* at 831, 165 Cal. Rptr. at 490.

95. *Id.* at 817, 165 Cal. Rptr. at 481. The court traced the term to *Zepeda v. Zepeda*, 41 Ill. App.2d 240, 190 N.E.2d 849 (1963). (*Zepeda* is the source of the term "wrongful life.") It noted that the Illinois court denied recovery to an illegitimate infant who sued his father for causing him to be born illegitimate. It reviews several other cases and uses substantial space to discuss *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967).

96. *Curlender*, 106 Cal. App.3d at 818, 165 Cal. Rptr. at 482.

97. 49 N.J. 22, 227 A.2d 689 (1967).

98. *Curlender*, 106 Cal. App.3d at 819, 165 Cal. Rptr. at 482.

sometimes accompanied by the public policy rationale.⁹⁹ The opinion illustrated the public policy rationale¹⁰⁰ by parsing *Berman v. Allan*¹⁰¹ and dwelling on the dissent.¹⁰²

The *Curlender* opinion stated that the parents have a power to obliterate the child but failed to state how that pertains to the child's complaint.¹⁰³ It agreed with the *Berman*¹⁰⁴ dissent that an obstetrician has a direct relationship with the unborn infant but failed to state any implication. The *Curlender* court then restated the *Berman* dissent's reasoning that evaluation of the infant's claim should start with "realization that the infant has come into the world and is here, encumbered by an injury."¹⁰⁵ The opinion¹⁰⁶ underscored the postulation in *Park v. Chessin*¹⁰⁷ of a right to be born "as a whole, functional human being." *Curlender* then cited several cases for dicta concerning the "interests of society" in correctness of genetic testing to establish a first rationale.¹⁰⁸ The desire of society not to have defective minor citizens motivated the *Curlender* court to create a tort in the undesired minor. This rationale is not compensation of the plaintiff but some punitive objective.¹⁰⁹

Then, *Curlender* stated that painful existence is the cause for action without comparative consideration of the alternative but curiously noted that the pain is felt by all concerned and that parental claims have been well established.¹¹⁰ The rationale making the infant proxy for others became clearer when *Curlender* stated that "social welfare" should influence policy, not ethical propositions about "quality of

99. *Id.*

100. *Id.* at 820, 821, 165 Cal. Rptr. at 483.

101. 80 N.J. 421, 404 A.2d 8 (1979). In that case the New Jersey court reiterated their earlier rationale but stated that their decision would be the same even if some new standard and extraordinary evidence could demonstrate comparative preferability of nonexistence to diseased life in a specific case. Their new rationale was a policy to value even diseased life more than nonexistence.

102. *Id.* at 821, 165 Cal. Rptr. at 483.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 822, 165 Cal. Rptr. at 484.

107. 88 Misc. 2d 179, 387 N.Y.S.2d 204 (1976). *Curlender* passes to discussion of the New York appellate division's decision in *Park v. Chessin* and notes that the allegation in *Park* was an erroneous affirmative assurance by defendant that there was no risk of the hereditary disease that had afflicted an older child after plaintiff parents had asked for an opinion. 106 Cal. App. 3d at 822, 165 Cal. Rptr. at 483-84. *Curlender* acknowledges that the New York Court of Appeals overruled *Park* on the rationale that before-and-after comparison to determine damages is not available, so that ascertainment of the existence of damages is impossible. *Id.*

108. *Id.* After citing an Alabama case, *Elliot v. Brown*, 361 So.2d 546 (Ala. 1978), following the N.J. and N.Y. decisions, in denying recovery, the opinion cites the decisions in two more cases and a dissent in another, all three of which were parental claims or so-called wrongful birth, not wrongful life cases. *Id.* at 824, 165 Cal. Rptr. at 485-86.

109. The court turns to a California case and notes that a bastard may not sue an abortionist for wrongful life, that his mother can sue for wrongful birth, and that the "benefits conferred" rule mitigates her damages. *Id.* It proceeds to distinguish that case because the conditions of bastardy and bodily illness like T.S. disease are different. *Id.* at 486.

110. *Id.*

life.”¹¹¹ The opinion commented: “genetic defects represent an increasingly large part of the overall national health burden.”¹¹² As evidence that these costs should be weighed more heavily than existence *per se*, the court pointed to the persistent attempts by parents to collect in wrongful birth and wrongful life litigation¹¹³ and to the dissents in prior cases.¹¹⁴

With these values in mind, the opinion quoted prior California cases enumerating factors to be balanced in judicial legislation.¹¹⁵ The court opined that the interests of the “individuals involved and of society as a whole” dictated the new tort.¹¹⁶ By the plural “individuals” the court must have been referring to parents. By reference to society as a whole it harkened to the welfare cost of maintaining handicapped persons. Such rationales might be pertinent in so-called wrongful birth cases but are bizarre in a wrongful life case claiming that the ill person would rather not have been born. The court returned to the wrongful life tort and with underscored words stated that the real crux of the issue is not duty but damages.¹¹⁷ It excused itself from analysis of any other element by reflecting that decisions in other states have been pre-occupied with damages. The California court resolved the issue by fiat.¹¹⁸

The fiat was striking and swift. In one paragraph the court dismissed concern for the problem of incomparability of ill health with nonexistence as an “unnecessary meditation.”¹¹⁹

The court understood the conceptual problem in noting that the harm plaintiff asserts is not Tay-Sachs disease itself but “birth—with such defect.”¹²⁰ It noted that the unique circumstance was “that the birth and injury have come hand in hand.”¹²¹ Having acknowledged the problem, the court denied any obligation to manage it, pronouncing: “we need not be concerned that had the defendants not been negligent, the plaintiff might not have come into existence at all.”¹²² The closest thing to a rationale was an appeal to sympathy and redistribution when it said the “reality” is that plaintiff “both *exists* and *suffers*” due to acts of defendants.¹²³ The emphasis was on the present fact of pain, not on the alternative situation. The court wished to redistribute wealth from the defendant class to presently ill persons and was motivated by sympathy for plaintiff’s condition and the intent to stimulate

111. *Id.* at 826-27, 165 Cal. Rptr. at 486-87.

112. *Id.*

113. *Id.*

114. *Id.* at 826, 165 Cal. Rptr. at 486.

115. *Id.* at 828, 165 Cal. Rptr. at 487-88.

116. *Id.* at 828, 165 Cal. Rptr. at 488.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

eugenic abortion to control welfare costs. There was full recognition of the incompatibility of the tort with all precedent and pre-existing doctrine. The technique was fiat. Having legislated boldly, the court accepted certain extreme consequences of the new enactment and passed to them without rationalizing the new law.

The opinion acknowledged that its new tort would be precedent for intrafamily lawsuits.¹²⁴ It conceded that where laboratories and physicians give accurate warnings and parents choose to beget the ill child, a suit by the child against the parent is authorized by the fiat. "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."¹²⁵ No suggestion of mitigation for conferring the benefit of existence was mentioned.

To find some support beyond its own positivism, the court returned to its rejection of the traditional comparative technique for ascertaining damages and reasoned from sections of the civil code which authorize damage awards to compensate for "detriment" defined as "harm suffered."¹²⁶ The court argued that "harm suffered is an absolute criterion and not a reference to prior condition." This was a literal reading of the statutes, but it is not the likely intent of the legislature. The court calculated damages consistently with its absolutist notion. Rejecting any duty to make "any attempted evaluation of a right not to be born,"¹²⁷ it construed the tort as implementation of a right to recover money "for the pain and suffering to be endured during the limited life span available" by such plaintiff and to recover any "special pecuniary loss" resulting from the impaired condition.¹²⁸

The appeal to the literal content of a statute absolved the court from the charge of positivism and usurpation of legislative prerogative, but the appeal is unconvincing for five reasons.

First, placing the argument near the end of the opinion after announcement of the rule suggests an insincere afterthought in an otherwise blunt opinion. Second, the literal statutory construction is weak. Third, the rule usually applied to construe statutes codifying common law rules assumes the legislature intends to enact common law doctrine generally in force in the jurisdiction. This rule implies enactment of the comparative test of detriment and the benefits conferred credit where the aim of the legislation is "compensation for loss." Compensation requires traditional mitigating credits and suggests diminution of

124. *Id.* at 830, 165 Cal. Rptr. at 488-89.

125. *Id.*

126. *Id.* at 830, 165 Cal. Rptr. at 489.

127. *Id.*

128. *Id.* To be fully consistent, the court would have to limit recoverable costs of maintenance to special costs associated with the illness. The opinion appears to do that. The opinion is not clear because it believes that the issue of maintenance costs will be settled in the parental claim which it is anxious to see consolidated with the infant's case to prevent double recovery. *Id.* at 830, 165 Cal. Rptr. at 490.

prior good. Loss as a definition of damage suggests the same comparative notion. The *Curlender* court seized on the word "detriment". Yet that word also suggests diminution from a prior beneficial state. Fourth, California precedents insist on application of the benefits conferred mitigation in wrongful birth cases.¹²⁹ Fifth, the statutory rationale is not convincing because it relies on sources outside the jurisdiction.¹³⁰

Curlender had no answer to the genuine problems wrongful life complaints pose: the intellectual problem of ascertaining harm and the constitutional problem of separation of powers. *Curlender* rejected the problems and established new standards motivated by purposes other than just compensation of the plaintiff. Like the *Berman* dissent,¹³¹ *Curlender* chose to dwell upon the "encumbrance" of pain without evaluating the asset. The claim that a codifying act justifies refusal to compute the net value of the equity is unconvincing and suspicious. *Curlender* was class legislation. It was redistributive rather than compensatory. It was judicial legislation. The judges in the *Curlender* case claimed to implement the will of the people but fundamentally repudiated representative government and imposed their own will.

The practical effect of the opinion, its language and its spirit, is to equate nonexistence with birth otherwise normal but with a four year life expectancy. Post-conception wrongful infliction of the Tay-Sachs symptoms on a healthy baby with a four year life expectancy would expose the tortfeasor to the exact same liability under traditional norm referenced measures. In this sense *Curlender* equates nonexistence with healthy life of limited span. The value of actual existence implied by the opinion is zero. By the lights of the *Curlender* judges, every hour of life for a Tay-Sachs baby is only a source of misery. The opinion allows no mitigation for actual existence or for the few months of symptom free living, usually six to twelve, that an early-infantile Tay-Sachs child has. The encumbrance model of the *Berman* dissent implies that the defendant caused a four year normal life and put a heavy lien of pain on the last 3 to 3.5 years.¹³² This whole calculus is genuinely bizarre, but as far as it goes, *Curlender* posits the net as the amount of the lien, the good of living having no equity.

129. *Id.* at 823-27, 165 Cal. Rptr. at 485-86.

130. See *Berman*, 80 N.J. at 434, 404 A.2d at 15. Principal among these is the *Berman* dissent which urges present sympathy for the infant and parents, disregard of prior conditions or states, and concentration on "encumbered" existence. *Id.* The court also cited a student note which argues for simple rejection of comparative ascertainment of harm by defining no existence as bench-mark neutral or zero and defining defective birth as negative value and healthy birth as positive value. *Curlender*, 106 Cal. App. 3d at 825, 165 Cal. Rptr. at 482; see Note, *A Cause of Action for "Wrongful Life" [A Suggested Analysis]*, 55 MINN. L. REV. 58 (1971). These are definitions consciously made and imposed as policy decisions to provide a framework like that of traditional tort law where admittedly one does not already exist.

131. 80 N.J. at 434, 404 A.2d at 15.

132. *Id.*

Nine Criticisms of the *Curlender* Opinion

Capricious Norms. The equivalent of the lost alternative of nonexistence implied by *Curlender* is normal life of short duration. This is arbitrary at best. Such a value varies with diseases. Nonexistence as a standard of comparison cannot vary with the nature of other things being evaluated by the comparison.

Contrary Empirical Data. In *Curlender*, the arbiters of policy are public aid budgetary officers, a few parents who file suits, and a very few dissenting judges who do not value handicapped existence. These sources are unrepresentative of general opinion.

Dr. Kubler-Ross reports that "extremely few" of the many hundred terminally ill patients she followed in prospective studies have attempted to hasten their own death.¹³³ Those that do use passive means; they may not accept treatment but do not destroy themselves violently.¹³⁴ The determinants are not pain and disability, but isolation, loneliness, personality traits, false expectations, and psychological cruelty of caretakers.¹³⁵ If pain were the reason for persons not to value life, then suicide statistics would not be so influenced by sex, marital status and social status.¹³⁶ The classic study of suicide causation confirms the negligible effects of pain, physical suffering and disability on valuation of life.¹³⁷ The legal presumption against suicide is relevant again.¹³⁸ To test the question whether life *per se* is preferable to nonexistence in the estimation of injured persons, a life close in some sense to nonlife but compatible with consciousness and the ability to evaluate must be considered. Existence of a person whose spinal cord has been transected at C4 and who is experiencing ascending myelitis and necrosis of the spinal cord is an existence as near as can be to such a life. Such a person has no movement or feeling below his neck. Breathing is labored and as necrosis ascends toward level C3, he can live only with a mechanical lung. Speaking of just these patients, the leading text in neurological surgery states that most of these patients express a "genuine desire to continue to live in spite of their horrendous disabilities."¹³⁹ In a few words, the *Curlender* judges sampled the wrong population.

Public Policy. In a jurisdiction which values life *per se*, policy contradicts the zero valuation of existence in *Curlender*. Nor is there likely

133. E. KUBLER-ROSS, QUESTIONS AND ANSWERS ABOUT DEATH AND DYING 54-55 (1974).

134. *Id.* at 55.

135. *Id.* at 52.

136. STATISTICAL ABSTRACT OF THE U.S. 62, 65, 150, 158, 159, 872 (1975).

137. See E. DURKHEIM, SUICIDE 224 et seq. (Eng. Trans. 1951). The statistics were French late 19th century data, but the data are not so different today.

138. *Supra* note 55. Relevant again is Dr. Nolan's quote about the rarity of suicide instincts in very ill patients in pain. See note 61 *supra*.

139. WHITE & YASHON, *General Care of Cervical Spine Injuries* in 2 NEUROLOGICAL SURGERY 1058-59 (1973).

to be found in most jurisdictions a statute creating a right to damages by virtue of a "detriment to the body" which could invite the literal construction in which the *Curlender* court engaged in order to avoid settled methods of damages assessment.

Unprecedented Methodology. The unsuccessful attempt in *Curlender* to measure damages without comparison to prior conditions opposes precedent. The insistence of a norm outside the present condition of the plaintiff manifests the general insistence on objective standards in the law of damages.¹⁴⁰ This insistence on comparison to established conditions reveals itself in the rule that a personal injury plaintiff must present specific evidence of his condition before the tort and may recover only for new harm or for the aggravation, but not the entirety, of a pre-existing injury.¹⁴¹ When accepted methodology cannot conceptually manage a new tort, that indicates the tort is very novel and ought to be created by the legislature if by anyone.

Disregard of Separation of Powers. The *Curlender* judges admit they are legislating and their legislative objectives exceed compensation for victims of torts. Other courts should not follow this example of disregard for separation of powers.

Neglect of Elements. Though it has much company, *Curlender* should be criticized for its inattention to elements other than interests protected and measurement of damages. How those other elements cut against the tort of wrongful life has been urged extensively in this article.

Atypical Allegations. The *Curlender* opinion drifts at points to supposed hardships of parents whose claim was not before the court. Some allegations pertinent to the parent's claim may have motivated the court to create the cause of action in the infant as a proxy for the

140. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8 (1973).

141. C. MCCORMICK, HANDBOOK OF DAMAGES § 29, 107 (1935). *Id.* § 76, at 269-74. Where future earnings lost are asserted as damages a plaintiff must establish his own life expectancy and work life expectancy and his own health, age, and strength considered specially. *Id.* § 86, at 299. The most dramatic application of the principle is *Dillon v. Twin State Electric Company*, 85 N.H. 449, 163 A. 111 (1932). In that case a boy fell from a very high bridge over rocky waters which were deep where not interrupted by boulders. A moment later on his descent he hit naked electrical wires and died of electrocution before he completed his fall. His chance of survival absent electrocution was small. He might have died from impact on a rock, or impact on the water, or he might have been disabled from swimming, and have drowned or have drowned in all events. The appellate court sustained a charge to the jury, tendered by defense counsel, that in assessing damages for wrongful death by electrocution, the jury must ascertain the life expectancy of the boy *in mid air* just before hitting the wires. The *ex ante/ex post* comparative technique is ingrained in common law. Note, *Wrongful Life and A Fundamental Right to Be Born Healthy: Park v. Chessin; Becker v. Schwartz*, 27 BUFF. L. R. 537, 542-43 (1977); Tedeschi, *On Tort Liability for "Wrongful Life"*, 1 ISRAEL L. REV. 513, 529 (1966). For an attempt to avoid the traditional comparative approach by inventing an arbitrary absolute scale, see Note, *supra* note 130, at 66.

parents. Ironically, the parental claim there is not so extraordinary as the infant's claim in eugenic nondisclosure cases.

In *Curlender*, the parents alleged that they had sought tests and had given specimens to be studied. They alleged want of skill in the acts of testing. They alleged misfeasance; negligence consisted of poor performance of concrete tasks and not poor verbal communication. An obligation arose from the order for laboratory services. As to culpability, an allegation of scienter charged that the laboratory knew its methods produced "false negative" findings.¹⁴² As to reliance, it appears that the *Curlender* couple had sought genetic counselling early, perhaps before conceiving the baby, because the tests were blood tests of the parents to determine carrier status. Thus, the relationship was bilateral between the laboratory and the parents for analysis of their specimens. On these facts, Mr. and Mrs. Curlender might have sued the laboratory in contract for breach of an implied warranty of workmanlike laboratory technique. If the parents had not conceived before obtaining results, they would not have had to allege willingness to abort in order to allege reliance and causation. As such, their claims would be a wrongful conception claim which is often treated differently from other wrongful birth claims.¹⁴³ The parental claim in *Curlender* is probably within existing forms of action *ex contractu*. Insofar as a sense of urgency about that claim motivated the court in creating the infant's claim, to that extent the precedential value of *Curlender* declines greatly. Yet, the most important criticisms of the *Curlender* case are the ones of fairness and harmony.

Unfairness. *Curlender* is unfair to defendants in two ways. In not allowing for mitigation of damages for the benefit of existence which ineluctably accompanies the articulated detriment, the court does more than to take sides with one segment in a bitter public debate. It categorically excludes the possibility of mitigating factors in particular cases like the several months of symptom-free infantile life of a Tay-Sachs child. By brushing mitigation aside, the *Curlender* attempt at norm-free damages will overcompensate plaintiffs in fact in many cases. This flaw persists even if one adopts the implications of the court about unvalued existence in some situations.

A second unfairness is the variability of guidelines with illness. Under *Curlender*, an unwanted retarded child could sue for the anguish of dependency for many years of life expectancy contrasted with the four year life expectancy in *Curlender*. The implied norms of comparison (four years of healthy life in one, many years normal life in the other) used to assess damages have no principled difference. The inequality of norms cannot stand. Such open-ended and unprincipled variation should not be.

142. *Curlender*, 106 Cal. App. 3d at 817, 165 Cal. Rptr. at 480-81.

143. *Becker*, 46 N.Y.2d at 408, 386 N.E.2d at 810, 413 N.Y.S.2d at 898.

The Authorization of Unconstitutional Intra-Family Lawsuits. The issues in *Curlender* are, with one exception, common law issues. But to the extent that *Curlender* authorizes suits by infants against parents for failure to abort, the decision conflicts with the constitution.¹⁴⁴

The question arises whether the constitutional right to have an abortion implies creation of the wrongful birth and wrongful life causes of action. The author submits that it does not.

The "abortion cases" in constitutional law are public law cases. They review criminal or regulatory statutes seeking either to restrain abortion before the fact or punish it as a crime.¹⁴⁵ The creation of a new tort has none of those intentions or effects. In general, changes in constitutional doctrine do not increase the obligations of private defendants, though such changes may enlarge immunity from suit.¹⁴⁶ Federal constitutional doctrine is irrelevant to common law policy formation; confusion between public and private law produces inconsistent results.¹⁴⁷ Professor Kader notes that the constitutional cases limit what states may do by direct prohibition and state what they may do to protect a variety of competing interests, but do not oblige the states to protect all such interests.¹⁴⁸ He points¹⁴⁹ out that *Roe v. Wade*¹⁵⁰ has been cited by equally sincere courts to reach several different conclusions about the permissibility of new torts,¹⁵¹ showing that any connection between *Roe* and the new torts is superficial at most. He concludes that the effect of *Roe* on private litigation is restrictive, not expansionary.¹⁵²

Professor Kader reasons that the one clear restrictive effect of the constitutional abortion cases on private law is prohibition of any class of suit based on fetal death which tends to challenge the mother's decision to abort or to base liability on that decision.¹⁵³ The same reasoning should prohibit suits against parents for eugenic wrongful life. The *Curlender* dicta authorizing suits by infants against parents¹⁵⁴ is incon-

144. See notes 124-25 *supra* and accompanying text.

145. The Supreme Court has upheld several statutes and ordinances which refused to subsidize abortions for any but a few, narrow reasons while generously subsidizing parturition. *Maier v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); and *Beal v. Doe*, 432 U.S. 438 (1977). Following *Maier* and *Poelker*, the Supreme Court adjudged for the defendant in *Harris v. McRae*, 448 U.S. 297 (1980).

146. *Richards v. Leimbacher*, 131 Ill. App.2d 775, 267 N.E.2d 523 (1971). The only genuine influence of recent constitutional doctrine on common law is the effect of first amendment cases on the tort of defamation. Those cases enlarge the privilege of private publishers to publish inadvertent defamation of so-called public figures. See PROSSER, *supra* note 10, at 819-33. This change limited a tort. It did not compel states to create some new one.

147. Kader, *The Law of Tortious Pre-Natal Death Since Roe v. Wade*, 45 MO. L. REV. 639, 661-66 (1980); Clasen & Wittenberg, *Viability at the Time of Injury: Inconsistent Approaches in Illinois*, 67 ILL. B.J. 494 (1979).

148. See Kader, *supra* note 147, at 661-62.

149. *Id.* at 663.

150. 410 U.S. 113 (1973).

151. See Kader, *supra* note 147, at 666.

152. *Id.* at 665.

153. *Id.*

154. See notes 124 & 125 *supra*.

sistent with the Constitution in this respect. If the estate or guardian of a fetus or some third person such as a father or grandfather may not constitutionally sue a mother for aborting, then neither should the child be allowed to sue her for not aborting.

Unfavorable Judicial Responses to *Curlender*

In May of 1981, the Michigan Court of Appeals affirmed judgments for defendant in *Eisbrenner v. Stanley*.¹⁵⁵ Parents of a deformed child had sued an obstetrician alleging failure to diagnose German measles in the mother during her pregnancy and failure to warn of eugenic risks. The parents alleged that they would have obtained an abortion had they known these risks.¹⁵⁶ In affirming summary judgment for the defendant, the reviewing court rejected *Curlender*¹⁵⁷ because the panel insisted that comparison between sick existence and nonexistence, though necessary, is not possible.

In *Turpin v. Sortini*,¹⁵⁸ a girl deaf at birth and her parents sued a doctor who had treated an older sister for hearing loss. They alleged that misdiagnosis of the hereditary condition in the older girl caused the parents to beget the deaf plaintiff infant.¹⁵⁹ The court did not address factual distinctions;¹⁶⁰ instead, it rejected *Curlender* and eugenic wrongful life entirely. The rationales were five: want of any precedent for the tort of eugenic wrongful life save *Curlender*,¹⁶¹ impossibility of a comparison between ill life and nonexistence which the court held the new tort would require despite the *Curlender* sophistry about norm-free statutory "detriment",¹⁶² tendencies in *Curlender* to contradict or weaken detected California policy to value life of all people,¹⁶³ the unwholesome potential of the eugenic wrongful life tort to serve as precedent for suits by offspring against parents¹⁶⁴ and respect for legislative

155. 106 Mich. App. 357, 308 N.W.2d 209 (1981).

156. *Id.* at 359-60, 308 N.W.2d at 210. As damages they alleged mental distress and all expenses of caring for their deformed daughter. *Id.* The daughter also sued and alleged wrongful life. *Id.* The trial court had rendered summary judgment for defendant against the infant on the eve of trial. *Id.*

157. *Id.* at 365-67, 308 N.W.2d at 213. In accord is *Moore v. Lucas*, 405 So.2d 1022 (Fla. App. 1981). An equally divided vote by the six judges who participated in *Speck v. Feingold*, — Pa. —, 439 A.2d 110 (1981) affirmed a dismissal by lower courts of a claim for wrongful life.

158. 119 Cal. App.3d 670, 174 Cal. Rptr. 128 (1981), *petition for hearing granted*, No. S.F. 24319 (Aug. 6, 1981) (argued Nov. 30, 1981).

159. *Id.* at —, 174 Cal. Rptr. at 129. They alleged that an incidental effect of that misdiagnosis was failure of the parents to know they were carriers and loss of an opportunity, *id.*, to avoid another pregnancy. Only the claim of the deaf infant was before the court, *id.*, on appeal of a trial court order sustaining a demurrer to her complaint. The appellate court affirmed.

160. *Id.* The *Turpin* court might have distinguished or limited *Curlender*. In *Turpin* there was no direct relationship between defendant doctor and any plaintiff, and foreseeability or directness of consequences was also very remote. Defendant apparently was an ear-nose-head specialist whose diagnoses and treatments will rarely suggest eugenic implications and from whom people would not likely expect genetic counseling. His patient had not been the parents or the fetus but an older child of the family

161. *Id.*

162. *Id.* at —, 174 Cal. Rptr. at 130-31.

163. *Id.* at —, 174 Cal. Rptr. at 131-32.

164. *Id.* at —, 174 Cal. Rptr. at 132-33.

prerogative. The court articulated three aspects of eugenic wrongful life claims which require legislation before the courts may entertain them.¹⁶⁵ First is the methodology to assess damages. Another is substantive definition of the right to be born well, that is, legislative definition of illnesses, their gradation, and their classification into those that make life actionable and those that do not.¹⁶⁶ A third aspect is revision of other legislation whose values or objectives contradict eugenic considerations.¹⁶⁷ The dissent brushed aside all five rationales save incomparability.¹⁶⁸ The dissent argued that a claim of a sick infant for material support may be derived from the wrongful birth claim of the parents.¹⁶⁹ This turns the parent-child relation on its head. But the intriguing dissent does illustrate one thing: claims of parents and those of infants on account of nondisclosure of eugenic information cannot be separated sharply. The nearly universal rejection of eugenic wrongful life claims should inhibit creation or expansion of causes for action by parents on account of birth of a sick child.

On August 6, 1981, the California Supreme Court granted a petition for hearing in this case. Arguments were heard on November 30, 1981.

Summary to Part One

To create a tort of wrongful life on account of nondisclosure of eugenic information is to deny the inevitably tripartite relationship of obstetrician, mother, and unborn child. The law has other forms less drastic which can avoid that consequence, still honor reproductive choice as a value, and respect freedom of conscience of medical practitioners. The middle ground obliging physicians to supply honest answers to honest questions or to refer an inquiring patient to a good source of data avoids as well the effect of delegating legislation of values to one faction of one profession and makes it unnecessary for courts to seek a norm where none has arisen either by legislation or widespread consensus. That same middle course makes it unnecessary for courts to grade values of lives of citizens, an enterprise beneath the dignity of free courts of justice if not downright sanguinary. This middle course proposed is more contractual in nature and expects a bit of self reliance and initiative in prospective parents. That may imply less conscious eugenic selection overall than would the uniform compulsion to affirmative action implied in delictual obligations of the sorts lately advanced. Yet, that is good because the costs of a sudden increase in eugenic selection and decision making will surely outweigh the benefits unless there be gradual parallel adjustments in other parts of civic life.

165. *Id.* at —, 174 Cal. Rptr. at 132.

166. *Id.*

167. *Id.* at —, 174 Cal. Rptr. at 131-32.

168. *Id.* at —, 174 Cal. Rptr. at 133-36.

169. *Id.* at —, 174 Cal. Rptr. at 134-35. *See also* notes 155-157 *supra*.

The middle ground penalizes deceit and breach of contract, not mere nonfeasance.

Yet, even that moderate approach cannot pierce the barriers opposing a claim of eugenic wrongful life, as opposed to wrongful birth. The impenetrable obstacle is interests protected. Nonexistence is not an interest in the usual sense and speaking of it as an interest of the one whose existence is the subject is especially unmanageable. Another layer of the same impenetrable barrier is the difficulty of grading different conditions of life relative to one another and deciding their worth so as to separate those lives actionable as wrongful from those not actionable. Direct causation of harm is also absent. The one case in American law that might be construed to authorize suit by an infant for nondisclosure of eugenic information to the parents has little precedential value due to the adverse reaction to that opinion.

PART TWO: EUGENIC WRONGFUL BIRTH

Introduction

A eugenic wrongful birth complaint claims, in essence, loss of the opportunity to prevent conception or to obtain a eugenic abortion. Claims of lost opportunity to have a eugenic abortion must be distinguished from cases where plaintiff sought a therapeutic abortion which was not successfully performed. All authorities opposing the wrongful life tort apply as well to eugenic wrongful birth cases. Arguments made in Part One concerning duty, relationships and standards apply identically to eugenic wrongful birth cases.¹⁷⁰ Conversely, many arguments given in the next three subsections¹⁷¹ also preponderate against the wrongful life tort. The following discussion concerns claimed benefits and social and private costs of creating a new tort of eugenic wrongful birth.

Duty, Costs and Benefits

The discussion of duty in Part One indicated that the detriments to society produced by creation of either eugenic tort preponderate against creation of a duty of affirmative action to disclose eugenic risks.¹⁷² Now the Article will balance costs and benefits that a legisla-

170. The annotation at 83 A.L.R.3d 15 (1978 & Supp. 1981) collects both wrongful life and wrongful birth cases. As stated in note 8 *supra*, wrongful life claims rarely occur alone. Parents, however, often assert wrongful birth claims without making wrongful life claims on behalf of their infant. Three cases decided since the cited supplement appeared, where claims of wrongful birth and wrongful life were joined are: *Moores v. Lucas*, 405 So.2d 1022 (Fla. App. 1981); *Eisenbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W.2d 209 (1981); *Speck v. Feingold*, — Pa. —, 439 A.2d 110 (1981). In one recent case, both claims were made but only the wrongful birth claim reached the state Supreme Court. *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981). Part Two of this paper is directed to wrongful birth claims but necessarily refers at some places to wrongful life claims.

171. See notes 180-194 *infra* and accompanying text.

172. See notes 33-36 *supra* and accompanying text.

ture or a reviewing court weighs in deciding whether or not to create a new duty, obligation, or standard requiring conduct of a particular type. The discussion will illustrate that costs far exceed benefits. The overarching purpose is to show that providency of a eugenic wrongful birth tort is an issue of a legislative nature reserved for legislative determination. In the interests of consistency and careful allocation of governmental power, the article will first discuss two limiting prefaces to calculation of benefits and costs.

When the judicial system is privileged or authorized to adjust private obligations or to make new ones, the judge sitting as the judicial official of government makes or defines new general standards and revises relationships among classes of private persons; no *ad hoc* collection of citizens on one jury in one trial may do those things.¹⁷³ An allegation of negligence merely invokes consideration of the tort of negligence. Whether the form of action encompasses a class of transactions is a question of law and policy for the judge. When disputes over the content of established custom arise in professional malpractice cases, the jury will deliberate on this question, but whether to adopt the practices of a trade as a norm, thereby delegating lawmaking power to a profession,¹⁷⁴ is a question of law and policy for the legislature or reviewing court. Judge Hand and Justice Cardozo pointed out that allegations implicating a new area of behavior beg questions of policy: should the behavior be regulated by the private law of torts, what tort should govern, and what sort of norms should apply?¹⁷⁵ When such questions of legislative policy appear, there is little room for innovation by the court system.

The traditional Anglo-American method to evaluate imposition of new private obligations is the calculation of costs and benefits. This methodology is particularly appropriate in assessing expansions of the tort of negligence. The opinion of Judge Learned Hand in *United States v. Carroll Towing Co.*¹⁷⁶ is the most famous formulation of this three way calculus.¹⁷⁷ One first calculates the cost of compliance with the would-be obligation. Next one calculates the benefit to be achieved by the new obligation, discounting that by the probability of its occurrence absent the new proscription or mandatory requirement. Judge Hand does not suggest that judges should readily undertake such computations. He says only that when legislative reasoning is authorized, a court should employ such a balancing process.

173. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.10 (1956); RESTATEMENT (SECOND) OF TORTS § 285. See also PROSSER, note 10 *supra*, at 105-08.

174. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 212-14, 228-31 (1937); I. K. Davis, ADMIN. LAW TREATISE § 3.12, 193 (2d ed., 1978); Halligan, *The Standard of Disclosure by Physicians to Patients: Competing Models of Informed Consent*, 41 LA. L. REV. 9, 25-35 (1980).

175. See note 23 *supra*.

176. 159 F.2d 169 (2d Cir. 1947).

177. F. HARPER & F. JAMES, *supra* note 173, at 928-36; RESTATEMENT (SECOND) OF TORTS § 291; PROSSER, *supra* note 10, § 31, at 145-49.

If the proposed rule touches and concerns the subject matter jurisdiction of the courts and is within doctrinal boundaries of pre-existing law, courts may undertake legislative reasoning to limited degrees when there is no indication that the political departments of government would treat the consideration as an invasion of their prerogatives. Creation of a eugenic wrongful birth or wrongful life tort is not on the legitimate agenda of the courts. Were it within the constitutional agenda of courts to consider the providency of either tort, traditional considerations indicate that neither tort should be created because probable benefits fall far short of probable costs.

With these disclaimers, the article will employ the calculus outlined by Judge Hand by discussing claimed benefits and costs as applied to eugenic information pertinent to Tay-Sachs disease. Tay-Sachs disease was the imperfection implicated in *Curlender*¹⁷⁸ and several other cases.¹⁷⁹ It is so horrid a disease as to create an analytically precise example. If eugenic wrongful birth and wrongful life claims cannot find support on the hard facts of Tay-Sachs disease, then the same analysis applies to less pathetic hereditary diseases also.

Asserted Social Benefits of New Torts of Eugenic Wrongful Birth or Eugenic Wrongful Life

Imperfect Reliability of Tests. Eugenic tests are not as reliable as one may suppose. For example, amniocentesis tests can produce false negative findings in the diagnosis of Tay-Sachs disease.¹⁸⁰ The *Curlender* opinion¹⁸¹ illustrates that blood screening tests are also less than perfectly reliable. Some possibility of error is inherent in the particular testing procedure. Reliability of Tay-Sachs carrier screening depends upon age, sex, health, drug usage and presence of certain illnesses. Pregnancy also adversely affects reliability.¹⁸² Another source of error is human error. Quality control in genetic testing laboratories has become a problem at the present time and would be an increasing problem if the number of transactions were to increase markedly or suddenly.¹⁸³ The benefits of information and testing are not so secure or so certain as some presuppose. False negative findings greatly diminish the benefits of the whole testing enterprise. The prospect of a false positive result is even more striking. The consequence is not merely a reduction of the supposed benefits of the tort but imposition of an enormous new cost in the destruction of healthy fetuses begotten by people who want to have them. Another cost of false positive findings would be unnecessary restriction of subsequent reproductive

178. See note 82 *supra*.

179. Cases in notes 8 & 10 *supra* contain a number of Tay-Sachs instances.

180. Milunsky, *Amniocentesis*, 295 NEW ENGLAND JOURNAL OF MEDICINE 377, 379-80.

181. See notes 86-128 *supra*.

182. Kaback, *Detection of TS Carriers*, in GENETIC COUNSELLING 207 (DeLa Cruz and Lubs, eds., 1977).

183. See note 182 *supra*.

activity in some couples. These unreliabilities cumulate with other uncertainties and statistical factors showing the low incidence of inheritable diseases to give serious reason for even ardent advocates of eugenics to pause.

The Incidence of Inherited Disease and Mass Screening Programs. Tay-Sachs disease is an autosomal recessive inherited disease. The inheritance is not sex linked; in order to suffer the disease, one must inherit the gene from each of one's parents.¹⁸⁴ If one inherits the predisposing gene from one side only, that person will be a carrier who will not suffer the disease. If only one of a child's parents is a carrier, it is strictly impossible for the child to inherit Tay-Sachs disease although the child might become a carrier. The torts of wrongful birth or wrongful life imply that one in a later generation could sue the obstetrician who had failed to disclose information to one's grandmother, great grandmother, or great great grandmother. Even if one has a father and mother who carry an autosomal recessive disease gene, the probability that one will contract the disease is one in four. One also has a two in four chance of being a carrier and a one in four chance of being free of the trait altogether.¹⁸⁵ But how probable is it that a person is a carrier? The incidence of carrier status is low for most inherited diseases.

Tay-Sachs disease has a predilection for some Jewish people, the Ashkenazim Jews from Eastern Europe. Among Ashkenazim, the incidence of the trait is one in forty.¹⁸⁶ In the United States there are no pure Ashkenazim populations and subpopulations. Due to migration and intermarriage, the incidence of carrier status in this country is much less, even in neighborhoods generally composed of Ashkenazim. Yet, *Curlender*¹⁸⁷ implies that all Jewish people in the United States be screened for Tay-Sachs disease. This great burden on a large subpopulation is little justified by the small incidence of the trait. Tay-Sachs disease has a strong predilection for Ashkenazim, but it is not unheard of in other races and nationalities. By the logic of *Curlender*, anybody in the United States should be counselled to have screening tests and, in many cases, amniocentesis tests. The program would require great cost and inconvenience to detect very few carriers and far fewer affected infants. Accompanying the effort, expense, and pain would be a great deal of stress and a certain amount of erroneous findings with attendant costs. To illustrate the small amount of useful information generated by the mass program *Curlender* proposes, a bit of arithmetic is appropriate. First, assume that it is possible to identify people with a conducive genealogy. Considering populations of pure Ashkenazim, one in forty husbands and one in forty wives will have the trait. Thus

184. R. BEHRMAN, NEONATOLOGY 435 (1977).

185. A. EMERY, ELEMENTS OF MEDICAL GENETICS 94-107 (1974); BEHRMAN, *supra* note 184, at 435; See note 205 *supra*, at 204.

186. R. BEHRMAN, *supra* note 184, at 25.

187. See note 83 *supra*.

only one in every 1,600 couples will have two carrier parents. Only one in four children of these couples will have the disease. Even in a community of pure Ashkenazim, only about one in every 6,400 children will be affected with Tay-Sachs disease. Even if identification of fetuses with the disease and the associated opportunity to destroy them can be said to benefit a few individual parents, there is no net societal good.

The medical conduct necessary to avoid liability of the sort *Curlender* advances is insistence that every Jewish couple have blood screening tests and that one of every 1,600 Jewish women have amniocentesis for every pregnancy. This conduct will eliminate a disease with a natural incidence of at most one in 6,400 births in one subpopulation.¹⁸⁸ These figures understate the costs of screening and overstate the frequency of harm avoided because the Ashkenazim have disbursed over the continent and mingled with others.

Private Costs

Not all social costs will be felt by particular couples who are screened. The obvious costs incurred by the obstetrical patient and her husband include time, physical discomfort, and financial burdens. One author estimates that the cost of Tay-Sachs laboratory work was \$250 in 1980.¹⁸⁹ Under the test program advanced by *Curlender*, every Ashkenazim wife of childbearing age and her husband would undergo carrier screening including blood tests and biochemical analysis. In addition, about one in 1,600 wives would take the amniocentesis test or would be counselled to do so for every pregnancy. The accumulated costs would be very great. At the present time, most patients and most physicians do not advocate the sort of program which is the logical consequence of *Curlender* torts.

Social Costs

Eight additional costs not fully explored earlier support rejection of eugenic wrongful birth torts.

Lost Fetal Life and Associated Costs. False positive test results will produce undesired loss of healthy fetal life. This is a great social cost when a state has declared a policy that fetal life is valued. Such policies make no distinction between perfect and imperfect fetuses.

188. To review the mathematics, the probability of carrier status is 1/40 at most. The probability of affliction of an infant is 1/4, given carrier status of both parents. One-quarter times 1/40 equals 1/6400. Once a couple has one child with Tay-Sachs, they and their offspring and many other blood relatives are alerted and are likely to limit reproduction or undergo tests. This reduces the incidence of afflicted babies. Afflicted infants never survive to pass on the trait. Also, the incidence of carrier status in most populations is far smaller than one in forty.

189. R. BENSON, CURRENT OBSTETRIC AND GYNECOLOGIC DIAGNOSIS AND TREATMENT 539 (3d ed. 1980).

Collateral Health Factors of the Mother and the Fetus. Amniocentesis tests occasionally cause hemorrhage and infection in the mother and the child and breathing problems in the baby after birth. As such testing increases, the general elevation of these risks will become social costs bearing on the problem. Also, the incidence of spontaneous abortions caused by amniocentesis may be as much as 1.5% of women tested.¹⁹⁰ Increased fetal life lost by way of spontaneous abortion imposes an additional cost accumulating with lives lost as a result of false negative findings.

Economic Effects. A successful program of screening and amniocentesis testing would require a great amount of planning. The amount of new resources required for a mass program of screening for Tay-Sachs disease "would be enormous."¹⁹¹ The resources would include trained manpower, new equipment, new laboratory facilities, and a great deal of coordination. The coordination necessary would include cooperation between the medical community and the educational community. The involvement of the educational apparatus is essential to assure the effectiveness of the program and to assure that the program does not create social problems instead of solving them.

Anxiety and Stigmatization. Creation of a new tort which effectively obliges all obstetricians to inquire into the racial background of great numbers of patients is an act likely to produce stigmatization of some members of relevant racial groups and a great deal of anxiety within those groups unless the activity is undertaken with correlative mandates to educational and other apparatus of the government who can deal with such consequences.¹⁹² These concerns involve not only individual anxiety but the general mental health and social relations of the community.

Judicial Costs. An obvious cost of creating a eugenic wrongful birth tort is the flood of litigation brought upon the courts. Some of this new litigation is likely to be insincere or fraudulent for the following reasons. The temptation to commit perjury in order to obtain child support assistance is great to many persons. Such perjury is difficult to control because the causation alleged is subjective reliance. It is too easy and too tempting to say after the fact what one would have done had he had certain information. It would be extremely difficult to oppose insincere claims of subjective reliance. The judicial resources ex-

190. GENETICS AND THE LAW 53-56 (G. Annas and A. Milunsky, eds., 1976); Note, *Midtrimester Amniocentesis for Prenatal Diagnosis: Safety and Accuracy*, 236 J. A. M. A. 1417-76 (1976); Goldstein, *Minimizing the Perils of Amniocentesis for Prenatal Diagnosis*, 237 J. A. M. A. 1336-38 (1977).

191. See Kabeck, *supra* note 182 at 205.

192. *Id.* at 188.

pending in sorting sincere from insincere claims would be enormous and detrimental to the conduct of the court's other business.

Disrupted Family Harmony. A court should also consider disruptive effects on family life created by a tort of eugenic wrongful birth. The necessary reliance allegation states that the plaintiff parent would have aborted a now living child because that child is imperfect or in some way unacceptable. The child who becomes aware of this allegation must be enormously and gravely affected. The effect on other children in the family must also be grave and demoralizing. A sibling might well consider the question, "how acceptable am I to my parents; did they entertain the possibility of destroying me as well; how wanted or not am I?" Consider also the allegation's effect on parents and grandparents when the hereditary disease is not recessive but dominant.

Effect on Cooperation Between Patients and Physicians. Requiring physicians on a mass basis to undertake eugenic counselling of patients who do not want such counselling and find it offensive must have the effect of reducing cooperation between physicians and patients. Cooperation will be diminished as the physician appears to sell the screening services. The new tort would oblige doctors to refer patients for testing which frequently will produce no findings or information of any use to the patient. This will demoralize the patient and give him the feeling that he is a consumer being pressure sold by physicians marketing new and unsuccessful laboratory services. Opinions acknowledging a wrongful birth tort mandate this expense. The expense increases if physicians react defensively or if the new tort is exploited to sell unnecessary laboratory services. Good rapport and cooperation between health providers and patients are things that the law should try to advance. Creation of the new eugenic torts would do nothing but the contrary.

Efficiency of Medical Practice. The lengthy and costly education of a physician trains him for skillful administration of medicine, performance of surgery and performance of indicated tests. Distinguished from the role of physician is the role of educator. Physicians are not necessarily the best of health educators, nor do they claim to be. The law should not impose the role of health teacher on the doctor. If society would enlarge eugenic counselling and other health education services, it should be done by public law through educational and health agencies.

A reasonable allocation of manpower and a reasonable respect for specialization of labor leads to the conclusion that the creation of the new tort of eugenic wrongful birth is ill advised.¹⁹³ Society should use physicians for tasks that they do best and reserve other duties for other

193. *Id.* at 182.

segments. An obstetrician is in essence a very highly skilled tradesman and an applied scientist, not a teacher or educator. To the extent physicians must do things that they are not best qualified and trained to do, society loses a valuable resource of human investment in medical education. If society obliges physicians to spend time talking about illness, they will have less time available to treat disease. Physicians have a large responsibility already. Society should think carefully before imposing some additional affirmative verbal obligation detracting from performance of established tasks using principal abilities.

Using the traditional reviewing court rationale of *United States v. Carroll Towing Co.*¹⁹⁴ to assess expansion of negligence, courts should reject the tort of eugenic wrongful birth because the costs are great and the benefits, if any, are few. Eugenic nondisclosure is so novel and so political in nature that courts should not undertake to do the *Carroll* analysis. Eugenic expansion is not a small new step in settled jurisprudence, but a huge step in a new direction. The several social costs should lead an agency reasoning legislatively to reject torts of eugenic wrongful birth and wrongful life also. But more than that, courts should refrain from erecting new torts whose creation requires legislation or delegation of legislative power to private professions.

Widespread Opposition

Fewer than ten per cent of women advised that their fetuses risk serious inherited diseases undertake the amniocentesis test when told about its availability.¹⁹⁵ Medical opinion divides as to when risk is great enough to justify screening programs followed by amniocentesis tests.¹⁹⁶ When honest opinions differ so much, affirmative action should not be required.

Nonfeasance and Cognizability of Damages

Nondisclosure of information should not be defined as a breach in a case of eugenic information. Comments concerning nonfeasance by nondisclosure of information in wrongful life cases are also pertinent in wrongful birth disputes.¹⁹⁷ However, damages analysis differs between the two asserted eugenic torts.

Mental Equanimity and the Tort of Negligence

Interests Protected. Most jurisdictions do not recognize the tort of negligent infliction of emotional distress; some are extremely restrictive in allowing claims for intentional interference with mental equanimity.

194. 159 F.2d 169 (2d Cir. 1947).

195. 241 J. A. M. A. 1667 (1979) (Medical News Page).

196. Chapman, *Your Odds in the Prenatal Gamble*, in LEGAL ASPECTS OF MEDICAL PRACTICE 32, (2d ed. B. Knight 1976).

197. See notes 37-45 *supra*.

ity.¹⁹⁸ Mental equanimity is an interest rarely protected by any form of action and almost never protected by the tort of negligence.¹⁹⁹ Typical interests protected by negligence are tangible property or integrity of the body. Mental equanimity is not protected on account of abuse through insincere or exaggerated claims and a conscious legal desire to limit liability for unintentional action. Negligence is not scienter but inadvertent conduct.

In many wrongful birth cases, parents do not seek to recover damages for mental distress. When they do make such claims, results vary. The New Jersey case of *Berman v. Allan*²⁰⁰ does not allow recovery for grief but does allow it for the annoyance of an unwanted relationship.²⁰¹ But as the *Becker* case declared,²⁰² perfection and what imperfection may cause disappointment to the parents are questions problematical in the extreme. A handicapped child will cause some persons joy; at worse, emotions will be mixed.²⁰³

Nonjusticiability. Techniques of common law damage assessment break down in assessing the amount of mental distress in eugenic wrongful birth cases. The extent of discomposure or disequilibrium of the mind is a very difficult matter to measure. As *Howard v. Lecher*²⁰⁴ states, the equation of alleged mental distress with monetary amounts is an extreme case of the legal fiction of monetary damages in noncommercial litigation. The fiction is necessary in that no other practical remedy for past harm in private litigation exists, but operation of the fiction must be controlled in the interests of reason and fairness.²⁰⁵

The *Becker* opinion states that parents of a handicapped child must respond to the birth with mixed emotions.²⁰⁶ Besides the disappointment, there will likely be emotions such as inspiration, love and joy at the birth. These positive emotions necessarily mitigate the effect of negative ingredients.²⁰⁷ Computation of some net amount of emotional distress balancing accounts among these mixed emotions is an intolerable, speculative and impossible measurement for any court or jury.²⁰⁸

198. Sabin, *Intentional Infliction of Mental Distress—Seventeen Years Later*, 66 ILL. B.J. 248 (1978). See also *White v. United States*, 510 F. Supp. 146, 149 (D. Kansas, 1981) for an allegation of intentional infliction of mental suffering in a wrongful birth case.

199. *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E. 2d 64, 397 N.Y.S.2d 363 (1977).

200. 80 N.J. 421, 404 A.2d 8.

201. *Id.* at 433-34, 404 A.2d at 14-15. With no discussion, the order of the court in *Speck v. Feingold*, — Pa. —, 439 A.2d 110 (1981) allowed parents in a eugenic sterilization case to sue for mental distress.

202. *Becker*, 46 N.Y.2d at 411-12, 386 N.E.2d at 812, 413 N.Y.S.2d at 900-01.

203. *Id.* at 416, 386 N.E.2d at 815, 413 N.Y.S.2d at 903. In accord is *Moores v. Lucas*, 405 So.2d 1022 (Fla. App. 1981).

204. 42 N.Y.2d at 111, 366 N.E.2d at 65, 363 N.Y.S.2d at 364.

205. *Id.* at 112, 366 N.E.2d at 66, 363 N.Y.S.2d at 365.

206. *Becker*, 46 N.Y.2d at 416, 386 N.E.2d at 815, 413 N.Y.S.2d at 903.

207. *Id.*

208. *Id.*

If anyone would undertake such a computation it should be with guidance provided by the legislature.²⁰⁹ To determine what conditions of infants produce more sorrow than love requires arbitrary and artificial distinctions.²¹⁰ In the absence of legislated yardsticks, damages are incommensurable and nonjusticiable and should not be cognizable.

Cognizability of Costs of Child Care

Derivative Economic Claims and Negligence. In common law, a plaintiff is not typically able to recover for harm to another person.²¹¹ Parental claims by virtue of a condition of their children are exceptions to this rule and must be narrowly construed.²¹² Such claims are not often entertained and are derivative in nature, meaning that they depend upon existence of the infant's claim.²¹³ The parents may not maintain an action unless the child has an actionable cause against the same defendant by virtue of the same condition. Contributory negligence barring the minor's claim automatically bars action by the parent.²¹⁴ The doctrine of derivative tort reflects the sentiment that negligence should be limited to decent bounds and that the whole law of tort must be limited to reasonable perimeters. Protection of concrete property and integrity of the body are sufficient missions for the tort of negligence. Claims for medical costs of a diseased child are purely financial in nature.²¹⁵ At least one wrongful birth opinion²¹⁶ appreciates this distinction in awarding a very limited recovery for the obstetrical costs of birth, emphasizing that these were costs of attention to the body of the mother. The next inquiry is why purely economic interests are not protected by the tort of negligence.

209. *Wilczynski v. Goodman*, 73 Ill. App.3d 51, 391 N.E.2d 479, 487 (1979).

210. See *Howard v. Lecher*, 42 N.Y.2d at 113, 366 N.E.2d at 66, 397 N.Y.S.2d at 365; *Becker*, 46 N.Y.2d at 413-14, 386 N.E.2d at 813, 413 N.Y.S.2d at 902.

211. Foster, *Relational Interests of the Family*, 1962 U. ILL. L. F. 493 (1962).

212. *Id.* at 494-95.

213. *Id.* at 494-95. *Becker*, 46 N.Y.2d at 419-20, 386 N.E.2d at 817, 413 N.Y.S.2d at 905-06; PROSSER, *supra* note 10, § 125, at 891-94; RESTATEMENT (SECOND) OF TORTS § 703.

214. Foster, *supra* note 211, at 427. PROSSER, *supra* note 10, § 129, at 938. An example of the strict application of the consequences of the derivative nature of parental claims in tort on account of a necessity of caretaking of the child is *Jones v. Schmidt*, 349 Ill. App. 336, 110 N.E.2d 688 (1953). In that case a child was hurt when it trespassed upon land of defendant. The land was in a dangerous condition but the child was a trespasser and the traditional law is that a landowner owes no duty to a trespasser except to avoid dangerous nuisances attractive to child trespassers. Conditions were dangerous but there were no attractive nuisances in the *Jones* case. The child had no cause of action and neither did the parents.

215. Economic interests are somewhat protected by the law of torts, although an occasional case suggests that it is the office of the law of torts only to protect bodily integrity, personal reputation, and tangible property. *Koplin v. Chrysler Corp.*, 49 Ill. App.3d 194, 364 N.E.2d 100 (1977). A better and narrower statement is that the forms of action of negligence and strict liability do not protect economic interests, so that economic interests are protected only against intentional tortious interference or deliberate unfairness. PROSSER, *supra* note 10, § 79, at 517-25, and § 83, at 952-54.

216. *Wilczynski v. Goodman*, 73 Ill. App.3d at 63, 391 N.E.2d at 488. Some courts say that limited claims of parents for obstetrical costs and pain should be allowed and that they would better be labelled "wrongful pregnancy" cases. See *White v. United States*, 510 F. Supp. 146 (D. Kansas 1981).

Practical problems in adjudicating economic claims and the more compelling quality of tangible trespasses are some of the reasons why, absent a contractual or statutory ground, the common law does not allow claims by third persons for increased cost of maintaining sick persons. Such claims would create a tendency towards multiple litigation and a risk of multiple recovery. Rules requiring crediting of judgments would mitigate these unwholesome effects. But judicial management of those offsets would complicate litigation and further confuse the law of torts, while inadvertence and the settlement process are likely to result in double recoveries in some cases despite good management. Deliberate conception of parental claims as strictly derivative in nature is not only logically elegant but ethically and juridically sound. Because parental claims are derivative, cases rejecting the tort of wrongful life are compelling authority for nonrecognition of wrongful birth in a eugenic context.

All jurisdictions save one²¹⁷ appellate district in California are steadfast in asserting²¹⁸ that an infant may not make any claim on account of his imperfection. This implies that a parent has no claim by virtue of imperfection of his child. The article will now discuss the three main damage patterns that have developed from the wrongful birth cases.

The most frequent damage pattern allows parents to recover costs of caring for a handicapped child born on account of fault of a physician.²¹⁹ One state arguably does not allow parents to recover cost of care.²²⁰ A third group of cases²²¹ recognizes a distinction between ordinary and extraordinary costs. Allowing recovery only of special incremental costs, these cases create great practical problems in separating and segregating costs. These cases reason that, in a eugenics case, the parents wanted to have a baby. They did not seek to avoid ordinary expenses of child care, thus, loss is limited to the additional expense of raising a more costly child. Whereas the cases denying recovery for economic cost of care articulate best with general tort doctrine, the third group of cases highlights the doctrinal and practical difference between lost opportunity for therapeutic and eugenic abortion. The

217. The sole exception is *Curlender*, 106 Cal. App.3d 811, 165 Cal. Rptr. 477 (1980).

218. See note 8 *supra*.

219. Excepting the first two cases cited in note 220 *infra* and the cases cited in note 221 *infra*, all the cases cited in notes 8 & 170 *supra* appear to allow recovery of all costs of care.

220. *Wilczynski v. Goodman*, 73 Ill. App.3d 51, 391 N.E.2d 479 (1979). *But see* *Cochrum v. Baumgartner*, 99 Ill. App.3d 271, 425 N.E.2d 968 (1981) *further appeal docketed*, No. 55733 (Feb. 2, 1982). New Jersey had appeared to belong in this second category but now appears to belong in the third. Compare *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979) with *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981).

221. Besides New Jersey, these states include Florida, Texas and Wisconsin. *Moore v. Lucas*, 405 So.2d 1022 (Fla. App. 1981); *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex., Civ. App. 1975); *Dumer v. St. Michael's Hosp.*, 69 Wis.2d 766, 233 N.W.2d 372 (Wis., 1975). Arguably once in this third category, Pennsylvania now probably belongs in the first. Compare *Gildiner v. Thos. Jefferson Hosp.*, 451 F. Supp. 692 (E.D. Pa. 1978) with *Speck v. Feingold*, — Pa. —, 439 A.2d 110 (1981).

distinction is critical when state policy values life.²²²

If something is valued as a matter of state policy, a lost opportunity to destroy the thing cannot be cognizable as damages. Such is the essence of lost opportunity to have a eugenic abortion. In many jurisdictions, state policy forbids recognition of eugenic wrongful birth regardless of actionability of wrongful birth involving therapeutic abortion.²²³ Yet, economic losses associated with lost opportunity for eugenic abortion are very hard to measure even if the underlying values are consistent with state policy.

Measurement and Adjudication of the Economic Claims of Parents. The mixed emotions which lead the courts to decline to treat mental equanimity as an interest protected by the tort of negligence also complicate assessing costs of care as damages because the positive emotions also mitigate financial damages.²²⁴ Even the financial costs are prob-

222. *Wilczynski v. Goodman*, 73 Ill. App.3d at 57, 63, 391 N.E.2d at 483, 488.

223. In the abortion funding cases, *supra* note 145, the Supreme Court found both federal policy and policy in several states to favor childbirth and support of perinatal and neonatal life and to weigh them more heavily than maternal mental health and economic well-being and other interests. The states included Pennsylvania, Connecticut, and Missouri. In *Turpin v. Sortini*, 119 Cal. App.3d 670, —, 174 Cal. Rptr. 128, 130-32, (1981), *petition for hearing granted*, No. S.F. 24319 (Aug. 6, 1981) (argued Nov. 30, 1981), the California Court of Appeals found manifest in California a state policy to value all life including life of very ill infants just born and in its research found like policy expressed in opinions from New York, New Jersey, and Pennsylvania. California excludes abortion from procedures covered by its Medi-Cal program and deleted the eugenic abortion clause from the ALI Model Act when it passed it. Note, *Survey of Present Statutory and Case Law on Abortion*, 1972 U. ILL. L.F. 177 (1972). At the time of the 1972 survey just cited: four states banned all abortions and punished them as felony; thirty states punished all abortions save those required to save the life of the mother; one forbade all abortions save those required to save the life of the mother or to terminate a pregnancy in a victim of rape; one state allowed abortion to save the life or health of the mother; one state, California, had passed the ALI Model Act but without the eugenics clause, to allow early abortions, therapeutic abortions for victims of crimes, but not late eugenic abortion; ten states had passed the ALI Model Act intact; three other states had few restrictions on abortions. Thus, about thirteen states allowed eugenic abortions late enough to make amniocentesis of use in deciding to abort. Excepting New York, those thirteen were not populous states. Even that status of things represented a liberalization in the preceding ten years in some seventeen states and the trend toward liberalization had slowed very much. In many jurisdictions, the stimuli to change were the ALI Model and the Thalidomide scare, both of which stimuli had abated. On the other hand, the Thalidomide motivation was eugenic in nature though it did not involve inherited traits. 1972 U. ILL. L.F. 177, 179-80 (1972); see notes 21-33 *supra*. Also, one year later, Justice Blackmun noted that three more states had passed the ALI model, though none of the populous states had done so save California which excised the eugenics clause. *Roe v. Wade*, 410 U.S. 113, 140 n.37 (1973). This history of American legislation shows early antipathy to abortion, and, after the civil war, development of thorough repugnance to it. 410 U.S. at 139-42. The limits on legislation placed by the court in 1973 make criminal codes and other statutes regulating abortion problematical evidence of policy. But the resistance of legislatures to *Roe v. Wade* is apparent, especially for late nontherapeutic abortions.

In consideration of all the above, it is fair to say that late eugenic abortion after amniotic testing is an activity opposed to state and local policy in a majority of American jurisdictions including all the populous ones save perhaps New York whose courts nevertheless construe state policy simultaneously to value life as it tolerates or facilitates eugenic activity.

224. See *Sherlock v. Stillwater Clinic*, — Minn. —, 260 N.W.2d 169 (1977); *Troppi v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971); See also *Eisbrenner v. Stanley*, 106 Mich. App. 357, 308 N.W.2d 209 (1981).

In *Eisbrenner v. Stanley*, parents of a deformed girl sued an obstetrician who allegedly failed to diagnose German measles in the expectant mother. Plaintiffs alleged wrongful birth

lematical. The New York Court of Appeals thought the matter so difficult in one case that it reserved this question for subsequent appeal.²²⁵

Even if economic interests within family relationships were protected by the law of negligence, such damages should not be awarded in eugenic abortion cases because they are immeasurable. But if damages are awarded, justice requires that costs be separated²²⁶ into the cost of care for a perfect infant and special incremental costs of caring for an imperfect child.

Ironically, the costs of care for a sick infant may be less than the cost of care for a well infant. Educational and developmental costs are often lower for an imperfect child with short life expectancy. Where costs are greater for the child, still the measurement is extremely difficult. Consider the possible implications. Some parents might claim that because the possibility of determining sex was not disclosed, they lost an opportunity to abort a child of an unpreferred sex. Such facts might be a cause for action to recover damages amounting to the costs of caring for a girl over a boy. The opposite claim might also be made.

Some say that male children are more disruptive, have more school problems, tend to get into more trouble and incur greater financial costs. These factors differ among families and social or economic strata. The valuation may also differ between urban and rural communities. The valuation could also vary with prior composition of the family. Furthermore, what about the extraordinary costs of raising perfect children? The gifted child aspires to a university education and graduate school enrollment. Birth of an imperfect child circumvents these enormous costs. These remunerations over factors and setoffs are not fanciful. They should be familiar. Economic measurement of eugenic damages within the family are so difficult that courts should decline to create a tort actionable by parents respecting inherited condition of their offspring.

and as damages alleged both costs of care, ordinary and extraordinary, and mental distress. The trial court allowed plaintiffs to present evidence about all types of damages alleged. But the jury found for defendant. 106 Mich. App. at 360, 308 N.W.2d at 211. Plaintiffs appealed asserting arguments of defense counsel and hearsay evidence as error. Defendant cross-appealed but the opinion does not state what error defendant asserted. *Id.* at 361, 308 N.W.2d at 211. The appellate court expresses the opinion that the trial judge was correct in allowing plaintiffs to contest for damages of all the sorts claimed and that the prior case of *Troppe v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971), supports allowance of damages for mental distress offset by any emotional benefits of parenthood. But since the jury had found defendant not guilty of other elements of malpractice, the jury had had no occasion to assess damages. *Id.* at 367, 308 N.W.2d at 214. Because the appellate court affirmed the verdict and judgment for defendant, its comments about damages are dicta. And for the reason that the opinion does not describe the points of error raised by defendant on his cross-appeal, it may be that damages were not briefed or argued and that the comments about damages are obiter dicta. Thus, it is still possible to argue in Michigan that emotional benefits reduce financial damages but that emotional distress does not augment other losses and is not compensable in a wrongful birth case. Another court struggling with the question of emotional benefits as an offset to costs of caretaking is the Illinois Appellate Court. See *Cochrum v. Baumgartner*, 99 Ill. App.3d 271, 425 N.E.2d 968 (1981).

225. *Becker*, 46 N.Y.2d at 413-14, 386 N.E.2d at 813, 413 N.Y.S.2d at 901-02.

226. MCCORMICK ON EVIDENCE, *supra* note 159, § 90, at 323.

The Curious Status of Obstetrical Costs in a Case Alleging Eugenic Wrongful Birth

Interests Protected. The subject is childbirth or parturition. One court considering unsuccessful therapeutic abortion reasoned that obstetrical costs were not economic damages but a reflection of the mother's interest in the integrity of her own body. Parturition in that case was an experience the plaintiff sought to avoid.²²⁷ Since the defendant abortionist unsuccessfully undertook to help her avoid that physical experience, the court reasoned that defendant should pay the costs closely connected with that experience. In a typical eugenic wrongful birth case the plaintiffs allege that it was an opportunity for eugenic abortion or eugenic contraception which they lost when they did not receive information about eugenic data and tests from the defendant. The implication is manifest. In a case of lost eugenic opportunity, the woman does not seek to avoid parturition but the particular infant she delivered.

Nonjusticiability. When women allege lost opportunities for eugenic abortion or eugenic contraception, they do not claim that undesirable childbirth harmed them. Quite the contrary, such an allegation implies the desire for parturition. Parturition is sometimes sorrowful and at other times thoroughly ecstatic.²²⁸ Usually, it is a mixture of the two. The courts are not agencies competent to separate one from the other. In a eugenic wrongful birth case, the complaint does not allege violation of a liberty to avoid such an experience. Since a woman will have sought parturition *per se*, she cannot claim obstetrical costs incidental to it as damages.

In some wrongful birth cases, a parent has undergone an unsuccessful sterilization or abortion.²²⁹ In most eugenic wrongful birth cases, a parent has done nothing, alleging lost preventative opportunity.²³⁰ Both logic and fairness require that the court offset and credit the expense of contraception, sterilization or surgery not incurred against the obstetrical costs in eugenic cases. Other offsets are the costs of tests that the plaintiffs allege they would have had, costs of screening the husband and wife and amniocentesis testing. Costs of tests and eugenic abortion may equal or exceed the costs of parturition. Such cases prompt indeterminable computations of offsets and net amounts. Courts should avoid such problematical computations especially where the net will be small or negative. Difficult and protracted litigation over small net amounts is better avoided to begin with.

227. *Wilczynski v. Goodman*, 73 Ill. App.3d at 60, 391 N.E.2d at 488.

228. Q.H. DEUTSCH, *THE PSYCHOLOGY OF WOMEN* I, 19, 210 (1945); A. MASLOW, *TOWARD A PSYCHOLOGY OF BEING*, 75, 98, 136 (2d ed. 1968).

229. Robertson, *Civil Liability Arising From "Wrongful Birth" Following An Unsuccessful Sterilization Operation*, 4 A.J.L. & MED. 131 (1978).

230. See notes 8 and 170 *supra*.

Causation in a Case Alleging Eugenic Wrongful Birth

The author will now direct attention to elements of causation in eugenic wrongful birth. The first is causation in fact. In these cases, a plaintiff makes a literally true allegation that inaction of a defendant physician caused the loss claimed or that, but for his verbal inaction, the loss would not have occurred. The reason is that one can allege reliance on disclosure. But literal reliance by plaintiff in fairness should not suffice. Reasonable reliance should also be pleaded and proved. But that too is problematical in a eugenics case.

Reasonable Reliance and Materiality

Hornbook law states that a cause of action for fraud or deceit must allege a misstatement of material concrete fact and that actual reliance on that fact by plaintiffs was reasonable. Reasonable reliance and material fact are logically distinct elements that practically overlap.²³¹ Many states borrow these elements from other torts and fasten them to medical negligence in informed consent cases.²³² This limited obligation of disclosure concerning cure generally follows negligence models.²³³ These models require proof of a custom of disclosure among physicians²³⁴ and proof of reliance.²³⁵ The plaintiff must plead and prove that the fact withheld was objectively material making subjective literal reliance objectively reasonable.²³⁶ Materiality is an objective construct.²³⁷ The calculus of materiality is rather like the calculus reviewing courts use in deciding whether to establish new standards and expand the tort of negligence.²³⁸ How material are the undisclosed risks to a decision to forego or undertake carrier screening tests or amniocentesis tests, and how material are particular findings from tests to a decision to undergo eugenic abortion?²³⁹

Broad demographic facts dealing with this problem are often available.²⁴⁰ Tay-Sachs data illustrate materiality in a concrete setting. Among Ashkenazim, the probability of carrier status is no more than one in forty, while the possibility that both spouses are carriers is no more than one in 1600. Other things equal, low incidence of a risk tends to imply that its nondisclosure is immaterial. Carrier status probabilities for other Jewish people are even less.²⁴¹ Yet allegation of a handicap with larger incidence is still not enough to establish materi-

231. See F. HARPER & F. JAMES, *supra* note 173.

232. See Halligan, *supra* note 39.

233. *Id.* at 35-47.

234. *Id.* at 35-36.

235. *Id.* at 44-47.

236. *Id.*

237. *Id.* at 28-35 and 44-47.

238. *Id.* at 28-33.

239. The use of probabilistic calculus of materiality is classical in jurisprudence as well as in mathematics. See note 40 *supra*, at 28-35.

240. See notes 180-90 *supra* and accompanying text.

241. Courts may take notice of epidemiological data collected by government bureaus and the

ality because the doctrine is an objective construct implicating public controversies of a political and nonjusticiable nature also.

To explore the nonjusticiability of materiality in the context of eugenic wrongful birth cases, suppose an express allegation of risk, incidence, nondisclosure, materiality and reliance. Should a court undertake a public opinion poll of the Ashkenazim population and persons with Ashkenazim blood, or should it poll the public at large? By reference to what values and hypothetical reasonable persons shall a jury deliberate on the objective importance of an undisclosed risk? Where the underlying factual matter is eugenics, the objective relevance and materiality are more than usually controversial. Such matters are delicate and infrequently discussed. A random sample of twelve persons sitting as a jury is not likely to hold a representative cross-section of community values in such cases. Nor will a small collection of persons be able to ascertain eugenic consensus of the community from life experience. Eugenic materiality, like eugenic standards, is not justiciable by common law courts. The courts should decline to entertain such claims.

The alternative would be to exclude proof of materiality as an element of the tort. That alternative has little to recommend it. Reliance should always be tested against an objective standard before serving as a basis for judicial relief. Actual subjective reliance is the literal cause in fact alleged. It should not suffice for plaintiffs to allege only subjective reliance consisting in a hypothetical decision they claim they would have made. When the gist of the claim is nondisclosure, the law requires allegation and proof of objective materiality of the fact not disclosed. But when a parent attempts to prove materiality in a eugenic wrongful birth case, that parent unavoidably alleges a consensus of political opinion among citizens that does not exist.²⁴² In such cases, materiality is a nonjusticiable construct.

The citizen who deems facts important may obtain them by self study or contract with a eugenic counsellor.²⁴³ That person has the right to such information if the counsellor contracts to disclose the requested facts. In that case, nondisclosure of information is a basis for breach of express contract.²⁴⁴ There, objective materiality of fact and other elements of a delictual action are not involved. Rejection of eugenic torts does not suppress information or frustrate persons who want

leading private scientific sources whose work is used and scrutinized by governmental agencies and others. MCCORMICK ON EVIDENCE § 331 (2d ed., 1972).

242. That is to say, eugenic risks are unlike collateral risks of treatment or side effects, and consensus about eugenic risks is less likely so that the whole concept of objective materiality somewhat breaks down.

243. A paper exploring breach of warranty and other contractual theories is Robertson, *Civil Liability Arising From "Wrongful Birth" Following An Unsuccessful Sterilization Operation*, 4 A.J.L. & MED. 131 at 134-37. See *Wilczynski v. Goodman*, 73 Ill. App. 51, 391 N.E.2d 479, 488-89, for a discussion of the requirements of separate consideration and explicitness in a claim of breach of medical warranty.

244. The measure of damages and public policy will still be difficult issues.

the information. People are free to see educators and ask questions. Opportunities foreseeably lost on account of breach of contract may often be claimed as consequential damages.²⁴⁵ But to be actionable, a lost opportunity must be an opportunity to do a lawful act.²⁴⁶

Legal Availability of Eugenic Abortion

Since contraception is widely privileged,²⁴⁷ the discussion of legality will concentrate on abortion. The author will again use Tay-Sachs disease as an example. Amniocentesis tests to detect the disease cannot commence before sixteen to eighteen weeks after conception because there is not sufficient fluid from which to draw a test sample before that time.²⁴⁸ Then the fluid is analyzed. The procedure involves isolation of chromosomes (Karyo-typing), culturing for long periods, and analysis of enzymes released. The whole process takes a minimum of forty days.²⁴⁹ Even when the tests go well, the process brings the woman perilously close to the end of the twenty-fourth week of pregnancy after which eugenic abortion is not available in many states.²⁵⁰ Though during this period the states must allow therapeutic abortion, only about fourteen permit eugenic abortion.²⁵¹ While some plaintiffs may claim they would have gone elsewhere, many are the exigencies of locating and going to a facility where legal abortion is available. In such circumstances, the law should require plaintiffs to allege availability with great particularity. Unless they do, the allegation of cause in fact is not sufficient. Even if parents allege an absolute right to abortion, this is so dubious as to be demurrable without particulars.

Recognition of eugenic wrongful birth will create an incentive for

245. Query, when a plaintiff sues a counsellor for breach of a counselling contract and as consequences of breach alleges loss of an opportunity to prevent conception of an ill child or to abort him or her, does she seek to protect her reliance interest or expectation interest in performance? Fuller and Perdue, *The Reliance Interest In Contract Damages*, 46 YALE L.J. 52, 373 (1936); RESTATEMENT OF CONTRACTS § 329. Opportunities or choices lost in this sense are not like chances, or prize contests where the gain is aleatory. RESTATEMENT OF CONTRACTS, § 332. Such alternative measures of damages are not required because when plaintiff parents have elected to procreate, now have a sick child, and credibly testify that they would have elected without doubt not to procreate had they had correct information, then consequences in the form of increased costs appear reasonably certain as required by the law of contracts, 11 WILLISTON ON CONTRACTS §§ 1344A, 1346 (3d. ed., 1968), though measurement of benefits conferred, a familiar part of the computation of contractual damages, remains difficult. RESTATEMENT OF CONTRACTS §§ 329, 331(1). All these difficulties of classification demonstrate that costs of child care should not be considered general damages for breach of contract but special damages recoverable only when a defendant contractor bargains to pay them either expressly or by implication from notice received and specialized activity. That is why we limit our discussion to genetic counsellors and argue against liability of health care providers who do not concentrate on genetic counselling.

246. That the opportunity lost must be the opportunity to do a lawful act is readily derived from the principle that a contract is unenforceable if performance be criminal, tortious, or otherwise against state policy. RESTATEMENT OF CONTRACTS § 512.

247. *Griswald v. Conn.*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

248. Hirshhorn, *Human Genetics*, 224 J.A.M.A. 597, 604 (1973).

249. Glautz, *Amniocentesis*, in *GENETICS AND THE LAW* 29 (G. Annas & A. Milunsky, eds., 1976).

250. E.g., ILL. REV. STAT., ch. 38, § 81 (1979); See note 223 *supra*.

251. See note 223 *supra*.

physicians to provide information which may operate as a suggestion to obtain an illegal abortion. When patients are unable to travel to another jurisdiction permitting eugenic abortion after the twenty-fourth week of pregnancy, the suggestion amounts to a private law obligation to tempt commission of a crime. In many other cases, law abiding citizens will not obtain an illegal abortion rendering the testing for naught. In these cases, nondisclosure of risk will not cause lost opportunity but will increase medical costs to patients and society.

Proximate Causation

The Indirect Nature of the Consequences of Nondisclosure

Though plaintiffs in eugenic wrongful birth cases allege that they would have undergone tests and procured an abortion, the likelihood of such behavior is questionable. Parental deliberation intermediates any effect of the physician's nondisclosure as an intervening cause. No physician produces inheritable illnesses. Courts should not render judgments against defendants who have not disclosed facts as if they produced the ill condition of a baby or failed to cure it. To treat defendants guilty of verbal nonfeasance like defendants in a prenatal impact case is to expand the tort of negligence beyond fair and manageable boundaries.²⁵²

Foreseeability

Foreseeability in law is constructed of predictability and fairness in a particular setting.²⁵³ The concrete example of Tay-Sachs disease serves well to illustrate the role of foreseeability in eugenic wrongful birth.

The objective likelihood that a child born of parents who are pure Ashkenazim will suffer Tay-Sachs disease is one in 6,400. This low level of likelihood is the objective aspect of predictability. The subjective aspect is the likelihood that a person, undertaking to treat women obstetrically, will contemplate liability for child support of imperfect children and mental distress of their parents. Such animadvertence is not likely and should dissuade courts from creating eugenic wrongful birth torts.

Contemplation of the liability illustrates the disproportionality to the asserted fault. Disproportionality is the rationale of *Howard v. Lecher*²⁵⁴ denying liability for mental distress. The same rationale somewhat motivates the courts that decided *Berman v. Allan*²⁵⁵ and

252. *Howard v. Lecher*, 42 N.Y.2d 109, 111, 366 N.E.2d 64, 65-66, 397 N.Y.S.2d 363, 364 (1977).

253. True probability, cause and effect and a desire for a fair scope of liability are the ingredients of proximate cause. PROSSER, *supra* note 10, § 42, at 244.

254. 42 N.Y.2d at 111, 366 N.E.2d at 65-66, 397 N.Y.S.2d at 364.

255. See note 16 *supra*.

Wilczynski.²⁵⁶ The comments are germane to the whole notion of eugenic wrongful birth. One of the attributes of good jurisprudence is a doctrinal means to keep liability within fair and manageable boundaries.²⁵⁷ Proximate cause is such a means, and it ought to be invoked here.

Summary to Part Two

The courts should not recognize a new tort of eugenic wrongful birth just as they should not recognize the tort of eugenic wrongful life. Nor should mental equanimity and economic expectations be interests protected by the tort of negligence so as to create a potentially huge liability for mere verbal nonfeasance. Creation of such a tort would set the courts adrift on a sea of nonjusticiable contentions about the materiality of eugenic facts, the standards for their disclosure, and the amount of damages. Finally, the courts should reject the tort because its creation will work social harm, not good.

PART THREE: LEGISLATION

A major theme played here has been legislative prerogative. What can be said of a proposal that the legislature excuse pleading and proof of some elements of negligence in eugenic wrongful life or wrongful birth? This suggests that the new torts are similar to negligence and that enactment of the new torts is not radical. All the foregoing discussion shows that this is not so. Both torts lack several elements of negligence. Either new tort would be a new composition in a new key and no mere variation on older themes. It would do violence to legal usage to term either new tort an adjustment or rearrangement of negligence or malpractice.²⁵⁸ If such a bill were introduced, how should such a bill be titled or styled?

The tort closest to those proposed is negligent misrepresentation,²⁵⁹ an outgrowth of deceit derived from trespass.²⁶⁰ Yet even deceit and misrepresentation differ from eugenic wrongful life and wrongful birth. Deceit and misrepresentation rarely compel affirmative action²⁶¹ to disclose data and both require proof of other elements²⁶² problematical in eugenic wrongful life and wrongful birth cases. An obligation of the sort called a middle ground²⁶³ in an earlier discussion of duty resem-

256. *Wilczynski v. Goodman*, 73 Ill. App.3d at 62, 391 N.E.2d at 487.

257. *Howard v. Lecher*, 42 N.Y.2d at 111, 366 N.E.2d at 65-66, 397 N.Y.S.2d at 364.

258. 1 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 18.09 (4th ed.) (relation of title to the body of an act).

259. See PROSSER, *supra* note 10, § 107, at 704-10.

260. See PROSSER, *supra* note 10, at 731; F. MAITLAND, FORMS OF ACTION AT COMMON LAW 44, 54 (A. Chaytor & W. Whittaker, eds., 1971).

261. See PROSSER, *supra* note 10, § 106, at 694-99.

262. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 7 (1956); Halligan, *supra* note 174, at 25-35; PROSSER, *supra* note 10, at 685-86, 705-10.

263. See notes 10-15 *supra* and accompanying text.

bles an obligation defined by common law deceit more than it resembles negligence. A right correlative with such an obligation would imply a limited form of suit alleging eugenic wrongful birth. Statutory creation of such an obligation to give honest answers to direct questions or to refer patients who ask them to other good sources would not do huge violence to the established law of torts. But allowing claims for wrongful life alleged as a consequence of a breach of this moderate obligation would still contradict policy²⁶⁴ in most jurisdictions to value life and would present doubt about the reality of harm suffered by the infant. Indeed, some sorts of eugenic wrongful life torts may so conflict with constitutional rights of parents that a legislature may not create them in any form.

A legislature might consider defining a narrow obligation of disclosure and a correlative right in parents drawing upon the law of deceit without huge disorganization of tort law doctrine. The critical question is how the legislature should do it.

While the lawmaker must answer this question,²⁶⁵ the costs of eugenic disclosure and testing are many and the benefits few and small.²⁶⁶ The contrariety of other policies may be great. Precision of legislative titles does not remove conflict of values and does not dissolve costs and inflate benefits. Any bill should contain all the relevant adjustments to other statutes with appropriations for public health and public education which new eugenic activity will require.²⁶⁷ Hearings on any such bill should be protracted and well advertised. All factions should be heard. Effects on the volume of litigation should be estimated and budgeted. Any decision to legislate a eugenic obligation should take care to enact that no other like obligation exists.²⁶⁸ Any assembly creating such an obligation must then deliberate on sanctions. Questions of remedies contain burning issues of policy and must not be left to the courts. Elected representatives owe their constituents deliberation on these issues. One fair remedial authorization would be a right of parents to recover extraordinary costs of care incurred during the minority of the child discounted to present value and mitigated by any benefit. The disfavored status²⁶⁹ of mental equanimity should persuade legisla-

264. See notes 46-62 *supra* and accompanying text.

265. See notes 189-194 *supra* and accompanying text.

266. See notes 180-188 *supra* and accompanying text.

267. See notes 184-188, 191, 192 *supra* and accompanying text.

268. The canon of narrow construction of a statute in derogation of common law lingers and makes it wise for a legislature to express its intent to pre-empt an area and to define the only remedies. 3 SUTHERLAND, *supra* note 258, § 61.01, at 41, nn. 3, 4. Also, penal provisions should be treated separately since they too are construed differently from other enactments. *Id.* at § 60.01 (Liberal Construction of Remedial Legislation).

269. The courts have entertained even intentional interference only lately and reluctantly, fearing fictitious and trivial claims, noting difficulties of measurement, and reflecting upon the unforeseeable nature of many emotional responses of plaintiffs. PROSSER, *supra* note 10, at § 12. Negligent infliction is actionable only when it accompanies bodily harm and a few jurisdictions may still even require an accompanying impact against the body of plaintiff by defendant or his instrument. *Id.*, § 54, at 326-35.

tors to disallow recovery for parental emotional harm.

Most important is delineation of the risks that must be disclosed so that the courts need not draw artificial lines or grade lives and illnesses to determine materiality of nondisclosure. The legislature must determine when a technical disease is an illness, when an illness is material, and when racial predilection is material. One technique posits delegation of such definitions to the state public health department.²⁷⁰ Those should include prevalence and incidence statistics, existence of parental screening tests, existence of fetal tests, and racial predilections which the doctor must disclose to questioning patients. Good legislation will immunize physicians from parental suits by patients who become frightened reading the list or who claim waste of money procuring negative tests.

Legislatures should take care to express their intent on all points of private controversy identified by nondisclosure litigation lest the bill create ambiguity rather than settle doubt. Legislators should prepare a detailed report for circulation to all interested parties referring to all issues litigated previously.

The appendix provides an outline of section headings for a statute. Beside each heading appears a list of issues which legislation should settle and include in that section. The same outline also serves as a table of contents for committee and sponsor reports. Use of the list assures that the legislature will deliberate simultaneously on all relevant issues before passage of a new statute.

A conscientious legislature may conclude upon full deliberation that the best statute will be one which excuses any physician other than a genetic counsellor or private health educator from any obligation of disclosure. That is, a statute granting immunity may be the best law.

GENERAL CONCLUSION

Absent statutes authorizing suit, courts should routinely dismiss complaints alleging life, even diseugenic life, as a wrong. Life is not a harm cognizable at common law. Standards should be legislated positively by political representatives of all factions where widespread non-partisan consensus does not exist. Absent legislation, even causal elements are problematical. In all events, costs of eugenic wrongful life exceed benefits even when the computation derives from favorable ethical assumptions. Racial stigmatization, disharmony in the family, and increased expense of medical care are key among costs that must be acknowledged even on neutral principles.

Rejection of the tort of eugenic wrongful life implies rejection of eugenic wrongful birth as well because parental claims for cost and inconvenience of care for sick minors are derivative. Eugenic wrongful birth complaints share many of the elemental infirmities of eugenic

270. Halligan, *supra* note 174, at 262, 270.

wrongful life and a tort of eugenic wrongful birth modeled on negligence will generate most of the private and social costs of the companion tort. Creation of a tort of eugenic wrongful birth unfairly expands negligence to protect novel interests.

Either tort implies that the medical profession will suffer exposure to enormous liability for mere nonfeasance on account of events only tenuously influenced by the nonfeasance. The torts leave little room for silence dictated by conscience and create conflicts of loyalty toward patients.

With one exception,²⁷¹ the legislature may create a variety of causes of action for nondisclosure of eugenic information. But this paper illustrates that the legislature should not create a tort of eugenic wrongful life and that any tort of eugenic wrongful birth should be very limited. The legislation should not obligate any defendant to do anything he has not specifically contracted to do²⁷² save to give honest answers to questions put to him or, in the alternative, to direct inquiring patients to other sources.

271. See notes 153 & 154 *supra*.

272. 11 WILLISTON ON CONTRACTS § 1344A, (3d. ed. 1968) (Distinction Between General and Special Damages).

APPENDIX

An Outline of Section Headings of a Statute to Govern Disclosure of Eugenic Information with Suggestions of Issues to be Legislated under Each.

Findings

Testing and Information. How Much. Enough or Not Enough. Accuracy of Information. Persons or Segments Dissatisfied.

Policy

Life. Health. Reproductive Choice. Freedom of Conscience and Speech. Occupational Choice. Specialization of Labor. Efficient Allocation of Resources. Consumer Wellbeing. Freedom of Contract. Judicial Resources. Public Welfare Costs. Public Education. Population Eugenics.

Intent and Construction

Interests Protected and Not Protected in General. Remedial or Restrictive Intent. Liberal or Strict Construction. Effectuation of Purpose. Severance or Not of Invalid Parts. Classes of Affected Persons in General. Public Regulation of Relationships. Other Private Law Implications.

Persons Regulated

Persons. Agencies. Practitioners. Relationships. Genetic Counsellors. Health Care Providers. Health Advocates.

Persons Entitled.

Parents. Children. Siblings. Relatives. Third Persons. Promisees. Patients. Pupils. The Public.

Transactions Regulated

Information. Critical Information. Incidental Information. Disclosure. Nondisclosure. Affirmative Action. Treatment. Counselling. Publication. Advocacy. Propaganda.

Materiality

Conditions. Severity. Incidence. Prevalence. Racial Predilections. Objective-Subjective Distinctions. Relation to Reliance.

Delegation

Definition of Material Risks by Public Health Department. Lists. Exclusive or Not. Positive or Presumptive Rules.

Immunities

Schools. Publishers. Hospitals. Charities. Planned Parenthood Organizations. Relatives. Parents. Clergy. Government Agencies. Municipal Clinics. Conditional Immunity for Conscience. Exculpation by Referral.

Exclusivity

Other Rights to or Expectations of Eugenic Information. Remedies for Violation Exclusive or Not. Pre-emptive Intent. Local Rules.

Obligations

Performance of Contract. Warranties. Affirmative Action Absent Contract. Accuracy. Honesty. Use of Delictual Forms as Guiding Models. Deceit. Negligence. Malpractice. Sources of Standards. Degree or Level of Care or Skill. Differences Among Classes of Persons: Genetic Counsellors vs. Health Care Providers, etc.

Correlative Rights

Interests and Rights of Patients, Pupils, Persons Counselling, Subscribers, Promisees. Extent and Measure of Rights Generally.

Damages

Restitution of Consideration. Economic Consequences. Emotional Consequences. Ceilings on Damages. Interest. Costs. Exemplary Damages. Fixed Rates. Penalties. Distinctions among Categories of Defendants and Relationships Implicated. Reference to Theory or Wrong Alleged. Cumulative Recovery. Combining Contractual and Non-contractual Claims. Credits for Recovery by Others. Protected Interests Reflected. Norms or Standards of Comparison. Other Techniques to Assess Damages. Lump Sums and Installments. Public Welfare Liens or Awards. Protecting Minors. Enforcing Use of Awards For Support of Minors. Contractual Exculpation or Limitation.

Other Elements

Reliance. Reasonableness of Reliance. Corpus Delicti: Jeopardy (At Risk) or Materialization of Eugenic Disease. Mode of Erroneous Disclosure or Other Breach or Violation. Actual Ignorance, Other Sources of Data. Reality of Alleged Opportunity. Legality of Opportunity.

Limitations

Occurrence. Discovery of Harm. Discovery of Wrong. Writings. Contracts or Torts. Character of Harm. Minor Plaintiffs.

Other Affirmative Defenses

Disclaimer. Parental Immunity. Other Immunities. Waiver. Release.

Tribunals

Courts. Administrative Agencies. Arbitration. Judicial Review. Law. Facts.

Evidence

Hearsay. Epidemiological Data. Surveys Re Standards. Demographic Data. Surveys Re Materiality. Presumptions.

Other Procedures

Indemnity and Contribution.

Public Law

Public School Curricular Mandates. Public Health Agency. Screening Programs: Voluntary, Involuntary. Licensing Genetic Counsellors. Discipline of Regulated Persons.